

Freedom of Information Act 2000 (Section 50)

Decision Notice

3 December 2007

Public Authority: East London and The City Mental Health NHS Trust
Address: Trust Headquarters
East One
22 Commercial Street
London

Summary

The complainant made two requests under the Freedom of Information Act 2000 (the "Act") to East London and The City Mental Health NHS Trust (the "Trust"). The first request was for a copy of internal reports into the circumstances surrounding the death of a patient of the Trust ("Mr A"). The Trust refused to disclose the information and cited the exemptions at sections 40 and 44. It cited section 44 as it believed that if it were to disclose the reports it would be in breach of its common law duty of confidentiality. During the course of the Commissioner's investigation the Trust also stated that it was relying upon section 41 to withhold some of the information contained in the reports. The complainant also made a second request for the details of the solicitors acting on behalf of the family of Mr A. The Trust refused to release this information due to, "issues of confidentiality" – although it did not specify which exemption it was relying upon. In relation to the first request, the Commissioner decided most of the information in these reports was exempt from disclosure under section 41. He also decided that some information in the reports was exempt under section 40. In relation to the second request, the Commissioner decided that this information was exempt from disclosure under section 40. However, the Commissioner also decided that some of the information subject to the first request was not exempt under sections 40 or 41, and therefore he decided that this information should be disclosed. The Commissioner also decided that the Trust had not complied with section 17, as both refusal notices did not contain details of the Trust's internal review procedures or the contact details of the Commissioner. Further to this the second refusal notice did not contain details of the exemptions the Trust was relying upon.

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. The complainant advised the Commissioner that on 12 December 2005 the following information was requested from the Trust in accordance with section 1 of the Act:

"I have been in communication with [...] regarding my concerns about the death of [Mr A] in 2001.

[...] has stated that the Trust's initial enquiry was completed in October 2001 and an addendum report was completed following the inquest.

...I would be grateful if you would forward to me...a copy of the Trust's enquiry and addendum report as it does not appear on your website."

It should be noted that the complainant is not a relative of Mr A.

3. By way of background, Mr A had been a patient of the Trust and had committed suicide in 2001. Shortly before his death he had been linked to a homicide, but had never been charged or convicted in connection with this offence
4. On 29 December 2005 the Trust responded to the complainant's request. It refused to disclose the information requested, claiming that the information was exempt under sections 40 and 44. The refusal notice stated:

"Under section 40 of the Act all personal data relating to a third party is exempt from disclosure. However, I am aware that the primary purpose of this Section is to protect the privacy of living persons. The Trust is obviously aware of its duty to the family of [Mr A] to protect its privacy and confidentiality. This information is also subject to the exemption under section 44 of the Act which prohibits disclosure that '...would constitute or be punishable as a contempt of court'. This section would apply because disclosure of confidential information about the care and treatment of [Mr A] would be a breach of the Trust's common law duty of confidentiality, which is ultimately punishable by a Court."

This refusal notice did not contain any details of the complainant's right to an internal review or the contact details of the Commissioner.

5. The complainant emailed the Trust on 3 January 2006 to complain about this refusal. The Commissioner has formed the view that this email constituted a request for an internal review.
6. The Trust responded in a letter dated 3 January 2006 and referred the complainant to the previous letter refusing access to the information requested. It advised the complainant to contact the Commissioner if she was unhappy with the response. The Commissioner believes that this letter formed an internal review decision.

7. The complainant initially complained to the Commissioner on 11 January 2006. However, before an investigation was initiated the complainant contacted the Commissioner again on 15 March 2006, and provided further information. This information contained a second request which the complainant had made to the Trust under the Act.
8. This second request was made to the Trust on 27 February 2006. The complainant asked the Trust for the name and address of the solicitor acting for the family of Mr A in relation to his death.
9. In a letter dated 7 March 2006 the Trust refused to release the information which was the subject of the second request because of, "issues of confidentiality". The Commissioner has formed the view that this letter constituted a refusal notice. This letter did not contain any details of an exemption, the complainant's right to an internal review or the contact details of the Commissioner.

The Investigation

Scope of the case

10. On 11 January 2006 the complainant contacted the Commissioner to complain about the way her first request had been handled. The complainant specifically asked the Commissioner to consider whether the refusal was appropriate. As stated above, the complainant provided further information to the Commissioner on 15 March 2006 which contained a second request and the Trust's response.
11. For the sake of expediency the Commissioner has decided to investigate both of these requests and refusals at the same time.
12. Although the complainant did not raise the point, the Commissioner also considered whether the Trust had complied with section 17 of the Act.

