

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 January 2013

Public Authority: The Nursing and Midwifery Council (NMC)

Address: 23 Portland Place

London

W1B 1PZ

Decision (including any steps ordered)

1. The complainant has requested information relating to the termination of the complainant's company's contract with the Nursing and Midwifery Council (NMC). The NMC responded by disclosing information within the scope of the request. The complainant does not consider that the NMC has provided him with all of the information falling within the scope of his request. The NMC has argued that it does not hold any further information.
2. The Commissioner's decision is that the NMC holds no additional information within the scope of his request, other than that which has been provided to the complainant. However, the Commissioner finds that the NMC breached sections 1 and 10 of the FOIA by not responding to the complainant's initial request within the statutory time period.
3. The Commissioner requires no further steps to be taken.

Request and response

4. On 19 March 2012, the complainant wrote to the NMC and requested information in the following terms:

"information relating to the termination of the NMC's contract with [name of complainant's company] notified by letter dated 17 June 2011 from the NMC."

The complainant further specifically requested:

"1. Why was the contract terminated? Please provide minutes or other records of any meetings, discussions or correspondence where this

decision was considered between 1 June 2010 and the present.

2. What involvement did Jackie Smith have in the decision to summarily sack [name redacted] and [name redacted] as legal assessors as referred to in paragraph 2 of the High Court's decision in the application for judicial review reference CO/4203/2011 dated 7 December 2011? Please provide minutes or other records of any meetings, discussions or correspondence where this decision was considered between 1 June 2010 and the present.

3. Where did the NMC obtain contact details for the individuals listed below?

[List of 14 names of legal assessors redacted]

Please specify what sources were used and on what dates and by what means the individuals were contacted."

5. The NMC responded on 4 May 2012. It provided information in response to the request. Specifically, in response to question one it provided a letter dated 15 March from Field Fisher Waterhouse (legal advisor's acting on behalf of the NMC) in which the reasons that First Law's contract was terminated were explained, as well as minutes from a meeting held on 20 June 2011 where this decision was discussed. The NMC did not provide any information in relation to questions two or three, other than to state that information contained in the letter dated 15 May 2012, which the NMC had disclosed in response to the first question of the request, also held information that falls within the scope of the third question. The NMC further stated that no information, other than the letter dated 15 March and the minutes of the meeting which had both been disclosed, is held by the NMC which falls within the scope of the entire request.
6. On 29 May 2012 the complainant requested an internal review, stating that more information must be held by the NMC that falls within the scope of the request.
7. Following an internal review the NMC wrote to the complainant on 2 July 2012. It stated that it did not hold any further information other than that which it had already disclosed. The NMC re-iterated that the only information that falls within the scope of this request is information that the NMC initially disclosed, and that no further information is held by the NMC.

Scope of the case

8. On 23 April 2012 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant has provided detailed arguments as to why he considers that there must be additional information held. The Commissioner has asked the NMC about each of these points and the NMC provided its arguments in response.
9. The Commissioner considers that the scope of this case is to assess whether or not the NMC holds any information relating to any of the three questions which the NMC has not disclosed. For each of these three requests the Commissioner has evaluated whether, on the balance of probabilities, it is likely that that the NMC holds any information relating to that individual request for information which the complainant alleges the NMC holds and has withheld.
10. The Commissioner has then considered whether, on the balance of probabilities, it is likely that the NMC holds any information that falls within the scope of the request as a whole, other than the information initially disclosed by the NMC.

Reasons for decision

11. Section 1(1)(a) of FOIA states that, any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request.
12. The standard of proof that the Commissioner has applied in determining whether the NMC does hold information relevant to the complainant's request is the civil standard of the balance of probabilities as outlined by what was then the Information Tribunal in the case of *Linda Bromley v Information Commissioner & the Environment Agency* (EA/2006/0072). In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the NMC as well as the reasons offered by the NMC to explain why the information is not held.

Background

13. The background to this case is that the complainant's company was previously contracted by the NMC to provide legal services. This

company supplied the NMC fitness to practice committees with a managed legal assessor service between 2006 and 2011. In 2010 the complainant's company procured a new contract to continue providing this service. The new contract began in 2011 and was agreed to last for a term of three years starting June 2010. In June 2011, one year in to the three year contract, the NMC terminated this contract.

