

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 August 2018

Public Authority: Nursing and Midwifery Council
Address: 23 Portland Place
London
W1B 1PZ

Decision (including any steps ordered)

1. The complainant requested information from the Nursing and Midwifery Council ("the NMC") about a competence test. The test, which comprises a computer-based test ("CBT") and an objective structured clinical examination ("OSCE"), is compulsory for applicants who have trained in nursing or midwifery outside the UK and wish to register with the NMC. The NMC disclosed some information to the complainant, but withheld information relating to the number of candidates, the pass rate and the number of complaints, broken down by test site, under section 43(2) of the FOIA – prejudicial to commercial interests – and under section 31(1)(g) of the FOIA – prejudicial to the exercise of specific law enforcement functions.
2. The Commissioner's decision is that neither exemption is engaged in this case and that the NMC withheld the information incorrectly.
3. The Commissioner requires the NMC to take the following step to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant.
4. The NMC must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 4 November 2017, the complainant wrote to the NMC and requested information in the following terms:

"I would like to request the May 2017 to October 2017 CBT and OSCE number of candidates and Passing Rate. Please break it down per test site. Also, please provide the total number of complaints per site and number of complaints in relation to background noise and/or distraction. This will be for the year 2017 broken into months."

6. The NMC responded on 1 December 2017. It provided some information, as follows:

- It directed him to its website for some information which it considered would fall within the scope of the request, relating to the period May - September 2017. It also stated that the October figures would be available online in January 2018.
- It explained that it was unable to provide him with the pass rates broken down by test centre, either for the CBT qualification or the OSCE qualification. It stated that it did not hold this information with regard to CBT, and that it was withholding the information relating to OSCE under section 43(2) of the FOIA – commercial interests.
- With regard to complaints, it explained that although some information was held, it was withholding it under section 43(2) of the FOIA.

7. The complainant requested an internal review on 4 December 2017, disputing the application of section 43(2).

8. The NMC sent him the outcome of its internal review on 15 December 2017. It upheld its original position.

Scope of the case

9. The complainant contacted the Commissioner on 21 December 2017 to complain about the way his request for information had been handled.
10. The Commissioner wrote to the NMC asking it for some further clarification as to what information was held, and what had been withheld.

11. During the course of the investigation, the NMC clarified that it held "*the May 2017 to October 2017 CBT and OSCE number of candidates and Passing Rate*" and that, although this information was published at quarterly intervals on its website, it had now collated the information for the whole of the specific period requested which it then provided to the complainant.
12. However, the NMC clarified that it only held this information broken down "*per test site*" with regard to the OSCE. It was withholding this information under section 43(2) of the FOIA – commercial interests – and also under section 31(1)(g) of the FOIA – law enforcement. It did not hold the information broken down "*per test site*" with regard to the CBT, which is provided by a single external provider and often taken in candidates' homes or in any one of multiple venues.
13. With regard to the request for the "*total number of complaints per site*", the NMC clarified that it held the number of complaints made to the NMC itself about each test site, broken down by months, although it did not hold information relating to any complaints which may have been made directly to the test sites. It was withholding the information which it held under section 43(2) and section 31(1)(g) as before.
14. With regard to the "*number of complaints in relation to background noise and/or distraction*", the NMC similarly confirmed that it held this information in relation to complaints that had been made to the NMC itself, but not any information relating to any complaints about background noise and/or distraction which may have been made to the test sites. The NMC considered that this information could now be released to the complainant, and provided it to him.
15. The withheld information may be summarised as comprising the following three categories:
 - 1) the number of candidates for the OSCE from May to October 2017, broken down by test site ("number of candidates"),
 - 2) the pass rate for the OSCE from May to October 2017, broken down by test site ("pass rate"), and
 - 3) the number of complaints relating to the OSCE received by the NMC relating to 2017, broken down by test site ("number of complaints").
16. The complainant confirmed that he wished the investigation to focus on the information that was withheld initially under section 43(2) of the FOIA. The following analysis has considered whether the NMC correctly withheld this information under section 43(2) of the FOIA and/or section 31(1)(g) of the FOIA.