Chronology

13. The Commissioner wrote to the complainant on 8 January 2007 and asked her to confirm whether she wished to make a complaint about the handling of both requests. The complainant confirmed that she did, by way of a telephone call on 11 January 2007.
14. The Commissioner contacted the Trust on 22 January 2007 and notified it that he had received a complaint. In this letter he asked the Trust to provide him with copies of the withheld information, together with an explanation as to why it believed that sections 40 and 44 applied.
15. The Trust responded in a letter dated 19 February 2007 and provided copies of two internal inquiry reports. It reiterated its belief that sections 40 and 44 applied

- to this information, although it did not provide any further details as to why it thought that this was so.
16. The Commissioner contacted the Trust again, on 23 February 2007, seeking further clarification about some of the information it had provided.
 17. The Trust provided clarification by way of a letter dated 27 February 2007.
 18. Following the decision of the Information Tribunal in *Mrs P Bluck V The Information Commissioner and Epsom & St Helier University Hospital NHS Trust*, the Commissioner contacted the Trust by way of a telephone call on 1 October 2007. He advised the Trust of the Tribunal's decision and asked whether, in light of this decision, it had any further submissions it wished to make.¹
 19. The Commissioner asked the Trust to provide further information as to the source of some of the information contained in the withheld reports. Finally the Commissioner also asked the Trust to confirm whether it held a copy of the addendum report, referred to in the original request. The Trust confirmed that it would make further submissions, and stated that it would provide the further information he had requested.
 20. The Commissioner did not ask the Trust to provide a copy of the addendum report as he had obtained a copy of this report from a different public authority, during the course of an investigation of another case, which is running parallel to this one. During the telephone call he made the Trust aware of this.
 21. The Commissioner did not receive a response, and contacted the Trust again by way of telephone calls on 17 October 2007 and 30 October 2007.
 22. The Trust responded in a letter dated 2 November 2007 and provided further submissions to the Commissioner. In this letter it informed the Commissioner that some of the information on the withheld documents had been obtained from the Police and from the Coroner, and that it believed that this information was exempt under section 41. Finally it confirmed to the Commissioner that it held a copy of the addendum report as referred to in the original request and refusal notice.

Analysis

Procedural matters

23. The Commissioner considered whether the refusal notices issued by the Trust on 29 December 2005 and 7 March 2006 complied with section 17 of the Act.
24. 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:

¹ Appeal number EA/2006/0090, paragraph 31.

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

25. 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.”

26. The refusal notices issued by the Trust did not contain details of its internal review procedures or the right to appeal to the Commissioner.

27. Furthermore, the refusal notice of 7 March 2006 did not state which exemption the Trust was seeking to rely upon to withhold the information.

28. Lastly, the Trust did not inform the complainant of the exemption it sought to rely upon during the course of the Commissioner’s investigation.

29. The full text of section 17 can be found in the Legal Annex at the end of this Notice.

Exemptions

30. The Commissioner has considered the applications of exemptions to each of the requests in turn.

The First Request

31. The Trust withheld the information detailed in the first request under section 44, as it believed that the release would be a breach of confidence, and under section 40, although it did not fully explain why it believed that section 40 applied. During the investigation of the case the Trust also cited section 41 to withhold some of the information contained in the reports.

32. Although the Trust has cited both sections 41 and 44 to withhold this information, it has based the claim of these two different exemptions on the same argument – that the disclosure of these reports would be an actionable breach of confidence. Therefore the Commissioner has considered the application of section 41 to all of the withheld information. However, the Commissioner is concerned about the Trust’s application of section 44, and he will therefore first consider briefly its use of this exemption.

Section 44

33. Section 44(1) provides an absolute exemption for information where disclosure is:

- (a) prohibited under any enactment;
- (b) incompatible with any European Community obligation;
- (c) would constitute or be punishable as a contempt of court.

34. The Trust claimed that section 44(1)(c) applied, stating that the reports contain information about the care and treatment of Mr A and if it disclosed this information it would be in breach of its common law duty of confidentiality, which would be ultimately punishable by the Court.
35. The Commissioner does not agree with the Trust's reasoning on this. Section 44(1)(c) applies only when the disclosure of information would constitute or be punishable as a contempt of court. He does not consider that a breach of confidence would constitute a contempt of court, unless there was a court order in place ordering the confidentiality of some information. The Commissioner has not been supplied with any evidence to show that such a court order is in place. Therefore he does not accept that section 44(1)(c) applies in this case.
36. The Commissioner then considered whether section 44(1)(a) or (b) would apply in relation to a breach of confidence. In his opinion they would not.
37. The Commissioner has gone on to consider the applicability of section 41.