14. Part of this service was to provide readily available legal assessors. The complainant has stated that to do this, his company recruited a further 30 - 40 legal assessors for the new contract. The complainant explained that list of names referred to in question three is a list of some of those recruited.

Question 1:

15. The first part of the request for information was as follows:

"Why was the contract terminated? Please provide minutes or other records of any meetings, discussions or correspondence where this decision was considered between 1 June 2010 and the present."

16. The complainant argued that it is logical that the NMC must hold documentation showing how it arrived at this decision, as follows:

*"The NMC's response... (to the original FOI request) does not explain **why** the NMC brought the service in-house nor does it give any reasons, it just states that the decision has been made. The NMC's response states 'there is no further information held'. If there is no further information held, how could [name redacted] state with any authority in the meeting on 30 June 'that the move to in-house model was to improve efficiency and reduce costs' and how could [name redacted] state 'we are of the strong opinion that the move to in-house will deliver a more efficient process'? How can a strong opinion be formed by a large organisation with no record of how that opinion was formed?"*

It is also hard to believe that there could be a change in direction just 12 months after the NMC had re-tendered the work to be outsourced and a new three-year contract awarded, without any information being retained as to why such a fundamental change to its fitness to practice function has occurred..."

17. The complainant argued that logically the NMC must hold information other than that disclosed. The complainant argued that the decision to terminate the contract could not have been arrived at without correspondences about the decision being sent or meetings about the decision being held. The complainant argued that when a decision of this nature is made, there must be documents which show this decision being arrived at.

18. The NMC stated in the letter dated 15 March 2012 (which was disclosed by the NMC) that its reasons for terminating the contract are as follows:

"The [name of complainant's company] Contract was terminated in accordance with its terms following our client's decision to bring FtP in-house."

19. The complainant stated that:

"There has been no suggestion that the service [name of complainant's company] provided between 2006 and 2011 had been inefficient in any respect."

20. The complainant stated that it had provided an excellent service to NMC, (backed up by anonymised comments from legal assessors), and that therefore there must be reasons other than those stated by the NMC that the contract had been terminated. The complainant argued that the reasons of efficiency or cost saving did not make sense as their service was efficient and cost effective. The complainant drew the Commissioner's attention to a comment by the Judge made in the ruling by the High Court of Justice about the termination of this contract, as follows:

"The High Court states in Reason 5 of its decision dated 7 December 2011 'it might be inferred from the Defendant's solicitors letter dated 7 July 2011 that the termination of [name of complainant's company] contract was driven by tactical considerations relating to this claim'.

21. The complainant argued that the Judge's comment is evidence that the decision to end the contract was driven by ulterior motives.
22. The NMC argued that the Judge's comment "...was made in relation to costs only", and that the complainant's interpretation of the comment is wrong.
23. It is the Commissioner's view that whatever the reason behind the decision to terminate the contract actually was, this has no bearing on whether or not information is held by the NMC that falls within the scope of this request. The Commissioner further emphasises that in stating this, he is not passing judgement on the reasons that this contract was terminated.
24. The Commissioner does not consider that any of the above evidences that the NMC holds any information relating to the decision to terminate the contract, other than that already disclosed. It is the Commissioner's view that whether or not the Judge's comments indicate that the NMC terminated the contract for reasons other than those outlined in the disclosed letter, that this does not infer that any information about the

termination of this contract is held. It is the Commissioner's view that the Judge's comments and the complainant's arguments do not demonstrate that any information within the scope of the request has been withheld.

