

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 19 April 2007

Public Authority: Maidstone and Tunbridge Wells NHS Trust
Address: Maidstone Hospital
Hermitage Lane
Maidstone
Kent
ME16 9QQ

Summary

The complainant requested copies of correspondence exchanged between the public authority and the local Coroner's Office in relation to the death of his wife. The public authority responded to this request but failed to provide all of the information it held within 20 working days and therefore breached section 10 of the Act. The complainant submitted a number of further requests asking for clarification on a number of issues. The public authority responded to all of these requests except the final request citing section 14 as the basis to refuse this request. The Commissioner has decided that the public authority was incorrect to apply section 14 to this request.

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 submitted a request for information on 16 September 2005 to the Trust (request 1 in the request annex). This request was:

'Under the FOI Act 2002 I request copies of all correspondence, notes and documents, including emails, regarding contact between any employee of the Maidstone and Tunbridge NHS Trust and any department of the West Kent Coroner's Office regarding the death of my late wife [wife's name and date of birth redacted] and the ensuing post mortem investigation.'

3. The Trust provided the complainant with an initial response to this request on 17 October 2005. In this response the Trust provided copies of a number of emails exchanged between the representatives of the Trust and the Coroner's Office. On 21 October 2005 the complainant contacted the Trust and suggested that the response sent to him was incomplete. The complainant alleged that a certain doctor at the Trust, Dr X, had contacted the Coroner's Office and asked for a copy of his wife's post mortem report, but the disclosure of information made to him on 17 October did not include any documents with reference to Dr X's correspondence with the Coroner's Office.
4. On 21 October 2005 a representative of the Trust informed the complainant that: 'I have confirmed with Dr X that he has had no contact with the Coroner's office in relation to [complainant's wife]'. However, the Trust informed the complainant that it was undertaking a further review of the relevant files in order to ascertain if any other individuals may have contacted the Coroner's Office.
5. On the 26 October 2005 the Trust informed the complainant that it had been 'formally advised by the Coroner's Office that under law I am not permitted to release information originating from or pertaining to investigations of the Coroner's Office'.
6. On 28 October 2005 the complainant submitted request 2 to the Trust.
7. On 21 December 2005 the Trust provided the complainant with further information omitted from the first response of 17 October. This disclosure included a letter dated 16 May 2005 in which Dr X asked the pathologist who had carried out the post mortem for a copy of the post mortem report. The Trust's letter of 21 December also informed the complainant that 'there is no further correspondence outstanding in this matter that has not already been provided to you'.
8. On 29 December 2005 the complainant contacted that Trust once again (request 3) in order to question whether the Trust still held the copy of the post mortem report sent to Dr X, and if so whether he could be provided with copy under the Act.
9. The Trust confirmed on 11 January 2006 that it did hold the copy of the post mortem report in question, but informed the applicant that 'the Trust is unable to release this report to you as it is the property of the Coroner's Office who have instructed us not to release this document'.
10. On 17 January 2006 the complainant asked the Trust to identify the relevant exemption of the Act that it considered allowed it to withhold the post mortem. On the 17 January 2006 the Trust informed the applicant that it considered the report exempt by virtue of the exemption contained at section 32 of the Act.
11. The complainant contacted the Trust a number of times again in order to question the application of this exemption. On 10 February 2006 the Trust informed the complainant that the post mortem report requested by Dr X was no longer held by the Trust. In this letter the Trust also informed the complainant that under the

terms of the Act, no further information or correspondence would be entered into without prior payment of a fee relating to £25 per hour, payable in advance.

12. Following this date, the complainant and Trust exchanged further correspondence in relation to the information previously disclosed to the applicant. Within this correspondence the complainant submitted a number of further requests to the Trust querying the previous responses he had been provided with. These subsequent requests are also listed in the attached request annex. On the 24 February 2006 the Trust informed the complainant that he had been sent all of the correspondence it held relevant to his original request and therefore it would not respond to any further requests on the basis that it would be vexatious under section 14 of the Act.