Section 41

38. The Trust has stated that the withheld information is confidential. It initially informed the complainant that it believed that the requested documents were confidential as they contained information about the medical care and treatment of Mr A. Although the Trust cited section 44 on the basis of this argument, the Commissioner believes that it is appropriate for him to consider these arguments in relation to section 41 of the Act.
39. After examining the withheld information the Commissioner noted that the reports contained some information that did not appear to have been obtained from Mr A's medical records. Therefore he contacted the Trust on 1 October 2007 and asked it whether the Trust had obtained information from any other sources when producing the reports, and whether this information had been provided to the Trust in confidence. On 1 November 2007 the Trust contacted the Commissioner and confirmed that some of the information on the reports had been obtained from the Police and from the Coroner's inquest into the death of Mr A. It informed the Commissioner that it believed that section 41 applied to this information.
40. After considering the information provided by the Trust the Commissioner believes that it has argued that the reports are made up of three kinds of information, and that it believes that this information is exempt under section 41. The three kinds of information are:
- Information obtained from Mr A's medical records, either directly, or indirectly and in such a way as that details of his medical care and condition can be easily identified
 - Information obtained from the Police.

- Information obtained from the Coroner.

41. Section 41 provides that information is exempt if it was obtained by the public authority from any other person and the disclosure of the information to the public would constitute a breach of confidence actionable by that or any other person.
42. Section 41 is an absolute exemption, and is therefore not subject to the public interest test as listed in section 2(1)(b) of the Act.
43. The full text of section 41 can be found in the Legal Annex at the end of this notice.
44. The Commissioner has gone on to consider the application of section 41 to each of these groups of information in turn.

Information obtained from Mr A's medical records

45. The Commissioner has considered whether the Trust was correct to apply section 41 in relation to information drawn from Mr A's medical records in the reports.
46. Whilst taking into account the particular circumstances of this case, the Commissioner has been mindful of the decision of the Information Tribunal in *Mrs P Bluck V The Information Commissioner and Epsom & St Helier University Hospital NHS Trust*, which dealt with a request for a deceased person's medical records from an individual who was not the deceased person's personal representative. The Tribunal upheld the Commissioner's decision that the requested information was exempt from disclosure under section 41 of the Act.²
47. Having examined these reports the Commissioner is satisfied that a large proportion of the information contained therein has been drawn directly from Mr A's medical records. He also believes that the reports contain information which has been written after close consideration of Mr A's medical records and has drawn from these records, and from which details of Mr A's medical care and condition can be easily identified.
48. He is satisfied that this information has been drawn from medical records and from interviews with the relevant health professionals involved in Mr A's care and has been combined into reports about the circumstances surrounding Mr A's death. While the information is not in the form of medical records the Commissioner believes that it is of the same sensitivity and relevance to the deceased as his medical records and has been obtained in connection with the provision of health services to Mr A by the Trust.
49. The Commissioner is satisfied that the information which relates to Mr A's medical records is information that was obtained from a third party. The Commissioner is also satisfied that the information has the necessary quality of confidence in that it is not generally accessible nor trivial.

² Appeal number EA/2006/0090.

50. The reports contain a substantial amount of information that has been drawn from the medical records of Mr A. When patients submit to treatment from doctors and other medical professionals whether this is in surgeries, hospitals or other institutions, they do so with the expectation that that information would not be disclosed to third parties without their consent. He is satisfied that an obligation of confidence is created by the very nature of the doctor / patient relationship and the duty is therefore implicit. This is further supported by the oath which doctors take guaranteeing to protect doctor / patient confidentiality. The Commissioner is also satisfied that the information was imparted in circumstances importing an obligation of confidence
51. The Commissioner has gone on to consider whether the duty of confidence can survive the death of the individual to whom the duty is owed. The argument is considered on the basis of both principle and authority contained in relevant case law.
52. The argument of principle is that the breach of confidence would affect the conscience of the defendant. Where the disclosure of such information could be said to be unconscionable, it may be restrained by the Court even where it would not damage the confider. The Commissioner finds the argument of principle to be a reasonable one, particularly given the fact that the disclosure under the Act is disclosure to the world at large.
53. Having considered the argument of principle, the Commissioner has examined the argument of authority. While this may be less powerful than the argument of principle, there would appear to be no binding authority against the argument of principle. In view of this, the Commissioner is satisfied that the duty of confidence attached to medical / health records can survive the death of the person to whom the records relate.
54. The Commissioner's decision is therefore that the duty of confidence would survive the death of Mr A and disclosure of information by the Trust would be a breach of the duty of confidence owed to Mr A.
55. The duty of confidence is not absolute. The courts have recognised three broad circumstances in which information may be disclosed in spite of a duty of confidence. These include where the disclosure is consented to by the confider, where disclosure is required by law, and where there is a greater public interest in disclosing the information which overrides any duty of confidence which may be owed.
56. There are no issues surrounding consent or law in this case. This leaves a consideration of the public interest. The Commissioner must therefore balance the public interest in disclosing the requested information against the public interest in maintaining the duty of confidence, with a view to deciding if the duty of confidence should be maintained.
57. In considering whether the disclosure was in the greater public interest, the Commissioner was mindful that in some circumstances there may be a public interest in the disclosure of such information, such as instances where there were

