

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 25 June 2007

Public Authority: Western Cheshire NHS Primary Care Trust
Address: 1829 Building
The Countess Of Chester Health Park
Liverpool Road
Chester
CH2 1HJ

Summary

The complainant made two sets of requests to the Cheshire West NHS Primary Care Trust (the "PCT") for a number of pieces of information relating to a doctor who had been investigated by the PCT in connection to allegations of criminal offences. By the time of the second set of requests the doctor had appeared in court. These events were related to two 'protected disclosures' which the complainant had made to the PCT. The PCT withheld all of the information it held which fell under these requests under section 40(2). The PCT also claimed section 30, section 31 and section 42 for some of the information in question. After considering the case the Commissioner upheld the PCT's decision to withhold the information under section 40(2). Therefore he did not go on to consider the application of the other exemptions. The Commissioner did, however, find that the PCT had not complied with some of the procedural requirements of the Act, namely section 10 and section 17. The Western Cheshire NHS Primary Care Trust has since taken over responsibilities for this Trust, and therefore this Notice is addressed to it.

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 Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant has advised that in an email to the PCT dated 11 October 2005 she made a request for information under section 1 of the Act. She has stated that this request was, "following a 'protected disclosure' [within the meaning of

s.43c(1) Employment Rights Act 1996, as amended by the Public Interest Disclosure Act 1998] made to the Trust by [the complainant] in October 2004.” This disclosure was made in relation to a doctor who was a general practitioner. This Notice shall refer to this doctor as Dr Y.

In this email she requested the following pieces of information, which the Commissioner has labelled (a) to (e), for ease of reference:

Request (a) “Minutes of any meeting held by the Trust to discuss, action or otherwise deal with, these protected disclosures.”

Request (b) “Any reports containing narrative, conclusions, or decisions about the PCT’s enquiries or investigations into the incidents described – whether prepared by individuals, or for or on behalf of the Trust Board, Professional Committee, and/or Corporate Management Team, or any member thereof.”

Request (c) “Any risk assessment or other similar document prepared in respect of quantifying the risk to patients from [Dr Y], in relation to the information supplied in the protected disclosures.”

Request (d) “Any documents held by the Trust relating to the Trust’s management of [Dr Y] as a practising GP in the light of his dependency on substance abuse.”

Request (e) “Any documents in which the PCT decided to take any action/no action/defer action, in respect of supporting me (or otherwise), as a health professional who suffered significant detriment as a direct consequence of making a protected disclosure, an act which is unlawful under section 2 of the 1998 Act.”

3. The PCT responded to these requests by email on 28 October 2005. In this email the PCT informed the complainant that it did hold some information relating to requests (a) to (d), although the information was not necessarily in the form that she had described. However, the PCT refused to disclose this information, and cited a number of exemptions, which are listed below.
4. In relation to requests (a) to (d) of the request the PCT cited sections 31(1)(a), 31(1)(b), and 31(1)(c) of the Act. The PCT did not go on to consider the public interest test.
5. The PCT also cited section 40 in relation to requests (a) to (d). However, it did not clarify which part of section 40 it was relying upon.
6. In relation to request (d) the PCT also cited section 30 – however, it did not go on to consider the public interest test.
7. In relation to request (e) the PCT stated that this was not covered by the Act.

