

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Dated 27 November 2006

**Name of Public Authority:** Department of Health

**Address of Public Authority:** Skipton House  
80 London Road  
London  
SE1 6LH

### Summary Decision and Action Required

The Commissioner's decision in this matter is that the Department of Health (the "Department") has not dealt with the Complainant's request in accordance with Part I of the Act in that it has failed to comply with its obligations under section 1(1) and section 10.

- 1) The Department has not complied with its' obligations under section 1(1) of the Act in that it failed to communicate to the complainant information to which he was entitled on the basis that it is exempt from disclosure under sections 33, 35(1)(a), 40(2) and 41 of the Act.
- 2) The Department did not respond to the complainant's request within the time for compliance set out in section 10 of the Act.

In view of the matters referred to above the Commissioner hereby gives notice that in exercise of his powers under section 50 of the Act he requires that:

The Department shall, within 35 calendar days from the date of this notice, disclose the information requested in accordance with its duty under section 1(1) of the Act.

#### **1. Freedom of Information Act 2000 (the "Act") – Applications for a Decision and the Duty of the Commissioner**

- 1.1 The Information Commissioner (the "Commissioner") has received an application for a decision whether, in any specified respect, the complainant's request for information made to the public authority has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000.

- 1.2 Where a complainant has made an application for a decision the Commissioner is under a duty to make a decision, unless:
- a complainant has failed to exhaust a local complaints procedure, or
  - the application is frivolous or vexatious, or
  - the application has been subject to undue delay, or
  - the application has been withdrawn or abandoned.
- 1.3 The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

## **2. The Complaint:**

- 2.1 In a letter to the Department of 1 January 2005 the complainant made the following request for information:

A copy of the report of the study about the National Health Service University (NHSU) which was chaired by Sir William Wells. This work was “a more detailed study” into the NHSU following on from the report “reconfiguring the Department of Health’s arm’s length bodies”. (the “Wells Report”)

- 2.2 On 14 February 2005 the Department refused the complainant’s request on the basis that the Wells Report is exempt by virtue of section 33(1)(b) (audit functions) of the Act. The Department also argued that, to a lesser extent, the exemptions under section 35 (formulation of government policy), section 40 (personal information) and section 41 (information provided in confidence) provide a basis for withholding the Wells Report. However, the Department did not provide any explanation as to why the latter three exemptions apply.
- 2.3 On 18 February 2005 the complainant appealed against the Department’s decision to withhold the Wells Report. At this point the complainant said that he would be happy to receive a copy of the Wells Report with the names or comments that could identify any individual removed.
- 2.4 The Department replied on 27 April 2005. It upheld its original decision that the Wells Report is exempt from disclosure under section 33(1)(b) of the Act. At this time the Department did not mention the additional exemptions that it had cited in its original refusal notice. However, it did say that it could not provide a redacted copy of the Wells Report (i.e. with the names of contributors and their comments removed), because this would give a misleading impression of its contents. Further, the Department suggested that disclosure of any part of the report would undermine its policy of encouraging candour.

- 2.5 In a letter dated 7 April 2005 the complainant requested that the Commissioner review the time taken by the Department to respond to the request and the Department's decision to withhold the Wells Report. In particular, the complainant asked the Commissioner to consider whether the Department correctly applied section 33(1)(b) of the Act to the Wells Report. Upon making a complaint to the Commissioner, the complainant had not been notified of the outcome of the Department's internal review which he had requested on 18 February 2005. In this case the Commissioner accepted the complaint despite the fact that the complainant had not been advised of the outcome of the internal review. As explained above, the Department completed its internal review on 27 April 2005.
- 2.6 During the course of the Commissioner's investigation the Department submitted that the exemptions under sections 35(1)(a), 40(2) and 41 of the Act also provide a basis for withholding the Wells Report. In particular the Department asserted that in addition to section 33 of the Act, section 35(1)(a) applies to the entire Report and that sections 40(2) and 41 apply to certain aspects of the Report, but not the Report as a whole. Therefore, the Commissioner's decision as to whether the Department dealt with the complainant's request in accordance with the requirements of Part 1 of the Act also includes a review of the Department's reliance on these additional exemptions.