Reasons for decision

Section 43(2) – prejudicial to commercial interests

17. Section 43(2) of the FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
18. The exemption can therefore be engaged on the basis that disclosing the information either 'would' prejudice someone's commercial interests, or, the lower threshold, that disclosure is only 'likely' to prejudice those interests. The term 'likely' is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice is more probable than not.
19. The exemption is subject to the public interest test, which means that even if it is engaged, account must be taken of the public interest in releasing the information.
20. For section 43(2) to be engaged, the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the NMC alleges would be likely to occur if the withheld information was disclosed has to relate to the specified commercial interests of itself or of a third party;
 - Secondly, the NMC must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e. in this case, whether there is a real and significant risk of the prejudice occurring.
21. The Commissioner has considered all three categories of withheld information with regard to the first criterion.

Does the alleged harm relate to the commercial interests of the specified party?

22. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner has considered the meaning of the term in her guidance¹ on the application of Section 43. This explains that:

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."

23. The NMC has explained that it has a contractual relationship with three test sites which provide the OSCE. Each of the test sites individually bears the cost of providing the OSCE.
24. The NMC has explained that it considers that the test sites' provision of the OSCE is a commercial activity, since each one charges a fee to candidates. It also considers that the sites operate within a competitive environment, since candidates are able to choose which of the three test sites they wish to attend to take the OSCE.
25. The NMC considers that harm would be likely to be caused to the commercial interests of one or more of the test sites if differences in the outcome of taking the OSCE at each site were highlighted.
26. The harm which the NMC alleges would be likely to be caused to the test sites' commercial interests is that candidates would be less likely to opt for a particular test site if it appeared that taking the OSCE there was more likely to lead to an unfavourable outcome.
27. The provision of the OSCE at the three sites is funded by the candidates' fees, and the NMC has therefore argued that each site has a commercial interest in factors that may influence which site a candidate selects.
28. The Commissioner is satisfied that the actual harm alleged by the NMC relates to the commercial interests of the test sites. Accordingly, she is satisfied that the first criterion is met.

¹ <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

Is there a causal link between disclosure and the alleged prejudice?

29. When investigating complaints which involve a consideration of prejudice arguments, the Commissioner considers that the relevant test is not a weak one and a public authority must be able to point to prejudice which is "*real, actual or of substance*" and to show some causal link between the potential disclosure and the prejudice.
30. The NMC has argued that disclosure of the withheld information may cause candidates to select one site over another.
31. The Commissioner is aware that the fee payable to any of the test sites in order to take the OSCE is £992. In addition, it is common for candidates who do not pass the test to make further attempts, which costs £992 for a full re-sit or £496 for a partial re-sit. The number of candidates in the relevant period alone comprised over 1750 in total and a high number of individuals re-sat the test on one or more occasions.
32. The Commissioner therefore considers that the prejudice that it is alleged would be likely to occur to the commercial interests of each test site is real and of substance, and has considered the categories of information in light of this.
 - 1) *Number of candidates*
33. The Commissioner notes that the NMC's arguments chiefly focus on the withheld information which relates to the breakdown of the *pass rate* by test site, and do not appear to consider, separately, the disclosure of the information which sets out the *number of candidates* taking the test between May and October 2017. The Commissioner is required to consider all of the requested information discretely.
34. She is aware that candidates may sit the test at a particular test site for a number of reasons. There may, for example, be geographical reasons; other candidates are sponsored by a potential employer such as an NHS trust, who may select the site for the candidate. It likely that there are a number of influencing factors on the party selecting the site.
35. However, the Commissioner is not persuaded that an awareness of the *number of candidates* who took the OSCE at each site between May and October 2017 is likely to influence candidates' choice of site, nor indeed sponsors' choice, where they have one.
36. Indeed the Commissioner is aware that until the beginning of 2017, only one site had previously offered the OSCE. A second site began offering the test in January 2017 and a third in May 2017.

37. The information requested by the complainant therefore concerns the first period during which it was possible to attend any of three sites.
38. In the Commissioner's view, candidates and sponsors are not likely to conclude that one site is preferable over another based simply on the number of candidates that attended each during the specific period, particularly since it would be known within relevant circles that the test was being newly, or relatively newly, offered at two out of the three sites.
39. The Commissioner, therefore, has found no causal link between the disclosure of the *number of candidates* at each site between May and October 2017 and the prejudice which the NMC considers may be caused.
40. She has therefore found that, with regard to the number of candidates, the second criterion is not met and the exemption at section 43(2) is not engaged. She has considered whether section 31(1)(g) is engaged with regard to this information further on in this notice.

2) Pass rate and 3) Number of complaints

41. The Commissioner has considered whether there is a causal link between the disclosure of these categories of information and the prejudice that the NMC considers would be likely to occur to the commercial interests of the test centres.
42. The Commissioner agrees that the disclosure of the pass rate and the number of complaints could, in some circumstances, lead to candidates selecting one test site over another where it may be perceived that it would be 'easier' to pass the OSCE.
43. She therefore accepts that these two categories of information are directly linked to the possibility that prejudice could occur to the test sites. She is therefore satisfied that the second criterion is met.

Likelihood of prejudice

44. The Commissioner has considered this third criterion with regard to the pass rate and the number of complaints.
45. In *Hogan and Oxford City Council v the Information Commissioner* (EA/2005/0026 and 0030) the Tribunal said: "*there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not.*" (paragraph 33)

46. In this case, the NMC has confirmed that it is relying on the lower threshold to engage the exemption. It has argued that disclosure *would be likely* to prejudice one or more test sites' commercial interests and their competitiveness as a provider of the OSCE. As referred to above, the Commissioner's view is that "*would be likely to*" places an evidential burden on the public authority to show that the risk of prejudice is real and significant, and not remote.

(2) *Pass rate*

47. The NMC has provided the Commissioner with copies of correspondence from test site(s) alleging that that certain NHS trusts have previously approached them and made reference to their pass rate. From the correspondence, it appears that anecdotal evidence may exist that it is 'easier' to pass the OSCE at one site rather than at another. The correspondence alleges that this has led some NHS trusts to request that their candidates attend specific site(s) in order to be more likely to pass. The correspondence is evidence of the tests site(s)' opinion that prejudice to their commercial interests would be likely to occur if the pass rates at each site were published.

48. The Commissioner has considered whether the risk of prejudice is real and significant.

49. She has considered the correspondence disclosed by the test site(s) and their view that their commercial interests would be affected if these were disclosed. She notes in particular a site's comment that: "*two trusts [have cancelled] a number of bookings with us in order to send their candidates to another centre as they have heard the pass rate is higher at this particularly [sic] centre - we have email evidence.*"

50. The Commissioner has weighed this up against the fact that other information exists in the public domain which may help to lower any risk of prejudice, since it could potentially account for, or lessen the importance of, any disparity in the pass rate.

51. These factors include the length of time that the OSCE has been offered by each site, and the fact that the NMC is currently reviewing its processes in any event (its website states: "*we're reviewing all parts of our registration process including how candidates submit their application, the fees they pay, how they demonstrate they meet our UK standards and the evidence we require of their English language capability*").

52. In addition, the requested information regarding the pass rate relates only to a specific few months, and therefore can be said to be a

'snapshot' of the percentage of candidates passing overall rather than necessarily being indicative of a persistent trend.

53. Also relevant is the total number of candidates having taken the test at each site (the disclosure of which is considered by this notice) since there is a relationship between this number and the percentage of candidates passing the test. The percentage of candidates passing at a test site with a small number of candidates is more significantly affected by individual performances.
54. In the Commissioner's view, these factors could be highlighted alongside the disclosure of the pass rate by way of explanation for any disparity between the sites.
55. The Commissioner considers that, in spite of the anecdotal evidence provided by one test site, the risk that the disclosure of the pass rate at each site from May 2017 to October 2017 would influence candidates to select one test site over another, is relatively low in view of all of these factors and therefore cannot be said to be "real and significant".
56. She has therefore determined that the exemption at section 43(2) is not engaged with regard to the pass rate. She will consider the application of section 31(1)(g) to this information further on in this notice.

(3) Number of complaints

57. With regard to the information relating to the number of complaints, the NMC has argued that, in its view, "*candidates would be likely to avoid those [sites] about whom... candidates have most frequently complained to the NMC.*"
58. The Commissioner has considered whether the disclosure of the information, which is a breakdown of those complaints received by the NMC about each test site, broken down for each month of 2017, would be likely to create a real and significant risk of prejudice to the commercial interests of the test sites.
59. She notes that the NMC has emphasised that it is not aware of, and does not hold, any complaints which may have been made directly to each test site, and that the withheld information may not present a full picture.
60. However, the Commissioner considers that this concern is of limited significance, since the complainant, in bringing his complaint to the ICO, had already been advised by the NMC that it held only a record of complaints which had been made to the NMC itself, and that the information may not be, in that sense, "*the total number of complaints*" which he had requested.

61. Having considered the withheld information in this category, the Commissioner notes that the number of complaints is extremely low when compared with the total number of sittings for the test (for the period from May to October alone, 2384 sittings, as has been disclosed to the complainant).
62. The Commissioner also notes that the NMC is able readily to account for two very limited spikes in the number of complaints at two specific test sites in two specific months, and has addressed any related issues.
63. Taking these factors into account, the Commissioner does not consider that the information is likely to influence the choice of one test site over another, either by a candidate or by a candidate's sponsor, and therefore considers that disclosure of the information carries only a remote risk of prejudice to the tests sites' commercial interests rather than a risk which is real and significant.
64. For all of these reasons, the Commissioner has found that the section 43(2) exemption is not engaged with regard to the number of complaints.
65. Since the Commissioner has determined that the exemption at section 43(2) of the FOIA is not engaged in respect of any of the withheld information, she has considered the second exemption which the NMC also considered to be engaged in this case, section 31(1)(g), with regard to all of that information.

Section 31(1)(g) – prejudicial to the exercise of a public authority's functions

66. Section 31 of the FOIA relates to a group of interests collectively known as "law enforcement" interests.
67. Specifically, section 31(1)(g) states that information is exempt from disclosure if its disclosure would, or would be likely to, prejudice the exercise by a public authority of its functions for any of the purposes specified in 31(2).
68. While the NMC has not identified one of the purposes listed in section 31(2) explicitly, it has explained that one of its functions is *"to ascertain the fitness and competence of individuals seeking to become authorised to practice as a nurse or midwife in the United Kingdom."* This correlates directly with section 31(2)(d):

"The purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on."

69. The Commissioner is aware that one of the functions of the NMC is to ascertain a person's fitness or competence in relation to the nursing and midwifery professions.
70. Section 31, like section 43(2), is a prejudice-based exemption and the criteria necessary for the exemption to be engaged are similar to those for section 43(2), considered above. That is, the public authority needs to be able to demonstrate that the following criteria are met:
- Firstly, the actual harm which the NMC alleges would be likely to occur if the withheld information was disclosed has to relate to the relevant law enforcement interests; in this case, the exercise of the function specified above;
 - Secondly, the NMC must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those interests; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e. whether there is a real and significant risk of the prejudice occurring.
71. However, in applying section 31, a public authority must be able to establish that the alleged prejudice would occur to its own interests (unlike section 43(2), under which a public authority may also consider prejudice to the interests of a third party, such as the test sites).
72. The NMC has explained how it considers that its interests could be affected. It has explained:
- "The NMC is under a statutory duty to ascertain the fitness and competence of any person who seeks to become authorised to practice as a nurse or midwife in the United Kingdom. In relation to nurses and midwives who trained outside of the United Kingdom, the NMC perform that statutory duty through the CBT and the OSCE."*
73. The NMC considers that the disclosure of the requested information could lead to a downturn in revenue for one or more site(s) which could lead to the site(s) ceasing to offer the OSCE; this in turn would put pressure on the remaining site(s) and lead to them becoming oversubscribed, causing a delay in people being admitted to the register.
74. In addition, the NMC considers that there is a risk that some individuals' visas may expire before they are able to sit the OSCE at all, which would lead to fewer applicants being admitted to the register.
75. The Commissioner has considered all three categories of information.

76. With regard to the first criterion, the Commissioner is satisfied that the alleged harm relates to the NMC's ability to ascertain individuals' fitness or competence and so to its ability to carry out its statutory duty.
77. She is therefore satisfied that the first criterion is met with regard to all of the withheld information.
78. However, with regard to the second criterion, the Commissioner does not consider that there is a causal link between the disclosure of the *number of candidates* who attended each site between May and October 2017, and the alleged prejudice to the NMC's interests. This is because she does not consider that the publication of this specific information would influence candidates or their sponsors when selecting a site, for the same reasons explored in paragraphs 33 - 40 above in relation to the test sites' interests and the exemption at section 43(2).
79. The Commissioner has therefore determined that section 31 is not engaged in respect of the information about the number of candidates.
80. The Commissioner has considered the second criterion with regard to the pass rate and the number of complaints.
81. For the same reasons explored in paragraphs 41 - 43, above, the Commissioner is satisfied that there is a causal link between the potential disclosure of these categories of information and the prejudice to the NMC's interests. Therefore the second criterion is met.
82. She has considered the third criterion – whether the risk of prejudice to the NMC's interests is real and significant – in relation to the pass rate and the number of complaints.

(2) Pass rate

83. In paragraphs 47 - 55, the Commissioner considered the level of likelihood of the prejudice being relied on by the NMC in relation to the commercial interests of the test sites, and she found that the risk was relatively low rather than real and significant. That is, while she accepted that there is some risk of prejudice to the commercial interests of the sites in disclosing the pass rate, for a number of reasons, including other information in the public domain about the test sites, she concluded that the risk of prejudice is low.
84. She has similarly considered the level of prejudice that would be caused to the ability of the NMC in being able to ascertain individuals' fitness and competence.
85. The Commissioner understands that it is essential for the NMC to be able to assess the fitness and competence of those professionals who

have trained overseas but who wish to be admitted to the United Kingdom register as nurses or midwives. The NMC carries out this function by requiring applicants to take the CBT and OSCE.

86. However, as with her determination regarding section 43(2), the Commissioner considers that the risk of prejudice to this ability is low. In her view, while there is some risk that disclosure of the pass rate could lead to certain test site(s) being favoured over others, in view of the factors explored in detail in paragraphs 51 – 53 she does not consider that it is a substantial risk.
87. Therefore she has determined that section 31 is not engaged in respect of this information.

(3) Number of complaints

88. As previously explained, the NMC has argued that candidates "*would be likely to avoid those [sites] about whom... candidates have most frequently complained to the NMC.*"
89. The Commissioner is aware that the NMC believes that, therefore, disclosure of the number of complaints would be likely to prejudice its ability to be able to ascertain individuals' fitness and competence.
90. However, for the reasons explored in detail in paragraphs 61 - 62 above, in the Commissioner's view there is only a remote risk of prejudice to the NMC's interests in disclosing this information.
91. The Commissioner has therefore determined that section 31 is not engaged in respect of the information relating to the number of complaints.
92. As the Commissioner has found that section 31(1)(g) is not engaged in relation to any of the withheld information, it has not been necessary to go on to consider the balance of the public interests. In light of this conclusion and that above on section 43(2), the NMC is required at paragraph 3 above to disclose the withheld information.

Right of appeal

93. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

94. 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.
95. 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

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