8. The PCT went on to note that the release of this information at that point could prejudice the Dr Y's right to a fair trial.
- 9 This refusal notice did not contain details of the complainant's right to an internal review, or the contact details of the Commissioner.
10. The complainant responded to this email on 28 October 2005, and stated that in relation to the information which the PCT had withheld under section 31, she would reapply for this information once the Court case had finished. She asked for clarification from the PCT as to which part of section 40 it was seeking to rely upon. In relation request (e) she asked for clarification of the PCT's response.
11. On 1 November 2005 the PCT responded to the complainant. It stated that it held one file concerning this subject, and that as all of the information on the file related to Dr Y it believed that section 40 applied to all of the information therein. It clarified that it was relying upon section 40(2) and section 40(3)(a)(i) as it believed that the disclosure of this information would be in breach of the principles of the Data Protection Act 1998 (DPA). It went on to state that it believed that section 30 and section 31 applied to the information on this file, as the file had been prepared "specifically for investigation and law enforcement." However the PCT believed that, "the Act is clear that s.30 takes precedence here, and so in effect we could claim exemption for the whole file under s.30." In relation to request (e) the PCT wrote, "Concerning the point you made "who suffered significant detriment" any such alleged suffering would not be managed under the Freedom of Information Act 2000. Our comment was about the alleged suffering." The PCT did not provide details of the complainant's right to appeal, or the contact details of the Commissioner.
12. The complainant contacted the PCT again on 14 November 2005. Her email dealt with the PCT's email of the 1 November 2005 in some detail, and her points have been listed in the following paragraphs (13) to (15).
13. In relation to the information withheld under section 40(2) and 40(3)(a)(i) she stated, "anything that does NOT identify a living individual cannot be subject of a s.40 exemption. My request is therefore for copies of all the documents in this file, suitably redacted to remove references to [Dr Y's] personal data, so that we can see what the Trust did, or did not do in this case."
14. In relation to the PCT's use of section 30 she stated, "...you are in error in respect of all of those documents in the file before my second protected disclosure, in January 2005, because the Trust had already decided to deal with the first by way of a "Root Cause Analysis" for the discrepancies in records of controller drugs – there was no "investigation" for the purposes of s.30(1)."
15. In relation to the PCT's response to request (e) she again sought clarification on the issue, and asked the PCT to confirm or deny whether it held any information relating to this matter.

16. In this email the complainant also made two new requests. For ease of reference the Commissioner has continued the reference system he used at paragraph 2 above:

Request (f) "I would like a schedule listing the documents now that your claimed exemption under s.31 has ceased to apply, as the criminal proceedings were concluded today."

Request (g) "...I am puzzled by your reference to "one file", as I understand that my first disclosure was discussed during at least one meeting of the Trust's Board or similar, when there was a dissenting Member in respect of the decision about action taken. Can you confirm that this is not the case, and that there are no minutes relating to any such disclosure, nor any dissenting Member?"

17. The PCT responded in an email dated 25 November 2005. In this email the PCT first addressed the complainant's concerns regarding its response to request (e). It informed her that it did not hold any information relating to this request as she had not worked for the PCT at the time she made the 'protected disclosures', and "it is not the PCT's statutory duty to offer you support and/or protection from suffering a detriment at the hands of your employer under [the Public Interest Disclosure Act 1998]."

18. The PCT then went on to confirm again that it held some documents relating to requests (a) to (d), although not necessarily as the complainant described them. However, the PCT refused to disclose this information and cited a number of exemptions, namely: section 30(2)(a)(iii), as this information had been obtained and recorded for the purposes of conducting an investigation into Dr Y; section 31(1)(g), as the release of this information would prejudice future investigations; and section 40(2), as the information contained the personal data of the doctor and third parties. In relation to section 40(2) it went on to state that taking into account the nature of the information, the circumstances in which it was collected, and the reasonable expectations of the data subjects, the release of this information would be in breach of the first principle of the DPA. The PCT also noted that some of the information was exempt under section 42, as it was subject to legal professional privilege.

19. In relation to sections 30 and 31 the PCT noted that they were qualified exemptions, and went on to consider the public interest test:

"The PCT believes that if it were to disclose information gathered and produced as part of an internal investigation, future and ongoing investigations would be prejudiced, as employees and third parties would not have any faith or confidence in the confidential nature of such investigations. The PCT is therefore satisfied that the very real risks to future and ongoing investigations outweigh the public interest in disclosing the requested information. Furthermore, given that the recent prosecution of [Dr Y] is already within the public domain, as well as [Dr Y's] suspension from the PCT's Performers list, the general public are already aware that the PCT has indeed taken the appropriate action; disclosure of the requested information is therefore neither warranted, nor justified, in the public interest."