suspicious circumstances surrounding a person's death – although he considers such circumstances will be rare.

58. In reaching a view on this the Commissioner has had regard for the findings of the Coroner, who pronounced a verdict of suicide in respect of Mr A's death. Furthermore the Commissioner has noted that the information in question focused primarily on the death of Mr A, not on the homicide he was linked to. The Commissioner has also noted that Mr A was neither charged nor convicted in connection with this offence. Having considered these points, the Commissioner has formed the view that in this case there is no overriding greater public interest, and that therefore the public interest does not override the duty of confidentiality.
59. One of the requirements for section 41 to apply is that the disclosure of the information would constitute an actionable breach of a duty of confidence. Given that the Commissioner accepts that in this case a duty of confidence exists, the questions to be addressed are whether such a disclosure would be actionable, and if so, who could bring the action?
60. In regard to whether this disclosure would be actionable, the Commissioner considers this to be the case, though it is unlikely that damages could be awarded for a breach of the duty of confidence to the deceased person as there is no obvious financial loss. Instead, any remedy would most likely be in the form of an injunction to prevent publication of the information requested.
61. After reaching this view, it is therefore necessary to establish who would be able to bring the action if the duty of confidence was breached.
62. While again there would appear to be no binding authority on this point, the Commissioner has reached the view that an action could be brought by the personal representatives of Mr A, namely the executors or administrators of the estate. It would be unlikely that surviving relatives other than Mr A's personal representatives would be able to bring an action based on a breach of the duty of confidence. The Commissioner has been provided with evidence that Mr A has surviving family members and he is satisfied that the breach of confidence which would arise from the disclosure would be actionable by them.
63. In view of the above, the Commissioner considers that disclosure of this information is exempt under section 41 of the Act, and that the Trust was correct to apply this exemption in relation to the parts of withheld reports which contain information drawn from Mr A's medical records.

Information obtained from the Police

64. The Trust has informed the Commissioner that some of the information contained in the reports was obtained by the Trust from the Police.
65. Whilst making a determination on the application of section 41 to this information the Commissioner has first considered whether this information was obtained from a third party. From the information provided by the Trust the Commissioner is satisfied that it was.

66. In order for the Commissioner to be satisfied that the exemption applies to this information he has gone on to consider whether this information has the necessary quality of confidence.
67. The information in question contains a small amount of detailed information relating to the homicide that Mr A had been linked to. The Commissioner believes that this information is very sensitive in nature, especially to the families of both Mr A and the victim of the homicide. As such the Commissioner believes that this information is highly sensitive information which clearly has the appropriate quality of confidentiality.
68. The Commissioner has gone on to consider the circumstances under which this information was obtained.
69. The Trust has informed the Commissioner that, "We do not have any information, [...], regarding the conditions on which the information was provided. It is, however, normal practice for the Trust to request information from the Police...following an incident, and the Trust would not normally disclose that information to third parties."
70. Although the Trust has been unable to provide much detail as to the circumstances under which this information was obtained, the Commissioner has taken into consideration that it was obtained from the Police for the purposes of an internal inquiry into the death of Mr A. Bearing this in mind he believes that given that:
 - the information relates to the death of Mr A, and his alleged links with a homicide;
 - that the information is of a very sensitive nature;
 - and that it is highly likely that disclosure would be distressing to the families of both Mr A and the victim of the homicide,

it is reasonable to believe that the information has both the appropriate quality of confidentiality and was provided with the expectation of confidence.