25. The complainant argued that a Fitness to Practice (FtP) review, or similar review, must have been carried out by the NMC and that therefore documentation of this review should have been disclosed in response to the request. The Commissioner therefore asked the NMC if such a report is held by the NMC, who stated that no FtP review report is held. The NMC added that no formal review of this kind was conducted.
26. The complainant pointed out to the Commissioner that an employee at the NMC had made reference to such a review in an e-mail dated 21 June 2011 to the complainant, as follows:

"I understand that the decision (to terminate the contract) was an outcome of our overall review of our FtP activities."
27. The complainant argued that the above e-mail evinces that an FtP review or other tactical assessment was conducted by the NMC, and as such documentation of this review must be held by the NMC. The complainant further argued that said documentation would contain information that falls within the scope of the request.
28. The NMC argued the following in regards to the question of whether or not any record of an FtP review report (or similar report) is held:

"No documentation is held. This review was a consideration of our needs in the department not a formal review."
29. The Commissioner has reviewed the e-mail which is quoted above in paragraph 26. It is the Commissioner's view that, given the phrasing of the e-mail, this e-mail does not sufficiently demonstrate that a formal review was ever conducted. In light of this, combined with the NMC's argument quoted in paragraph 17 above, the Commissioner finds that the use of the word 'review' in this instance does not inherently show that a review was formally conducted. The Commissioner is therefore not satisfied that documentation of an FtP review must be held by the NMC.
30. Where there have been indications that reports or reviews that may fall within the scope of this request are held by the NMC, the Commissioner has questioned the NMC about these. In response, the NMC has stated that no FtP or like review was conducted. The Commissioner asked the NMC about an e-mail sent by a member of NMC staff which referenced a review. The NMC responded by stating that this review was a review

that fell outside the scope of the request, and did not relate to any of the complainant's questions. The NMC explained this as follows:

"The report in question was about the review of decisions made by the NMC's Investigating Committee panels. [Name redacted] and [name redacted] were legal assessors for the Investigating Committee panels in question. The report does not contain information relating to [the complainant's] FoI request which asks for documents: relating to why the contract was terminated; what involvement Jackie Smith had in the decision to sack [name redacted] and [name redacted] and for records of any meetings, discussions or correspondence where the decision was considered.

I set out below an extract from this report relating to the terms of reference of the review:

"My terms of reference do not include determining whether any panel member or legal assessor should be disciplined or subject to a conduct procedure, nor whether what happened in these cases constitutes grounds for removing anyone from his or her position."

31. The Commissioner is therefore satisfied that where there are indications of any review being conducted, the content of this review falls outside the scope of the request.
32. The Commissioner finds that the complainant's arguments do not show that information relating to this request must be held. The Commissioner is satisfied that, on the balance of probabilities, the NMC does not hold any further information that falls within the scope of the first question of the request.

Question 2:

33. The second part of the request for information was as follows:
34. *"What involvement did Jackie Smith have in the decision to summarily sack [name redacted] and [name redacted] as legal assessors as referred to in paragraph 2 of the High Court's decision in the application for judicial review reference CO/4203/2011 dated 7 December 2011? Please provide minutes or other records of any meetings, discussions or correspondence where this decision was considered between 1 June 2010 and the present."*
35. In the NMC's initial response, dated 4 May 2012, the NMC stated the following:

"There is no information held, such as records of meetings, discussions or correspondence which record where the decision was considered or provides details of any involvement Jackie Smith may or may not have had."

36. In the letter to the complainant explaining the outcome of its internal review dated 2 July 2012 that it did not hold any information within the scope of this request, as follows:

"...the NMC...does not hold any information such as minutes and records of meetings, discussions or correspondence which record where the decision was considered or provides details of any involvement Jackie Smith may or may not have had."

37. The complainant argued that logically, the NMC must hold records of this type; as such a decision must have left a trail of correspondence or meeting notes showing how it was arrived at. Specifically, the complainant stated the following:

"Jackie Smith herself refers to her involvement in the decision in her e-mail to me of 18 February 2011 which has not been disclosed. I did not communicate with anyone else at the NMC about the decision to sack these individuals."

38. It is the Commissioner's view that whether or not Jackie Smith was involved in this decision, this would not mean that information about this decision being made must be held.

39. In a letter responding to the ICO's enquiry, dated 14 November 2012, the NMC explained the following:

"Our searches have not located the email of 18 February 2011 which (the complainant) states he received from Jackie Smith. It is therefore not possible to comment on what retention would have applied as this would have depended on the content."