20. The PCT noted the complainant's request to have the information in question redacted, and to have the personal data of the doctor removed. However, it refused to do so explaining that, given the nature of the requests and the complainant's involvement in the case, it did not believe that the information could be satisfactorily redacted so as to successfully anonymise the individuals concerned.
21. In relation to the information listed in request (f) the PCT refused to release this information, and cited the exemptions listed at paragraph 18 above. The PCT did not respond to request (g). At this point the PCT also offered the complainant an internal review.
22. The complainant responded to the PCT on 30 November 2005 and asked for a review of its decision. She pointed out that it had not responded to request (g) and said, "I can only conclude from your statutory response that (a) there was no such meeting, (b) that the Board did not discuss these issues or my role in them, and that (c) no member of the Board expressed any dissenting view." She went on to question the use of section 30, stating, "I note that you did not claim a s.30 exemption for your original refusal, but that you have now substituted this for the s.31 exemption originally claimed"
23. The PCT carried out an internal review and contacted the complainant by email on 22 December 2005. As a result of the review the PCT released extracts from three documents written by the acting Medical Director, which it stated contained all references to the information supplied by the complainant in her 'protected disclosures'. The PCT went on to state that a Reference Committee had discussed Dr Y on three occasions, and that it held minutes of those meetings, but that there were no references to her 'protected disclosures' within those minutes. The PCT has confirmed to the Commissioner that this was a response to request (g). The PCT went on to uphold the exemptions previously cited to withhold the documents contained in the investigation file about Dr Y. It also stated that the minutes of the meetings of the Reference Committee which had discussed Dr Y were also exempt from disclosure under these exemptions. The PCT went on, however, to give a brief summary of the dates and main decisions of these Reference Committees. Finally, the PCT informed the complainant of her right to complain to the Commissioner.

The Investigation

Scope of the case

24. On 17 January 2006 the complainant contacted the Commissioner to complain about the way her requests for information had been handled. The complainant specifically asked the Commissioner to consider whether the withholding of the requested information was appropriate.

25. Although not specifically requested to do so by the complainant, the Commissioner has also considered the procedural aspects of the PCT's handling of the requests for information.

Chronology

26. On 1 February 2006 the Commissioner contacted the PCT and informed it that he had received a complaint. The PCT responded on 7 March 2006 and provided the Commissioner with some background information about this complaint, together with copies of correspondence between the complainant and itself.
27. On 7 March 2007 the Commissioner contacted the PCT again and asked it to supply him with a copy of the withheld information, together with its reasoning behind some of the exemptions it had claimed. The PCT responded on 3 May 2007, and provided the information requested by the Commissioner.

Findings of fact

28. Dr Y appeared at Chester Magistrates Court on 14 November 2005 and pleaded guilty to 22 separate charges of obtaining drugs by deception, and the unlawful possession of class A and C drugs. 156 similar offences were taken into consideration. Subsequently, on 9 December 2005, Dr Y was sentenced to a total of 12 months imprisonment suspended for two years with costs.

Analysis

29. The Commissioner considered each of these requests, and the exemptions cited by the PCT, in turn.
30. In considering whether the requested information should be disclosed, the Commissioner took into account the fact that the Act is applicant blind and that disclosure under the Act should be considered in the widest sense – that is, disclosure to the public at large. In view of this, the Commissioner was unable to take into account the particular circumstances of the complainant when considering this request. Instead, the Commissioner had to consider that if the information were to be disclosed, it would in principle be available to any member of the public.

Requests (a) to (d)

31. On 28 October 2005 the PCT withheld the information which fell under requests (a) to (d) citing sections 40, 31(1)(a), 31(1)(b) and 31(1)(c). In relation to request (d) the PCT also cited section 30. The PCT did not clarify which part of section 40 it was seeking to rely upon. It did state that it believed that section 31 applied as the information in question related to an ongoing criminal investigation. However, it did not refer to section 31 being a qualified exemption, and therefore being subject to a public interest test