71. As stated above, the duty of confidence is not absolute. The courts have recognised three broad circumstances in which information may be disclosed in spite of a duty of confidence. These include where the disclosure is consented to by the confider, where disclosure is required by law, and where there is a greater public interest in disclosing the information which overrides any duty of confidence which may be owed.
72. There are no issues surrounding consent or law in this case. This leaves a consideration of the public interest. The Commissioner must therefore balance the public interest in disclosing the requested information against the public interest in maintaining the duty of confidence, with a view to deciding if the duty of confidence should be maintained.

73. After considering the factors listed at paragraphs 58 and 59 above the Commissioner believes that in this case there is no overriding greater public interest, and that therefore the public interest does not override the duty of confidentiality.
74. Therefore the Commissioner believes that the exemption is engaged, and that disclosure of this information is exempt under section 41 of the Act. He believes that the Trust was correct to apply this exemption in relation to information on the reports which was obtained from the Police.

Information obtained from the Coroner

75. The Trust has informed the Commissioner that some of the information contained in the withheld documents was obtained from the Coroner's hearing into the death of Mr A.
76. Whilst making a determination on the application of section 41 to this information the Commissioner has first considered whether this information was obtained from a third party. From the information provided by the Trust the Commissioner is satisfied that it was.
77. In order for the Commissioner to be satisfied that the exemption applies to this information he has gone on to consider whether this information has the necessary quality of confidence.
78. During the course of the investigation the Commissioner asked the Trust whether the Coroner's hearing into the death of Mr A had been held in public. The Trust was unable to provide a definite answer, but pointed out that, "the panel investigation report [...] states that the inquests were widely reported in the media. I therefore have no doubt that the hearings were held in public."
79. Further to this, the Commissioner is aware that coverage appeared in the press at the time which published details of the Coroner's hearing. Bearing this in mind, and as the Trust has not provided any evidence to show that the Coroner's hearing was a closed hearing, the Commissioner believes that the inquest into Mr A's death was a public hearing. Therefore he does not believe that this information has the necessary quality of confidence, and therefore the section 41 exemption is not engaged in respect of this information.

Other information in the reports

80. Having considered the contents of the reports the Commissioner also believes that there is a fourth kind of information contained in them. He believes that there is some information in the reports which was not obtained from Mr A's medical records (either directly or indirectly), the Police or the Coroner's hearing, but was instead produced by the authors of the reports.
81. Whilst the Trust has not referred directly to this information, as it has claimed that disclosure of the entire contents of the withheld reports would be an actionable

breach of confidence, the Commissioner has gone on to consider the applicability of section 41 to this information.

82. After considering this information the Commissioner believes that as it was not obtained from Mr A's medical records or from the Police, it was not obtained by the Trust from a third party. Therefore he believes that section 41 is not engaged in respect of this information.
83. Therefore the Commissioner believes that section 41 does not apply to information contained in the reports which was not obtained from the medical records of Mr A, from the Police, or from the Coroner's hearing.

Section 40

84. In the initial refusal notice the Trust informed the complainant that, "under section 40 of the Act all personal data relating to a third party is exempt from disclosure. However, I am aware that the primary purpose of this Section is to protect the privacy of living persons. The Trust is obviously aware of its duty to the family of [Mr A] to protect its privacy and confidentiality."
85. The Trust did not elucidate any further on its application of this exemption to the complainant. Nor did it do so when asked by the Commissioner.
86. As the Trust had referred to the privacy of Mr A's family, during the course of the investigation the Commissioner drew its attention to the Information Tribunal's views on Article 8 of the Human Rights Act 1998 (the right to privacy and a family life), and the applicability of section 44.³
87. The Commissioner has considered whether the reports contain any personal data relating to any of the family members of Mr A.
88. Section 1 of the Data Protection Act 1998 (the "DPA") defines personal data as data which relate to a living individual, who can be identified:
- from those data, or
 - from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
89. Having considered the contents of the reports the Commissioner does believe that there is a small amount of information which he believes forms the personal data of some of the members of Mr A's family.
90. As the Commissioner has formed the view that some of the information in the reports is the personal data of some of the members of Mr A's family, he has gone on to consider whether this information is exempt from disclosure under section 40(2).

³ In *Mrs Bluck V The Information Commissioner and Epsom & St Helier University Hospital NHS Trust*, the Tribunal considered the applicability of section 44 in relation to Article 8 and stated, "we do not believe that the effect of the Human Rights Act is to elevate to the level of a directly enforceable legal prohibition the general terms of Article 8." Appeal number EA/2006/0090, paragraph 31.

91. Section 40(2) gives an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied.
92. One of the conditions listed in section 40(3)(a)(i) is where disclosure of the information to any member of the public would contravene any of the principles of the DPA.
93. The Commissioner has primarily considered the first principle of the DPA which requires, amongst other things, that personal data is processed fairly and lawfully. The Commissioner has therefore first considered whether the disclosure of this information would be fair.
94. Given the nature of the contents of the reports, and the likely sensitivity of this information to Mr A's family members, the Commissioner does not believe that it would be appropriate to discuss the nature of this information in any detail in this notice. However, given the nature and focus of these reports, and the sensitivity of the subject, the Commissioner believes that it would be unfair to disclose this information.
95. As the Commissioner believes that the disclosure of this information would be unfair he has formed the view that disclosure would be in breach of the first principle of the DPA. Therefore he believes that section 40(2) is engaged and that this information is exempt from disclosure.
96. This is an absolute exemption and is therefore not subject to the public interest test as listed in section 2(1)(b) of the Act.
97. The full text of section 40 can be found in the Legal Annex at the end of this notice.

The Second Request

98. The complainant asked the Trust for the name and address of the solicitor acting for the family of Mr A in relation to his death.
99. The Trust stated that it is unable to release this information due to issues of confidentiality. However, it did not state which exemptions it believed applied. Despite this the Commissioner considered whether this information would be exempt from disclosure under section 40(2) of the Act.
100. The Commissioner has initially considered whether this information would be the personal data of members of Mr A's family. Taking into account that this information relates to individual members of Mr A's family, and would effectively act as a contact address for those individuals, he is satisfied that this information can be regarded as their personal data.
101. As stated above, one of the conditions listed in section 40(3)(a)(i) is where the disclosure of the information to any member of the public would contravene one of the principles of the DPA. As above, the Commissioner has initially considered

- the first principle, and particularly whether the disclosure of this information would be fair.
102. In considering whether disclosure would be fair the Commissioner has paid particular attention to the circumstances in which this information was provided to the Trust, and whether it would have been in the reasonable expectations of the family members when they provided this information to the Trust that this information would be disclosed to any member of the public.
 103. After considering the circumstances in which this information was provided to the Trust, it is the Commissioner's opinion that disclosure of this information to the public at large would not have been in the reasonable expectations of the family members. Given this, the circumstances surrounding the family members contact with the Trust, and the fact that these individuals are private citizens, it is his view that the disclosure of this information would be unfair, and would therefore be in breach of the first principle of the DPA.
 104. As the Commissioner believes that the disclosure of this information would be in breach of the first principle of the DPA he has formed the view that section 40(2) is engaged and the information is exempt from disclosure.
 105. As stated above, this exemption is not subject to the public interest test as listed in section 2(1)(b) of the Act.

The Decision

106. The Commissioner's decision is that the Trust dealt with the requests in accordance with the requirements of the Act in that it correctly withheld the following information:
 - Information on the reports which was drawn from Mr A's medical records, either directly or indirectly and in such a way as that details of Mr A's medical care and condition can be easily identified.
 - Information on the reports which was obtained from the Police.
 - Information on the reports which is the personal data of members of Mr A's family.
 - The details of the solicitors acting on behalf of members of Mr A's family.
107. However, the Commissioner has also decided that the following elements of the requests were not dealt with in accordance with the Act:
 - The Trust incorrectly withheld information in the reports which does not form the personal data of members of Mr A's family, and which was not obtained from Mr A's medical records or from the Police. The Trust therefore failed to meet the requirements of section 1.
 - The Trust failed to issue adequate refusal notices, in that they did not contain details of the right to appeal to the Commissioner or the right to request an internal review. The second refusal notice did not contain details of the

exemptions the Trust was relying upon. The Trust therefore failed to meet the requirements of section 17.

Steps Required

108. The Commissioner requires that the Trust disclose the information in the reports which is not exempt under sections 40 and 41.
109. The Trust must take the steps identified by this notice within 35 calendar days of the date of this notice.

Failure to comply

110. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

111. 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 3rd day of December 2007

Signed

Steve Wood
Assistant 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 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) he 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.

Section 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.

Section 44

- (1)** Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-
 - (a) is prohibited by or under any enactment,
 - (b) is incompatible with any Community obligation, or
 - (c) would constitute or be punishable as a contempt of court.

- (2)** The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).