The NMC further explained its retention policy as follows:

"Records relating to contracts are retained for six years after the expiry of the contract. For some administrative records, such as emails arranging and confirming appointments, there is no formal retention policy. Emails and other correspondence would be destroyed after the appointment has occurred. This is left to the discretion of the user. Briefing notes and informal notes are sometimes made and held by individuals for their use and are not subject to formal retention periods."

The Commissioner therefore takes the NMC's argument to be that if it did hold the e-mail, it must have been destroyed, and it therefore no longer holds it.

40. In relation to question two generally the NMC has argued the following:

"(the complainant) believes that there must be records of discussions and/or correspondence leading to the decision to sack [name redacted] and [name redacted] as well as of a meeting he attended with [name redacted]. When looking for this information I spoke to the staff in [name redacted] office and was informed that no such notes were taken. The staff assured me that had notes been taken they would have been asked to take them and they were not."

41. The complainant argued further as follows:

"Jackie Smith was at the time the deputy Registrar of the NMC and the decision to sack the legal assessors resulted in judicial review proceedings being brought against the NMC, judicial criticism of the NMC and eventual settlement with the legal assessors being reinstated and their legal costs being paid by the NMC. Jackie Smith has been acting Registrar and Chief Executive of the NMC since late 2011. No notes or records relating to any stage of these proceedings or the events that led to them have been disclosed."

The Commissioner considers that this would fall outside of the scope of the original request, as the original request was for information relating to the decision making process to sack these two individuals only. Notes or records of other decisions made in the process described above therefore do not fall within the scope of the complainant's original request.

42. It is the Commissioner's view that the arguments presented by the complainant do not show that the NMC must hold information relating to the decision making process to sack [name redacted] and [name redacted]. The Commissioner is satisfied that, on the balance of probabilities, the NMC does not hold any information that falls within the scope of the second question of the request.

Question 3:

43. The third part of the requests was as follows:

"3. Where did the NMC obtain contact details for the individuals listed below?"

[List of 14 names of legal assessors redacted]

Please specify what sources were used and on what dates and by what means the individuals were contacted."

44. In the NMC's initial response, dated 4 May 2012, the NMC stated that the only information that the NMC holds that falls within the scope of this request is contained within the letter from Field Fisher Waterhouse dated 15 March 2012 which has been disclosed.
45. The NMC has plainly argued in its letter to the Commissioner dated 14 November 2012 that it does not hold any information within the scope of the third question of the request, as follows:

"There are no emails or correspondence sent to or from the legal assessors requesting contact details as part of the process of compiling the new list."

46. The NMC previously explained its position on this in a letter forwarded to the complainant dated 16 September 2011 as follows:

"The NMC's position is straightforward. The Legal Assessor used by the NMC are well-known to the NMC and are almost exclusively barristers with expertise in regulatory matters. These details are publicly available – many of them are proud to include their assessor status on their website- and cannot conceivably be confidential to [the complainant's company]."

47. The complainant's firm compiled a spread sheet with a list of names of legal assessors who would be available to sit for the NMC. The complainant argued that this list is the intellectual property of his company and that the NMC has no right to use it, seeing as the contract was terminated by the NMC.

48. The NMC has argued that it made its own list from publically available information and from its own previous knowledge of these individuals. The complainant has argued that the NMC must have contacted these individuals to ascertain their contact details and that there must be information held by the NMC relating to this process of gathering the contact details of these individuals.

49. The complainant has argued that there are correspondences which show this list being compiled by the NMC. In a letter to the ICO dated 26 July 2012, the complainant explained the following:

"I made a further FOIA request to the NMC in July 2012 which resulted in them disclosing a list of names of legal assessors they now use. They also claimed this list was compiled from publicly available information. The NMC have still not disclosed any information about how the individuals were contacted as per my original request."

I believe emails were sent and telephone calls made to these individuals from August 2011 which have been withheld.