32. On 1 November 2005 the PCT stated that it held one file on the subject, and as all of the information therein related to Dr Y it believed that sections 40(2) and 40(3)(a)(i) applied to all of the information in the file. The PCT also stated that as the file had been prepared for law enforcement and an investigation it believed that sections 30 and 31 applied, and that it was relying upon section 30 as it believed that this took precedence over section 31. The Commissioner has formed the view that this response related to information which fell under requests (a) to (d).
33. On 25 November 2005 the PCT informed the complainant that it was withholding the information which fell under requests (a) to (d) under section 40(2), as it believed that the disclosure of this information would be in breach of the first principle of the DPA; under section 30(2)(a)(iii); and under section 31(g). The PCT carried out a public interest test in relation to sections 30 and 31, and stated that it believed that the public interest lay in maintaining the exemptions. The PCT also stated that section 42 applied to some of the documents on the investigation file.

Procedural matters

Section 17

34. The Commissioner has considered whether the refusal notices issued by the PCT on 28 October 2005 and 1 November 2005 complied with section 17 of the Act.
35. Section 17(1) requires a public authority which is refusing a request to issue a notice which –
 - states that fact
 - specifies the exemption in question, and
 - states why the exemption applies.
36. The refusal notice issued by the PCT on 28 October 2005 did not clarify which part of section 40 it believed applied to the information in question.
37. Section 17(3) requires a public authority that is relying upon a qualified exemption in order to withhold information, to inform an applicant in its refusal notice, “that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information,” and to state the reasons for making that claim.
38. The refusal notices issued by the PCT on 28 October 2005 and 1 November 2005 did not discuss the public interest test, in relation to its use of sections 30 and 31. The notice on 25 November 2005 did not refer to the public interest in relation to section 42.

39. Section 17(7) requires that a refusal notice must:
- 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
 - contain particulars of the right conferred by section 50.
40. The refusal notices issued by the PCT on 28 October 2005 and 1 November 2005 did not contain details of the PCT's internal review procedures or the contact details of the Commissioner.
41. The full text of section 17 can be found in the Legal Annex at the end of this Notice.

Exemptions

Section 40(2)

42. The Commissioner has formed the view that the PCT's response on 1 November 2005 citing section 40(2) related to the material it held in connection with requests (a) to (d).
43. The Commissioner believes that it is important to note that the PCT has confirmed that although it does hold information relating to the requests (a) to (d) this information may not be in the form described by the complainant. Therefore the Commissioner would emphasise that a discussion in this Notice about information which relates to requests (a) to (d) should not be taken to imply that the information exists in the exact format described by the complainant.
44. In considering the applicability of section 40(2) to the information in question the Commissioner has firstly considered whether the withheld information constituted personal data of a third party or parties.
45. The information in question was held on an investigation file, relating to allegations of criminal activity by Dr Y. Taking this into consideration, together with the purposes for which the file was compiled and, at the time the requests were received, held, the Commissioner believes that the contents of this file are the personal data of Dr Y, as defined by the DPA. The Commissioner also believes that the file contains personal data relating to several other third parties.
46. The Commissioner has gone on to consider whether the information on the file is the sensitive personal data of Dr Y. Section 2 of the DPA defines sensitive personal data as information relating to, amongst other things:
- the commission or alleged commission by an individual of any offence, or
 - any proceedings for any offence committed or alleged to have been committed by an individual.
47. Having considered the nature of the information in question; the purpose for which the information was created, compiled and, at the time the request was

received, held; and the circumstances surrounding the case, the Commissioner is satisfied that the information in question is the sensitive personal data of Dr Y.

48. The Commissioner has gone on to consider whether the release of this information would be in breach of the data protection principles. The PCT has confirmed to the Commissioner that it believes that the disclosure of this information would be in breach of the first principle of the DPA. Therefore the Commissioner has primarily considered whether the disclosure of this information would breach the first principle of the DPA.
49. The first principle of the DPA requires that personal data is processed fairly and lawfully and that,
- at least one of the conditions in schedule 2 is met, and
 - in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.

The Commissioner has initially considered whether one of the conditions in Schedule 3 can be met. He has considered schedule 3 first as he believes the conditions listed in this schedule are harder to meet than those listed in schedule 2.

50. Having considered the conditions listed in schedule 3 the Commissioner has formed the view that none of these conditions can be met. Accordingly the Commissioner believes that the disclosure of this information would be in breach of the first principle of the DPA. Therefore he is satisfied that the exemption listed at section 40(2) is engaged in respect of the information and provides an exemption from disclosure.
51. The full text of section 2 and schedule 3 of the DPA can be found in the Legal Annex at the end of this Notice.
52. The Commissioner has noted the complainant's assertion that the PCT, "can comply with my request without compromising any personal data about [Dr Y] that is not already in the public domain as a consequence of criminal proceedings." However, this does not remove the PCT's obligation to satisfy one of the conditions in schedule 3, and the Commissioner does not believe that schedule 3 contains a condition that would be satisfied by circumstances the complainant has described. Consequently he maintains his view that the disclosure of this information would be in breach of the first principle of the DPA. Furthermore the Commissioner also notes that the complainant has suggested that the PCT could redact the withheld information so as to not disclose any of Dr Y's personal data. However given the nature of the information, and the fact that the information was held on an investigation file which as a whole related to Dr Y, he agrees with the PCT's assertions that the information could not be redacted in a way which would allow for a disclosure of relevant information without breaching the data protection principles..
53. As the Commissioner has decided that a schedule 3 condition for the disclosure of this information cannot be met, and that therefore disclosure would be in

breach of the first principle of the DPA, he has not gone on to consider whether there is a schedule 2 condition or whether the disclosure would be fair or lawful.

54. The exemption listed at section 40(2), by way of section 40(3)(a)(i), is an absolute exemption, and is not subject to a public interest test.
55. As stated above, the Commissioner recognises that the information requested would also contain the personal data of other third parties. However, as he has formed the view that the information in question would be exempt from disclosure, the Commissioner has not gone on to consider whether the disclosure of this third party data would be in line with the data protection principles.
56. The full text of section 40 can be found in the Legal Annex at the end of this Notice.

Other exemptions

57. The Commissioner notes that the PCT has also relied on sections 30, 31 and 42 to withhold information relating to requests (a) to (d). However, as he has formed the view that section 40(2) provides an exemption for all the information the PCT holds in relation to these requests he has not gone on to consider the applicability of these other exemptions.

Request (e)

58. In her initial request on 11 October 2005 the complainant asked for copies of “any documents in which the PCT decided to take any action/no action/defer action, in respect of supporting me (or otherwise), as a health professional who suffered significant detriment as a direct consequence of making a protected disclosure, an act which is unlawful under section 2 of the 1998 Act.”
59. In its response the PCT informed the complainant that this was not covered by the Act. Despite the complainant attempting to clarify whether the PCT held any information relating to this aspect of her request, it was not until 25 November 2005 that the PCT informed her that it did not hold any information relating to this request, stating,

“At the relevant time you were employed directly by the [...] Medical Practice and not by Cheshire West PCT. I can therefore confirm that the PCT does not hold any information requested by you under this category, as it is not the PCT’s statutory duty to offer you support and/or protection from suffering detriment at the hands of your employer under [the Public Interest Disclosure Act 1998].”
60. The Commissioner accepts the reasoning behind the PCT’s statement that it does not hold any information relating to request (e). Furthermore he has not been provided with any evidence by the complainant to show that the PCT does hold information which would fall under this request. Therefore he has not investigated the PCT’s response to this request any further. He has, however, considered the procedural aspects of the PCT’s response to request (e).

Procedural matters

Section 10(1)

61. The Commissioner has considered whether the PCT complied with its obligations under section 10 of the Act when responding to request (e).
62. Section 10(1) requires a public authority to comply with section 1(1) promptly, and no later than 20 working days after the receipt of the request.
63. The PCT initially received this request on 11 October 2005. However, despite two attempts by the complainant to clarify whether it held this information, it was not until 25 November 2005 that the PCT informed the complainant that it did not hold any information relating to request (e).
64. The full text of section 10 can be found in the Legal Annex at the end of this Notice.

Possible application of section 40(1)

65. Having considered the nature of the information requested in request (e) the Commissioner has formed the view that this request should have been regarded as a request for information which was the personal data of the complainant. Therefore, if the information had been held, section 40(1) of the Act would have been engaged. However, as the Commissioner has accepted the PCT's arguments as to why it does not hold this information he has not investigated this issue any further.
66. The full text of section 40(1) can be found in the Legal Annex at the end of this Notice.

Request (f)

67. On 14 November 2005 the complainant asked for a schedule of documents which the PCT had withheld. As the PCT had previously informed the complainant that it held one file relating to the investigation of Dr Y and had withheld this information, the Commissioner has formed the view that this was a request for a schedule of the documents contained on the investigation file.
68. The PCT refused this request citing section 30(2)(a)(iii), section 31(1)(g), and section 40(2). In relation to section 40(2) it informed the complainant that it believed that the information requested formed part of the personal data of Dr Y, as well as other third parties, and the disclosure of this information would be in breach of the first principle of the DPA.

Exemptions

Section 40(2)

69. In considering the applicability of this exemption to the information falling within the scope of the request the Commissioner has first considered whether the withheld information constituted personal data of a third party or parties, and if it is personal data, whether it is the sensitive personal data of any of the parties concerned.
70. The information requested is a schedule of documents held on an investigation file, relating to accusations of criminal activity by Dr Y. The Commissioner believes that when deciding whether the information in question is the sensitive personal of Dr Y, it is important to note that at the time request (f) was received, Dr Y had been convicted by a magistrate's court and was awaiting sentencing.
71. Having considered the nature of the information in question; the purpose for which the information was created, compiled and, at the time the request was received, held; and the circumstances surrounding the case, the Commissioner is satisfied that the information in question is both the personal data and the sensitive personal data of Dr Y. In reaching this conclusion the Commissioner has been mindful of the definitions of sensitive personal data listed at paragraph 46 above.
72. The Commissioner has gone on to consider whether the release of this information would be in breach of the data protection principles. He has primarily considered whether the disclosure of this information would breach the first principle of the DPA (see paragraph 49).
73. After considering the conditions listed in schedule 3 the Commissioner has formed the view that none of these conditions can be met. Accordingly the Commissioner believes that the disclosure of this information would be in breach of the first principle of the DPA. Therefore he is satisfied that the exemption under section 40(2) is engaged in respect of that information and that the information is exempt from disclosure.
74. As the Commissioner has decided that a schedule 3 condition for the disclosure of this information cannot be met, and that therefore disclosure would be in breach of the first principle of the DPA, he has not gone on to consider whether there is a schedule 2 condition or whether the disclosure would be fair or lawful.
75. The exemption listed at section 40(2), by way of section 40(3)(a)(i), is an absolute exemption, and is not subject to a public interest test.

Request (g)

76. The Commissioner has considered the procedural aspects of the PCT's response to this request.

Procedural matters

Section 10(1)

77. The Commissioner has considered whether the PCT complied with its obligations under section 10 of the Act when responding to request (g). The requirements of section 10 have been listed at paragraph 62 above.
78. The PCT initially received this request on 14 November 2005. However despite an attempt by the complainant to clarify whether the PCT held this information, it was not until 22 December 2005 that the PCT informed the complainant that it did not hold any information relating to request (g).

Reference Committee Meetings

79. As stated in paragraph 23, the PCT confirmed to the complainant that a Reference Committee met to discuss Dr Y on three separate occasions, although there was no reference to her "protected disclosures" in the minutes.
80. In the email dated 22 December 2005 the PCT informed the complainant that "the minutes...are exempt from disclosure, based on the exemptions previously notified to you."
81. The Commissioner recognises that there may be some disagreement as to whether the minutes of these meetings would fall under the scope of request (g), as the complainant only asked the PCT to confirm that there were no minutes of a Board meeting at which a Board member had dissented about the proposals (see paragraphs 16 and 22). However, as the PCT cited exemptions in relation to these documents in the email to the complainant dated 22 December 2005 following request (g), and refused to disclose them, he has gone on to consider whether the withholding of these minutes would be appropriate.
82. The Commissioner has specifically looked at whether section 40(2) would apply to these documents.
83. Having considered the nature of the information in question; the purpose for which the information was held at the time the request was received; and the circumstances surrounding the case, the Commissioner is satisfied that the information in question is both the personal data and the sensitive personal data of Dr Y.
84. The Commissioner has gone on to carry out the steps described in paragraphs 48 to 50 above. He is satisfied that a schedule 3 condition cannot be met, and that the disclosure of these documents would be in breach of the first principle of the DPA. He is therefore satisfied that section 40(2) of the Act is engaged, and this information is exempt from disclosure.
85. As the Commissioner has decided that a schedule 3 condition for the disclosure of this information cannot be met, and that therefore disclosure would be in

breach of the first principle of the DPA, he has not gone on to consider whether there is a schedule 2 condition or whether the disclosure would be fair or lawful.

86. As noted above, section 40(2), by way of section 40(3)(a)(i), is an absolute exemption, and is not subject to a public interest test.

The Decision

87. The Commissioner's decision is that the PCT dealt with the following elements of the request in accordance with the requirements of the Act:

The exemption under section 40(2) was applied correctly

88. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

Some of the refusal notices issued by the PCT did not meet with the requirements of section 17. Specifically, the refusal notice of 28 October 2005 did not meet with the requirements of section 17(1), section 17(3) and section 17(7); and the refusal notice of 1 November 2005 did not meet with the requirements of section 17(3) and section 17(7). Additionally, some of the PCT's responses did not meet with the requirements on section 10(1).

Steps Required

89. The Commissioner requires no steps to be taken.

Right of Appeal

90. 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 25th day of June 2007

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Section 10

- (1) Subject to subsections (2) and (3), 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.
- (2) Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.
- (3) If, and to the extent that –

 - (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
 - (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied, the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.
- (4) The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.
- (5) Regulations under subsection (4) may –

 - (a) prescribe different days in relation to different cases, and
 - (b) confer a discretion on the Commissioner.
- (6) In this section –

“the date of receipt” means –

 - (a) the day on which the public authority receives the request for information, or
 - (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

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 1 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 30

- (1)** Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-
- (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-
 - (i) whether a person should be charged with an offence, or
 - (ii) whether a person charged with an offence is guilty of it,
 - (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or
 - (c) any criminal proceedings which the authority has power to conduct.
- (2)** Information held by a public authority is exempt information if-
- (a) it was obtained or recorded by the authority for the purposes of its functions relating to-
 - (i) investigations falling within subsection (1)(a) or (b),
 - (ii) criminal proceedings which the authority has power to conduct,
 - (iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or
 - (iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and
 - (b) it relates to the obtaining of information from confidential sources.

- (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) or (2).
- (4) In relation to the institution or conduct of criminal proceedings or the power to conduct them, references in subsection (1)(b) or (c) and subsection (2)(a) to the public authority include references-
- (a) to any officer of the authority,
 - (b) in the case of a government department other than a Northern Ireland department, to the Minister of the Crown in charge of the department, and
 - (c) in the case of a Northern Ireland department, to the Northern Ireland Minister in charge of the department.
- (5) In this section-
- "criminal proceedings" includes-
- (a) proceedings before a court-martial constituted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 or a disciplinary court constituted under section 52G of the Act of 1957,
 - (b) proceedings on dealing summarily with a charge under the Army Act 1955 or the Air Force Act 1955 or on summary trial under the Naval Discipline Act 1957,
 - (c) proceedings before a court established by section 83ZA of the Army Act 1955, section 83ZA of the Air Force Act 1955 or section 52FF of the Naval Discipline Act 1957 (summary appeal courts),
 - (d) proceedings before the Courts-Martial Appeal Court, and
 - (e) proceedings before a Standing Civilian Court;
- "offence" includes any offence under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957.
- (6) In the application of this section to Scotland-
- (a) in subsection (1)(b), for the words from "a decision" to the end there is substituted "a decision by the authority to make a report to the procurator fiscal for the purpose of enabling him to determine whether criminal proceedings should be instituted",
 - (b) in subsections (1)(c) and (2)(a)(ii) for "which the authority has power to conduct" there is substituted "which have been instituted in consequence of a report made by the authority to the procurator fiscal", and
 - (c) for any reference to a person being charged with an offence there is substituted a reference to the person being prosecuted for the offence.

Section 31

- (1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-
- (a) the prevention or detection of crime,
 - (b) the apprehension or prosecution of offenders,
 - (c) the administration of justice,
 - (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
 - (e) the operation of the immigration controls,
 - (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
 - (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
 - (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
 - (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.
- (2) The purposes referred to in subsection (1)(g) to (i) are-
- (a) the purpose of ascertaining whether any person has failed to comply with the law,
 - (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
 - (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
 - (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
 - (e) the purpose of ascertaining the cause of an accident,
 - (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
 - (g) the purpose of protecting the property of charities from loss or misapplication,
 - (h) the purpose of recovering the property of charities,
 - (i) the purpose of securing the health, safety and welfare of persons at work, and
 - (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.

- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

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 42

- (1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.
- (2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.

DPA - Section 2

In this Act “sensitive personal data” means personal data consisting of information as to –

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,
- (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
- (e) his physical or mental health or condition,
- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

DPA – Schedule 3

Conditions relevant for purposes of the first principle: Processing of sensitive personal data

- (1) The data subject has given his explicit consent to the processing of the personal data.
- (2) — (1) The processing is necessary for the purposes of exercising or performing any right or obligation which is conferred or imposed by law on the data controller in connection with employment.
 - (2) The Secretary of State may by order—
 - (a) exclude the application of sub-paragraph (1) in such cases as may be specified, or
 - (b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.
- (3) The processing is necessary—
 - (a) in order to protect the vital interests of the data subject or another person, in a case where—
 - (i) consent cannot be given by or on behalf of the data subject, or
 - (ii) the data controller cannot reasonably be expected to obtain the consent of the data subject, or
 - (b) in order to protect the vital interests of another person, in a case where consent by or on behalf of the data subject has been unreasonably withheld.
- (4) The processing—
 - (a) is carried out in the course of its legitimate activities by any body or association which—
 - (i) is not established or conducted for profit, and
 - (ii) exists for political, philosophical, religious or trade-union purposes,
 - (b) is carried out with appropriate safeguards for the rights and freedoms of data subjects,
 - (c) relates only to individuals who either are members of the body or association or have regular contact with it in connection with its purposes, and
 - (d) does not involve disclosure of the personal data to a third party without the consent of the data subject.

- (5)** The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.
- (6)** The processing—

 - (a) is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings),
 - (b) is necessary for the purpose of obtaining legal advice, or
 - (c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights.
- (7)** (1) The processing is necessary—

 - (a) for the administration of justice,
 - (b) for the exercise of any functions conferred on any person by or under an enactment, or
 - (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department.

(2) The Secretary of State may by order—

 - (a) exclude the application of sub-paragraph (1) in such cases as may be specified, or
 - (b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.
- 8.** (1) The processing is necessary for medical purposes and is undertaken by—

 - (a) a health professional, or
 - (b) a person who in the circumstances owes a duty of confidentiality which is equivalent to that which would arise if that person were a health professional.

(2) In this paragraph “medical purposes” includes the purposes of preventative medicine, medical diagnosis, medical research, the provision of care and treatment and the management of healthcare services.
- 9.** (1) The processing—

 - (a) is of sensitive personal data consisting of information as to racial or ethnic origin,
 - (b) is necessary for the purpose of identifying or keeping under review the existence or absence of equality of opportunity or treatment between persons of different racial or ethnic origins, with a view to enabling such equality to be promoted or maintained, and
 - (c) is carried out with appropriate safeguards for the rights and freedoms of data subjects.

- (2) The Secretary of State may by order specify circumstances in which processing falling within sub-paragraph (1)(a) and (b) is, or is not, to be taken for the purposes of sub-paragraph (1)(c) to be carried out with appropriate safeguards for the rights and freedoms of data subjects.
- 10.** The personal data are processed in circumstances specified in an order made by the Secretary of State for the purposes of this paragraph.