### 3. Relevant Statutory Obligations under the Act

- 3.1 **"Section 1(1)** provides that any person making a request for information to a public authority is entitled –
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
  - (b) if that is the case, to have that information communicated to him."
- 3.2 **Section 10** states that "...a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."
- 3.3 **Section 33- Audit functions**
- "33. - (1) This section applies to any public authority which has functions in relation to-
- (a) the audit of the accounts of other public authorities, or
  - (b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.

(2) Information held by a public authority to which this section applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).

(3) The duty to confirm or deny does not arise in relation to a public authority to which this section applies if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).

### 3.4 **Section 35- Formulation of Government Policy**

"35. - (1) Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
- (d) the operation of any Ministerial private office.

(2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

(4) In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.

(5) In this section-

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications-

- (a) between Ministers of the Crown,
  - (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
  - (c) between Assembly Secretaries, including the Assembly First Secretary,
- and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998."

### 3.5 **Section 40- Personal information**

"40. - (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.

(3) The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or

- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
  - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
- (4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).
- (5) The duty to confirm or deny-
- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
  - (b) does not arise in relation to other information if or to the extent that either-
    - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
    - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).
- (6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.
- (7) In this section-
- "the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;  
"data subject" has the same meaning as in section 1(1) of that Act;  
"personal data" has the same meaning as in section 1(1) of that Act."

### 3.6 **Section 41- Information provided in confidence**

“41. - (1) Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”

## 4. **Review of the Case:**

### **Section 10 (time for compliance with request):**

- 4.1 The complainant made a request for information on 1 January 2005. The Department responded to the complainant's request on 14 February 2005. In this letter the Department stated that it had not received the request until the 11 January 2005. However, in either case the Commissioner notes that the Department's response to the request was outside of the time for compliance set out in section 10 of the Act.

### **Background of the Report:**

- 4.2 The Wells Report outlines the findings of a review conducted by Sir William Wells, the Chair of the NHS Appointments Commission, into the operation of the NHSU since it was formally announced in October 2001. The Commissioner understands that the establishment of the NHSU fulfilled a commitment made in the 2001 Labour Manifesto. The NHSU was set up as a corporate university for the NHS. It was initially part of the Department of Health, but was established as a Special Health Authority in December 2003. Between its initiation and establishment as a Special Health Authority, the NHSU sought to establish itself as a focus for the development of staff at all levels in the NHS. The Wells Report was apparently prepared as a private report for the Secretary of State to be used in making policy decisions about the future of the NHSU, and in the context of a wider review of 'Arm's Length Bodies'. The NHSU no longer exists, having been superseded by the NHS Institute.

### **Section 33 (audit functions):**

- 4.3 In respect of section 33(1)(b), the Department took the view that the exemption was engaged and that the public interest favoured maintaining the exemption under section 33(1)(b). The Department's



main argument for withholding the requested information is that its disclosure would have a generally prejudicial effect on the Department's ability to audit the performance of the NHS. The Department has explained that the Secretary of State does not have a formal statutory obligation to audit the accounts of other public authorities, such as Special Health Authorities. However, according to Department the Secretary of State does have a general duty with regard to the efficient functioning of the NHS which extends to examining the economy, efficiency and effectiveness with which NHS bodies, including Special Health Authorities, use public funds.

- 4.4 In particular, the Department has argued that disclosure would discourage contributors to reports, like the Wells Report, from providing frank and unbiased advice to Ministers. The Department has also argued that disclosure will lead to NHS staff being less willing to cooperate with similar reviews in future. It has also said that disclosure would be damaging to the Department's relations with senior NHS staff. The Department suggested that even though the contents of the Report are not attributed to any individual, given the close working relationship between contributors to the Report, individuals would be able to attribute comments to each other. The Department argued that this could do serious harm to future working relations, and that the risk of wider dissemination could lead to individuals keeping potentially controversial comments to themselves. Further the Department pointed out that it has no powers to compel individuals to contribute to such reviews, and that disclosure would lead to fewer or lower quality contributions being made in the future.
- 4.5 In reviewing the Department's application of section 33(1)(b) the Commissioner initially set out to investigate both whether the NHSU is a public authority in its own right, and whether the Department has a function in respect of the examination of the economy, efficiency and effectiveness with which the NHSU uses its resources in discharging its functions. Firstly, as section 33 only applies in respect of a public authority's audit of another public authority, the Commissioner had to determine whether the NHSU was a public authority in its own right. The Department submitted that the NHSU was set up as a Special Health Authority (SHA). In particular, the Commissioner found that paragraph 38 of Schedule I of the Act, which sets out which public authorities are covered by the Acts provisions, includes SHA's established under section 11 of the National Health Service Act 1977. On this basis the Commissioner is satisfied that since its establishment as a SHA the NHSU was a public authority in its own right separate from the Department.
- 4.6 Section 33(1)(b) extends the scope of the exemption to public authorities that have functions in relation to the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions. However, in the Commissioner's view it is necessary to look at this definition in



more detail to determine its scope. Section 33(1) refers to public authorities that have particular functions. Those functions must be statutory functions and public authorities should refer to the legislation from which they derive their powers to determine whether they have a function described by section 33(1)(b). In this case the Commissioner is not convinced that a general duty on the part of the Secretary of State for Health to ensure the efficient functioning of the NHS qualifies as a statutory function for the purposes of section 33(1)(b) of the Act. In addition the Commissioner considered that the review was jointly commissioned by both the Department and the NSHU rather than undertaken solely by the Department in furtherance of its statutory functions.

- 4.7 Whilst in the Commissioner's view function does not have to be the public authority's primary function, nor does that function have to be expressed in the exact terms used in section 33(1)(b) the important point is that the audit examines how a public authority uses its resources in delivering services (the term 'resources' is not limited to financial resources but includes staff, premises, equipment etc.) The exemption does not extend to studies that do not consider how resources are used, for example inspections where the sole purpose is to identify whether set standards are being met would not fall within section 33(1)(b).
- 4.8 In this case the Commissioner considered the terms of reference of the review. Further, the Commissioner also reviewed the Wells Report and in his view it does not pertain to an examination of the economy, efficiency and effectiveness with which the NHSU used its resources. Therefore in the Commissioner's view the Department was not entitled to rely on the exemption under section 33(1)(b).

**Section 35(1)(a) (the formulation and development of government policy):**

- 4.9 The Department has argued that the requested information relates to the formulation or development of government policy, and that therefore the exemption under section 35(1)(a) applies. In this case the Commissioner has reviewed the Report and is satisfied that it was drawn up to inform the Secretary of State's policy decision in respect of the NHSU and its possible replacement. The Commissioner accepts, therefore, that section 35(1)(a) applies to the Wells Report.
- 4.10 The exemption under section 35 of the Act is a qualified exemption and therefore is subject to the public interest test. The Department argued that the public interest in maintaining the exemption under section 35(1)(a) outweighs the public interest in disclosure. In general the Department has argued that:
- releasing the information would have the effect of limiting the future candour of discussions in this policy area and across government;

- disclosure would prejudice Ministers' ability to request and to be provided with advice that is sufficiently candid to enable the best decisions to be made in relation to difficult policy issues;
  - there is a strong public interest in ensuring that performance review and policy decision-making is based upon the best advice available and on a full consideration of all the possible options, and that releasing the report would undermine this; and
  - the risk of disclosure of similar documents in the future could lead to a reluctance to commit to paper a whole range of arguments, judgements and ideas.
- 4.11 As outlined above (paragraph 4.8 and 4.9) the Commissioner does not accept that releasing the Report in this case would inhibit future candour of discussions across government. In the Commissioner's view public authorities relying on the exemption under section 35(1)(a) should take into account the effect of disclosure when considering the public interest test. The Commissioner has reviewed the Report and notes that in this case the Report does not attribute any contribution to any specific individual.
- 4.12 Again as outlined above (paragraph 4.8), the Commissioner is aware that many of the contributors to this, and other similar reports, are civil servants, some of whom are very senior. Such senior civil servants would be in breach of their professional duty should they deliberately withhold relevant information or fail to behave in a manner consistent with the Civil Service Code. Therefore the Commissioner does not accept that releasing the Report would lead to contributors to reviews of this nature providing lower quality contributions in the future.
- 4.13 Further, in the Commissioner's view, external contributors to the Report have a vested interest in taking part in such reviews because it is likely that such reviews by their very nature will influence future public policy and therefore have an effect on the interests of these external contributors.
- 4.14 The Department recognised that the issue is not whether disclosure of the contents of the Report would inhibit good decision making in respect of the issues dealt with in the Report (since the relevant decisions have already been taken). Instead the Department suggested that disclosure would have damaging effects for policy making on other issues in the future because it would inhibit Ministers' ability to gather full and frank information and advice from those with the best knowledge of the issues on which decisions need to be taken.
- 4.15 The Commissioner is aware that the government's decision in respect of the future of the NHSU has been taken: The NHSU no longer exists, having been superseded by the NHS Institute. In the Commissioner's view there is a public interest in access to information which may allow both those parties directly affected, and the public in general to more fully understand the basis of that decision and further to consider the

workings of the new NHS Institute which replaced the NHSU. It is clear that the Report was initiated in response to concerns about a government project involving a significant expenditure of public funds. As such in the Commissioner's view there is a strong public interest in access to this information in order to ensure accountability both in terms of the decision made in relation to the NHSU and in terms of the expenditure of public funds. In the Commissioner's view there are clear lessons to be learned and to this end access to the Report is likely to promote government accountability in respect of the new NHS Institute and allow for greater public participation in relation to future decisions in this area.

- 4.16 Whilst the Commissioner appreciates the public interest in preserving the effective and efficient functioning of the review process as it relates to the formulation and development of government policy, he is of the view that disclosure of the information requested in this case is unlikely to have the effect of inhibiting the functioning of such reviews in future. In particular the Commissioner notes that much of the information contained in the Report is factual in nature. As is outlined in the Commissioner's guidance note on section 35, subsection 35(4) provides an explicit indication that there is a strong public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking. In this case, in the Commissioner's view there is a strong public interest in disclosure of this sort of information.
- 4.17 Therefore, it is the Commissioner's view that in this case the public interest in maintaining the exemption under section 35(1)(a) does not outweigh the public interest in disclosure.

**Section 40(2) (personal information):**

- 4.18 The Department applied section 40(2) to elements of the Report but not to the Report as a whole. The Department argued that despite the fact that contributors to the Report are not expressly identified in the Report, it would be possible for many people reading the Report to link its content to particular contributors. The Department further argued that as it holds other information that clearly links contributors to the Report's content, in releasing the Report personal data would be disclosed. The Department further stated that in considering the assurances of confidentiality that contributions were given, disclosure would constitute a breach of the first Data Protection Principle's requirement of fairness.
- 4.19 As outlined above, the Commissioner has reviewed the Report and notes that some personal information falling within the scope of the definition of personal data in section 1 of the Data Protection Act 1998 (the "1998 Act") is included in the Report. In particular, an Annex to the Report contains a list of the contributors to the review.

4.20 However the Commissioner is of the view that disclosure would not breach any of the data protection principles of the 1998 Act. In particular, the Commissioner considered that in this case the parties that contributed to the review were acting in their professional capacities and that the mere fact that they contributed to the review is not a fact which one would expect would remain private. Further as outlined above, contributions to the Report are not attributed to particular individuals. Therefore in the Commissioner's view disclosure of the limited personal data contained in the Report would not breach the first data protection principle pertaining to the fair and lawful processing of personal data. As such the exemption under section 40(2) of the Act does not provide a basis for withholding this aspect of the information requested.