The reasons for my belief are:

- An email which was sent by [name redacted], Head of Adjudication at the NMC to legal assessors on our panel on 19 August 2011 which has not been disclosed (Enclosure 2, together with Enclosures 3A-E email confirmations from recipients).*
- Telephone calls were made to legal assessors asking for their contact details which have not been disclosed (Enclosures 4A-B email confirmations from recipients)."*

50. The Commissioner has reviewed the Enclosures to which the complainant refers above. It is the Commissioner's view that these are not in themselves information which falls within the scope of the request, and therefore the NMC was under no obligation to disclose them. To clarify, the Commissioner notes that none of the e-mails in these Enclosures specifically refer to contact details being asked for or obtained by the NMC, other than an e-mail from one of the legal assessors to the complainant. This e-mail would not have been held by the NMC and as such is not information which they could have disclosed.
51. The Commissioner considers that the e-mail confirmations to which the complainant refers above do not show that the NMC holds any information relating to the NMC compiling this list of names. To clarify, the e-mail confirmations (referred to as 'Enclosures 4A-B) are from legal assessors to the complainant, and they confirm receiving an e-mail from the NMC which informed them of the changes being made to Fitness to Practice bookings. These confirmations do not indicate any e-mail was sent requesting their personal details.
52. The Commissioner recognises that one e-mail (referred to as Enclosures 4 – B), which is an e-mail from one legal assessor to the NMC, does indicate that the NMC did make phone calls requesting that legal assessors confirm their contact details. However the Commissioner emphasises that this does not indicate that any information showing how this list was compiled is held by the NMC, as it only indicates that phone calls of this type were made.
53. The NMC argued that this list was compiled from publically available information and from its own professional dealings with individual legal assessors. It is the Commissioner's view that no conclusive evidence to show the contrary has been provided in this case. The Commissioner

therefore finds that the NMC has not withheld any information that should have been disclosed.

54. The Commissioner is satisfied that the NMC does not hold any further information that falls within the scope of the third part of the request.

The request as a whole:

55. When assessing cases where it is alleged that information is held and has not been disclosed, the Commissioner asks a public authority to explain how it searched for these records and expects that thorough searches will have been conducted.

56. In the letter explaining the outcome of the internal review, the NMC explained the searches carried out as follows:

"A thorough search of the information you have requested has been conducted. The searches included electronic and paper files and correspondence within the Fitness to Practise and Chief Executive's Office... the only information the NMC holds which falls within the scope of your request is the Field Fisher Waterhouse letter dated 15 March 2012 and the minutes to the meetings held on 20 June 2011. This information was provided to you in response to question 1 of your request."

57. In its response to the questions posed by the ICO, the NMC expanded on this in its letter dated 14 November 2012, as follows:

"In relation to items 1 and 2 of (the complainant's) request, searches were undertaken of the contract file for the period in question because records relating to the termination of a contract would be held in the file. In addition, colleagues who might have held such information were asked to check their email boxes. This included the Head of Procurement and Estates, to ascertain if emails were held that had not been placed on the contract file, the former Chief Executive and Registrar [name redacted] and the former Director of Fitness to Practise (Jackie Smith who is now the Chief Executive and Registrar).

Staff in the offices of both [name redacted] and Jackie Smith were asked to check the email boxes of both these individuals and their own email boxes. This was appropriate because the email boxes of the Chief Executive and Director of Fitness to Practise are managed by their staff. A search of the electronic records management system (ERMS) was undertaken for documents containing the words "(complainant's name)" and "[name of complainant's company]" for the dates in question. In addition, in relation to item 2 searches of the ERMS were undertaken for the names of "[name redacted – first sacked individual]" and "[name redacted – second sacked individual]"

58. The Commissioner is satisfied that the NMC has conducted appropriate and thorough searches to ascertain whether or not any further information is held that falls within the scope of the request. The Commissioner finds that the searches carried out adequately show that no information of the type is held by the NMC.
59. In light of the evidence and arguments presented by both sides in relation to each of the three questions, the Commissioner considers that, on the balance of probabilities, the NMC has not withheld any information that falls within the scope of the request. The Commissioner finds that the NMC has conducted satisfactory searches to show that it holds no further information within the scope of the request.
60. After considering the arguments made by the complainant and the explanation provided by the NMC, the Commissioner considers that on the balance of probabilities there is no further information held by the NMC relevant to the scope of the request.

Right of appeal

61. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

62. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
63. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF