

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 2 July 2007

Public Authority: Southampton University Hospitals NHS Trust
Address: Mailpoint 18
Southampton General Hospital
Tremona Road
Southampton
Hampshire
SO16 6YD

Summary

The complainant and his wife initially requested copies of two incident reports which had been completed by staff members of Southampton University Hospitals NHS Trust (the public authority) in 2001, in relation to alleged abusive and aggressive behaviour by the complainant and his wife. The public authority treated this request, and the subsequent request referred to in this Notice, as a request under the Freedom of Information Act 2000 (the "Act"). The incident reports were provided to the complainant and his wife in a form which did not show the names of the staff members who had written these reports. The complainant then contacted the public authority again, and asked specifically for the names of the staff members who had written these reports. The public authority refused to disclose the information, and cited the exemption at section 40. At review stage the public authority stated that the information was exempt under section 36. During the investigation of the complaint the public authority informed the Commissioner that it now sought to rely solely upon section 40(2), as it believed that the disclosure of this information would be in breach of the principles of the Data Protection Act 1998 (DPA). After investigating the complaint and considering the withheld information, the Commissioner was satisfied in the circumstances of this case that the information in question formed part of the personal data of the complainant and his wife, and he therefore decided that the information was exempt from disclosure under section 40(1) of the Act. Additionally the Commissioner found that section 36 was not engaged as the public authority had not sought the reasonable opinion of the qualified person. The Commissioner also concluded that the public authority had breached the requirements of section 17 of the Act by failing to issue an adequate refusal notice.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Act. This Notice sets out his decision.

The Request

2. On July 18 2005 the complainant, and his wife, emailed the public authority and requested "copies of any incident reports that surrounded the birth of my daughter above." The public authority treated this as a request under the Act.
3. These reports were provided to the complainant by the public authority on 2 August 2005. However, they were provided in a format that did not show the identities of the staff members who had made these reports.
4. The complainant contacted the public authority again on 9 September 2005 and requested,

"... the names and positions of staff involved afforded to me under the Freedom of Information Act."
5. In an email dated 10 October 2005 the public authority refused to provide this information, stating that this information was exempt under section 40 of the Act. The public authority did not specify which part of section 40 it believed applied to this information. The public authority did not inform the complainant of his right to an internal review or the contact details of the Commissioner. The Commissioner has believes that this email constitutes the public authority's initial refusal notice.
6. The complainant contacted the public authority in an email dated 10 October 2005 and stated that he believed that it was mistaken in claiming this exemption. He also asked for an explanation as to why it believed this exemption applied.
7. On 1 November 2005 the public authority wrote back to the complainant and informed him,

"Your request has been further considered by the Trust's Medical Director who has reaffirmed that this information is exempt under section 40, Data Protection, of the FOI Act."
8. The complainant wrote back to the public authority on 1 November 2005 in regard to this refusal, and stated,

"I will require you to place this in writing, preferably with your reasons and the name of the person who has made this decision, to forward onto the Information Commissioner to begin official proceedings."

9. The complainant contacted the Commissioner on the same day to complain about the refusal to release the names of the staff members. He was advised to seek an internal review from the public authority.

10. On 7 November 2005 the public authority emailed the complainant, and informed him that,

“Under these circumstances the most reasonable exemption would seem to be [section] 36 regarding ‘the effective conduct of public affairs.’”

The Commissioner has formed the view that this email constitutes the outcome of the public authority’s internal review procedure.

The Investigation

Scope of the case

11. On 13 March 2006 the complainant contacted the Commissioner and informed him that he had now been through the internal review process. The complainant specifically asked the Commissioner to consider whether the refusal to disclose the identity of the authors of the incident reports was appropriate.

12. Although the complainant did not raise the point, the Commissioner has also considered whether the public authority breached section 17 of the Act when issuing the refusal notice by failing to provide the full details of the exemptions it was relying upon, the reasons why it believed that these exemptions applied, or details of its internal review procedures.

Chronology

13. The Commissioner contacted the complainant on 4 January 2007 and asked him to clarify whether he was seeking the release of the names of the two staff members who had completed the incident reports regarding him and his wife.

14. In an email to the Commissioner dated 8 January 2007 the complainant confirmed that he wished the public authority to, “furnish me with the information to identify the staff who made the fictitious incident reports.”

15. The Commissioner contacted the public authority on 4 January 2007 to notify it that he had received a complaint. In this letter he asked the public authority to provide him with copies of the information in question, together with information about the policies and procedures the public authority had in place in relation to making incident reports. He also asked for an explanation as to why the public authority believed that sections 36 and 40 applied. In relation to section 36 he asked the public authority to clarify whether the ‘qualified person’ had made the decision to apply this section, and to provide him with information about the public authority’s consideration of the public interest in applying this exemption. In

- relation to section 40 he asked for its reasoning behind the application of this exemption.
16. The public authority responded in a letter dated 5 February 2007 providing copies of the information requested. The public authority did not, however, answer the specific questions the Commissioner had asked.
 17. The Commissioner wrote back to the public authority on 14 February 2007, again seeking clarification of its use of sections 36 and 40. Further to the questions he had previously put to the public authority he also asked which part of section 40 it was seeking to rely upon, and whether it was now solely relying on section 36, or whether it was also relying on section 40 to withhold the information in question.
 18. The public authority wrote back to the Commissioner on 5 March 2007. It informed him that the decision to claim section 36 had been made by the Medical Director, rather than the Chief Executive, and that as the issue referred to medical personnel it believed that he was the most appropriate person to make this decision. The public authority also informed the Commissioner that it had not carried out a public interest test when applying this exemption.
 19. The public authority went on to state that it was now relying solely on section 40(2) and section 40(3)(a)(i). It informed the Commissioner that its employees were encouraged to report any incidents in order that lessons could be learnt and to improve patient care, in “an open and non-punitive environment”, and that it was committed to providing a safe working environment and would not tolerate aggression towards its employees.

Analysis

Procedural matters

20. The Commissioner considered whether the refusal notice issued by the public authority on 10 October 2005 complied with section 17 of the Act.
21. Section 17(1) states that a public authority who is relying on an exemption(s) in order to withhold information must give the applicant a notice which:
 - (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.
22. Section 17(7) states:

“A notice under subsection (1), (3) or (5) must –

 - (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

- (b) contain particulars of the right conferred by section 50.”
23. The refusal notice issued by the public authority did not specify which part of section 40 the public authority was relying upon to withhold the information, nor did it provide adequate reasoning as to why section 40 applied. Furthermore the notice did not contain details of the public authority's internal review procedures or the contact details of the Commissioner.
 24. The Commissioner believes that the public authority did not provide adequate reasoning as to why it believed that section 36 applied, in its email on 7 November 2005.
 25. Consequently the Commissioner has found that the refusal notice on 10 October 2005 did not meet with the requirements of section 17(1) and section 17(7).
 26. The full text of section 17 can be found in the Legal Annex at the end of this Notice.

Exemptions

Section 40(1)

27. Although the public authority has not referred to this exemption the Commissioner has considered whether section 40(1) of the Act applies to the information in question.
28. In considering this the Commissioner is mindful of the fact that the original request for information on 18 July 2005 was made by both the complainant and his wife. He therefore considers that the request made on 9 September 2005 (which is the subject of this Notice) was a refinement of this original joint request. He has gone on to consider whether the information in question forms part of the personal data of the complainant and his wife.
29. Under section 40(1), requested information that constitutes the personal data of the applicant, as defined in the DPA, is exempt from disclosure under the Act. This exemption is absolute and therefore requires no public interest test to be conducted. It is important to note that the correct access regime for information of this type is the DPA.
30. After careful consideration of the withheld information in this case the Commissioner is satisfied that it forms part of the personal data of the complainant and his wife held by the public authority, and that the complainant and his wife are entitled to request this information under section 7 of the DPA. In reaching this view the Commissioner has taken into account the nature of the incident reports. These focus on the alleged actions of the complainant and his wife, and the alleged harassment of medical staff. The Commissioner has formed the view that in the circumstances of this case the names of the authors of those two reports are inextricably linked to the contents of the reports themselves, and therefore form part of the personal data of the complainant and his wife.

31. In view of the above, the Commissioner considers that disclosure of this information is exempt under section 40(1) of the Act.
32. The full text of section 40 can be found in the Legal Annex at the end of this Notice.
33. Although the Commissioner is satisfied that section 40(1) applies to the information in question the Commissioner has gone on to consider the public authority's use of section 36.

Section 36

34. Under section 36(2) of the Act, information is exempt from disclosure where, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, inhibit the free and frank provision of advice, the exchange of views for the purposes of deliberation, or would otherwise prejudice or would be likely otherwise to prejudice the effective conduct of public affairs.
35. The public authority has informed the Commissioner that in this case the individual whose reasonable opinion it sought was the Medical Director.
36. In order for this exemption to be engaged the reasonable opinion has to be that of the qualified person. The Act lists the qualified person for a number of specific public authorities in sections 36(5)(a) to (n). These include all public authorities in Northern Ireland and Wales and a small number of specific authorities in England. The qualified person in relation to the public authorities not listed is either a Minister of the Crown, the public authority itself if authorised by the minister, or an individual officer or employee of the authority who has been authorised.
37. The majority of public authorities in England either rely on a Minister to act as a qualified person or have had someone in their organisation authorised by a Minister as a qualified person. The Ministry of Justice (formerly the Department for Constitutional Affairs) is responsible for the authorisation of a qualified person within a public authority. A list of qualified persons is available at www.foi.gov.uk/guidance/exguide/sec36/annex-d.htm
38. The responsibility for the decision making cannot be delegated although the preparatory or administrative work leading up to the decision may be carried out by another person.
39. The qualified person in a public authority of this type (NHS Trust) is the Chief Executive (or equivalent).
40. After careful consideration of the facts of this case the Commissioner has formed the view that the public authority did not seek the reasonable opinion of the qualified person.
41. Therefore the Commissioner has formed the view that section 36 is not engaged in this case.

42. The full text of section 36 can be found in the Legal Annex at the end of this Notice.

Section 40(2)

43. Finally, the Commissioner notes that the public authority also cited section 40(2) of the Act in order to withhold the information in question. However, as he has formed the view that section 40(1) of the Act applies he has not gone on to consider the application of this exemption.

The Decision

44. The Commissioner's decision is that the public authority were justified in withholding the information requested in accordance with the requirements of the Act as he is satisfied that the information in question is exempt from disclosure under section 40(1). This is because he considers the information requested constitutes part of the personal data of which the complainant, and his wife, are the data subjects. However he notes that section 40(1) was not cited by the public authority.
45. Additionally the Commissioner found that the public authority misapplied section 36, as it did not seek the reasonable opinion of the qualified person.
46. The Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

By failing to issue an adequate refusal notice the public authority breached section 17 of the Act.

Steps Required

47. The Commissioner requires no steps to be taken.

Other matters

48. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
49. Section 7 of the DPA gives an individual the right to request copies of personal data held about them – this is referred to as the right of Subject Access. Therefore, the Commissioner will go on to make an assessment under section 42 of the DPA as to whether the information in question in this case should be disclosed to the complainant and his wife under this access right. However, this assessment will be dealt with separately and will not form part of this Decision

Notice, because an assessment under section 42 of the DPA is a separate legal process from the consideration of a complaint under section 50 of the FOI Act.

50. The Commissioner notes that this request should have been dealt with as a subject access request, under section 7 of the DPA from the outset, and he would encourage public authorities to consider requests under the correct access regime at first instance.

Right of Appeal

51. Either party has the right to appeal against this Decision Notice to the Information 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

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

Dated the 2nd day of July 2007

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Section 17

- (1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –
- (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.
- (2) Where –
- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim –
 - (i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
 - (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.
- (3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming –
- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
 - (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- (4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

- (5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
- (6) Subsection (5) does not apply where:
- (a) the public authority is relying on a claim that section 14 applies,
 - (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
 - (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7) A notice under subsection (1), (3) or (5) must-
- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
 - (b) contain particulars of the right conferred by section 50.

Section 36

- (1) This section applies to-
- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
 - (b) information which is held by any other public authority.
- (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-
- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
 - (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

- (3)** The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).
- (4)** In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person."
- (5)** In subsections (2) and (3) "qualified person"-
- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
 - (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
 - (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
 - (d) in relation to information held by the House of Commons, means the Speaker of that House,
 - (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
 - (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
 - (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
 - (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
 - (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
 - (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
 - (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
 - (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
 - (m) in relation to information held by the Greater London Authority, means the Mayor of London,

- (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
 - (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
 - (i) a Minister of the Crown,
 - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
 - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.
- (6)** Any authorisation for the purposes of this section-
- (a) may relate to a specified person or to persons falling within a specified class,
 - (b) may be general or limited to particular classes of case, and
 - (c) may be granted subject to conditions.
- (7)** A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-
- (a) disclosure of information held by either House of Parliament, or
 - (b) compliance with section 1(1)(a) by either House, would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

Section 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.