#### **Section 41 (information provided in confidence):**

- 4.21 The Department applied section 41 to elements of the Report but not to the Report as a whole. The Department stated that the review was carried out mainly through interviews between Sir William Wells and individuals who had been involved with NHSU. According to the Department, these interviews were conducted on the basis of an expectation of confidentiality, as Sir William Wells gave explicit verbal assurances of confidentiality before interviews began. As such a limited number of the comments by interviewees are included in the Report although none are attributed to individuals.
- 4.22 The Department has also pointed out that many professionals contributing to the review were not employees of either the NHS or the Department of Health. The Department has also argued that the fact that an individual held a particular opinion and shared it with Sir William Wells is a confidential matter which would not attract a public interest defence if disclosed to the wider public.
- 4.23 In considering the Department's application of section 41 the Commissioner considered the circumstances under which the information was provided, the nature of the information and whether release of the information to a third party would constitute an actionable breach of confidence.
- 4.24 The Commissioner understands that Sir William Wells gave assurances to those contributing to the review that their contributions would be kept confidential and as such the contents of the Report are not attributed to any individual. On this basis the Commissioner is satisfied that the circumstances under which some of the information contained in the Report was provided were confidential. However, having considered the nature of this information, the Commissioner is of the view that it does not have the necessary quality of confidence and therefore disclosure to a third party would not constitute an actionable breach of confidence. The Commissioner accepts that Sir William Wells gave assurances that contributors' specific contributions

would not be disclosed. Contributions to the Report are not attributable to any individual and therefore the assurance of confidentiality would not be breached by disclosure. Therefore in the Commissioner's view the exemption under section 41 of the Act does not provide a basis for withholding the Report.

## 5. The Commissioner's Decision

5.1 The Department has not complied with its obligations under section 1(1) of the Act in that it failed to communicate to the complainant information to which he was entitled on the basis that it is exempt from disclosure under sections 33(1)(b), 35(1)(a), 40(2) and 41 of the Act. In particular the Commissioner found that:

- the Department did not have a function in respect of the examination of the economy, efficiency and effectiveness with which the NHSU used its resources in discharging its functions. and therefore the exemption under section 33(1)(b) does not apply;
- although the requested information relates to the formulation or development of government policy under section 35(1)(a), in this case the public interest in maintaining the exemption under section 35(1)(a) does not outweigh the public interest in disclosure;
- although some limited personal information falling within the definition of personal data in section 1 of the 1998 Act is contained in the Report, disclosure of this information would not breach any of the data protection principles. In particular disclosure of this information would not breach the first data protection principle pertaining to the fair and lawful processing of personal data, and therefore section 40(2) of the Act does not provide a basis for exempting this information;
- although some of the information contained in the report was obtained from contributors in circumstances which were confidential, this information is not attributable to any specific individual. On this basis the information does not have the necessary quality of confidence and therefore disclosure to a third party would not constitute an actionable breach of confidence. As such the exemption under section 41 does not provide a basis for withholding this information.

5.2 The Department did not respond to the complainant's request within the time for compliance set out in section 10 of the Act. The complainant made his request on 1 January 2005 and the Department responded in a letter of 14 February 2005. The Department stated that it did not actually receive the complainant's request until 11 January 2005. However, in either case the Commissioner notes that the

Department's response to the request was outside of the time for compliance set out in section 10 of the Act.

**6. Action Required**

6.1 In view of the matters referred to above the Commissioner hereby gives notice that in exercise of his powers under section 50 of the Act he requires that:

The Department shall, within 35 calendar days from the date of this notice, disclose the Wells Report in accordance with its duty under section 1(1) of the Act.

**7. Right of Appeal**

7.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

7.2 Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

**Dated the 27th day of November 2006**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

**Information Commissioner  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**