The Investigation

Scope of the case

13. On 18 May 2006 the complainant contacted the Commissioner to complain about the way his requests for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - (i) The Trust failed to provide all of the information covered by the request of 16 September 2005.
 - (ii) The information that was supplied by the Trust in response to the request of 16 September was not supplied within 20 working days.
 - (iii) The Trust may have breached section 77 of the Act by supplying false and misleading information in response to the request of 16 September and also by disposing of information covered by the request of 16 September.
 - (iv) The Trust breached the Act by informing the complainant on 10 February 2006 that it would no longer correspond with him without prior payment of fees relating to £25 per hour.
 - (v) The Trust incorrectly applied section 14 of the Act by informing him on 24 February 2006 that it considered his requests for clarification of a number of issues to be vexatious.
14. With regard to complaint (iii) the information in question that the complainant alleges was disposed of consisted of a copy of the post mortem report requested by Dr X and any correspondence surrounding this report (e.g. covering letters, emails requesting/supplying report). The information that the complainant alleged was false and misleading were the Trust's explanations about the location and subsequent destruction of the post mortem report referred to above.

15. In order to support both of these allegations the complainant provided the Commissioner with the detailed correspondence exchanged between both parties between September 2005 and March 2006. The complainant drew the Commissioner's attention to a number of apparent discrepancies in the Trust's responses:
- On 21 October 2005 a representative of the Trust informed the complainant that 'I have confirmed with Dr X that he has had no contact with Coroner's office in relation to [name of complainant's wife]'. However, on 21 December 2005 the Trust provided the complainant with a letter dated 16 May 2005 in which Dr X wrote to the Coroner's Office and asked for a copy of the post mortem report in question.
 - On the 17 January 2006 the Trust informed the complainant that although it held a copy of the post mortem report obtained by Dr X, it could not provide him with a copy because it was exempt from disclosure under section 32 of the Act. In subsequent correspondence the complainant questioned the application of this exemption. On the 19 February 2006 the Trust responded to this correspondence and informed the complainant that the post mortem report in question was no longer held by the Trust.
 - The complainant also alleged that the Trust's email of 2 March 2006 cast doubt on a number of responses previously provided to him. The Trust informed the complainant that Dr X had only requested a copy of the post mortem report once the Coroner's Office had informed him on 1 July 2005 that he would have to provide evidence to the inquest. However, previous disclosures confirmed that Dr X had in fact contacted the pathologist on 16 May 2005 in order to ask for a copy of the post mortem.
 - The complainant also argued that the Trust's email of 2 March 2006 implied that the copy of the post mortem report was destroyed shortly after Dr X was informed that he would not need to attend the inquest or supply a witness statement. The complainant suggested that based on previous disclosures, it appeared that on 27 July 2005 it was clear that Dr X would not need to attend the inquest or provide any evidence. Therefore, the complainant argued that it was somewhat confusing that as late as January 2006 the Trust were suggesting that it still held the post mortem report, when its response of 2 March 2006 suggested that the post mortem report was likely to have been destroyed soon after July 2005.

Chronology

16. The Commissioner wrote to the Trust on 10 January 2007 and in order to discuss the complaints listed (i) to (v) above. The Commissioner specifically asked the Trust to respond to a number of particular points.
17. With regard to complaints (i), (ii) and (iii) the Commissioner asked the Trust to comment on the alleged inaccuracies that the complainant had identified in Trust's responses to his requests. The Commissioner also asked the Trust to

confirm exactly when it had destroyed the copy of the post mortem report requested by Dr X.

18. With regard to complaint (iv) the Commissioner explained to the Trust that in some circumstances, the Act does allow public authorities to charge for information provided to applicants. The Commissioner drew the Trust's attention to the relevant sections of the Act which deal with the fees (namely sections 9, 12 and 13) and the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. With reference to these sections of the Act, the Commissioner asked the Trust to explain its basis for informing the complainant that without pre-payment of fees relating to £25 per hour, it would not correspond with him any further.
19. With regard to complaint (v), the Commissioner referred the Trust to his guidance on section 14 and asked the Trust to explain why it considered the complainant's latest request to be vexatious. The Commissioner specifically drew the Trust's attention to the criteria which the guidance on section 14 classifies a vexatious request as, namely that a public authority has to demonstrate that the request places a significant burden on the public authority and either clearly does not have any serious purpose or value, is designed to cause disruption and annoyance, has the effect of harassing the public authority or can otherwise be fairly characterised as obsessive or manifestly unreasonable.
20. The Trust provided the Commissioner with a substantive response to his letter on 24 January 2007.
21. With regard to complaint (ii) the Trust confirmed to the Commissioner that it provided the complainant with a response to his original request of 16 Friday September 2005 on 17 October 2005. On 21 October 2005 the Trust received an email from the complainant advising that the material sent was incomplete. The Trust explained that it provided the complainant with one further piece of information covered by the scope of his original request on 21 December 2005.
22. With regard to complaints (i) and (iii) the Trust confirmed to the Commissioner that it received a copy of the post mortem report in May 2005. The Trust also explained that this report had been destroyed subsequent to Dr X being informed on 27 July 2005 that he would not need to provide evidence to the inquest. However, the Trust informed the Commissioner that it was unable to accurately state precisely when the report was destroyed:

'Dr X did not keep a formal record of the date upon which the Post Mortem report copy in question was destroyed. The Trust recognises this as an area of weakness and is reviewing the records management policy to address this issue'.
23. Therefore, the Trust acknowledged to the Commissioner its email to the complainant of 11 January 2006 in which it stated that 'The post mortem report is held by Dr X' was incorrect and should in fact have read 'The post mortem report **was** held by Dr X. (Emphasis in original document).

24. Furthermore, the Trust also explained to the Commissioner that:

'It has since come to light (15 January 2007) following a review of files held by the Trust Legal Services Manager...that a copy of the Kent Police post mortem relating to [the complainant's wife], was sent to the legal services department on 3 August 2005 by Tunbridge Wells Coroner's Office. This copy is held on file in the legal services office. This department was not searched as part of the previous reviews as our records did not identify the presence of a legal file. We are now resolving this issue'.

25. With regard to complaint (iv) the Trust explained to the Commissioner that in dealing with the complainant's original request and subsequent inquiries the Trust's staff had spent more than 18 hours on the complainant's requests and therefore, on this basis, 'the Trust advised the complainant that any further requests in relation to this one request for information would be subject to a fee to cover costs incurred for reviewing files and extracting and redacting information as appropriate'. In its letter to the Commissioner the Trust did not cite any section of the Act as a basis upon which to deal with the complainant's future requests in this way.

26. With regard to complaint (v), the Trust provided the Commissioner with copies of all the correspondence exchanged with the complainant between October 2005 and March 2006. The Trust informed the Commissioner that in the period March 2005 and June 2006 the complainant made 4 requests for information all related in some degree to an ongoing complaint against Dr X. The Trust outlined to the Commissioner the background to this case, namely the investigations undertaken by both the Trust and subsequently the Healthcare Commission into issues raised by the complainant. The Trust informed the Commissioner that both of these investigations concluded that there were no grounds to uphold the complaints raised by the complainant. With regard the actual application of section 14, the Trust informed the Commissioner that:

'in applying section 14 of the Freedom of Information Act [the Trust] deemed further correspondence from [the complainant] would be vexatious in light of comments from Lord Bach who stated:

"The notion of a 'vexation request' in sub-section 1 of clause 12 is intended to capture such things as supplementary request from the same individual for further and further clarification of an original request beyond the point where further information could be reasonable provided".

27. The Commissioner understands that this quote is from a House of Lords debate on amendments to the Freedom of Information Act held on 17 October 2000. The full text of the debate can be viewed at:

http://www.publications.parliament.uk/pa/ld199900/ldhansrd/vo001017/text/01017-33.htm#01017-33_spnew7

28. The Commissioner wrote to the Trust again on 6 February 2007 and explained his concerns surrounding the Trust's inability to accurately date when the copy of the post mortem report held by Dr X was destroyed and the Trust's failure to identify the fact that its Legal Services office held a copy of the report. The

Commissioner asked the Trust to provide it with a copy of the post mortem held by the Legal Services office.

29. On 7 February 2007 the Trust provided the Commissioner with a copy of the report held by the Legal Services office.

Analysis

Complaint (ii)

30. The Commissioner has established that the Trust made two separate disclosures in relation to the complainant's original request of 16 September 2005. The first disclosure was on 21 October 2005, within the 20 working days stipulated by section 10 of the Act. However, the second disclosure was made on 21 December 2005, outside of the 20 working day period. Therefore, the Commissioner is satisfied that in responding request one, the Trust breached section 10 of the Act.

Complaint (iv)

31. The Commissioner acknowledges that section 13 of the Act provides that a public authority may charge for communication of any information which it is not required under section 1 to provide because the cost of compliance exceeds the appropriate limit. Furthermore, the Commissioner recognises that section 9 of the Act allows public authorities to provide applicants with a fees notice which informs applicants of the amount payable before a request is fulfilled.
32. However, the Commissioner does not consider that these sections have been correctly applied by the Trust when dealing with this complainant's requests. A fees notice can only be issued once a public authority has actually received a request from an applicant. A public authority cannot issue a fees notice *before* it has received a request on the basis that the aggregated cost of answering previous requests is estimated to have exceeded the appropriate cost limit. Essentially, the Act does not allow public authorities to demand a pre-payment for a request that has yet to be submitted.
33. Therefore, the Commissioner is satisfied that by demanding pre-payment for an effectively hypothetical request, the Trust mis-applied sections 9 and 13 of the Act.

Complaints (i) and (iii)

34. The Commissioner has carefully considered whether the Trust provided the complainant with all of the information it held covered by his request of 15 September 2005. Section 1(1) of the Act provides that:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

35. The information that the complainant alleges was not supplied to him consisted of the post mortem report (and related correspondence) requested by Dr X. When responding to the request in October 2005 the Trust implied that it held a copy of the report but it could not disclose it to the complainant on the basis of advice provided by the Coroner's Office: '[the Trust] is unable to release any information relating to correspondence with the Coroner's office. This is covered by exemption 32 for the Freedom of Information Act'. However, the Commissioner notes that this response did not explicitly confirm that a copy of the post mortem report in question was held by the Trust.
36. In January 2006 the Trust explicitly confirmed to the applicant that it held a copy of the report, but stated that it was exempt from disclosure by virtue of the exemption contained at section 32. However, as the Commissioner's investigation has established, the Trust has now clarified that its email to the complainant of 11 January 2006 in which it stated that it held Dr X's copy of the post mortem report was incorrect. In fact the Trust now confirmed that it believed this information had been destroyed at some point after July 2005 and therefore in January 2006 it no longer held Dr X's copy of the post mortem report.
37. The Commissioner has carefully considered whether he can conclude that the Trust breached section 1(1)(a) of the Act by apparently incorrectly informing the complainant that it still held Dr X's copy of the post mortem report in January 2006. The Commissioner acknowledges that the Trust's recent declaration that it did not hold Dr X's copy in January 2006 relies largely upon the word of Dr X who it would appear on the evidence referred to elsewhere in this notice to be an unreliable source of information (e.g. he apparently stated that he had no contact with the Coroner's Office when subsequently emails were disclosed showing that he had in fact contacted the Coroner's Office).
38. However, the Commissioner considers that on the balance of probability Dr X's copy of the post mortem report had been destroyed by January 2006. The Commissioner bases this conclusion on the fact that Dr X was informed in July 2005 that he would not have to provide evidence to the inquest into the death of the complainant's wife and it was likely that Dr X destroyed his copy of the report at some point shortly after being informed of this. Therefore, by January 2006, some six months later, the Commissioner considers that it is highly likely that the report in question was no longer held. The Commissioner notes in the course of his investigation he has not found any evidence to contradict this conclusion and furthermore notes that the complainant himself accepted that by January 2006 the report had in fact been destroyed. Consequently, the Commissioner believes that by incorrectly informing the complainant in January 2006 that it Dr X held a copy of the post mortem report, the Trust breached section 1(1)(a) of the Act.

39. As has been noted above the Trust has now established that at the time of the request it held, and still holds, a further copy of the post mortem report. This copy is held by the Trust's Legal Services office. Obviously, the Commissioner is concerned that this report, clearly covered by the scope of the original request, was not located as part of the Trust's previous searches of its records.
40. The Commissioner has also carefully considered whether the Trust's failure to confirm to the complainant that it held a copy of the post mortem in its Legal Services Office constituted a breach of the Act. The Commissioner has concluded that the Trust's confirmation to the complainant that it could not provide him with Dr X's copy of the post mortem report on the basis of section 32 inadvertently acted as a sufficient refusal in terms of the Act to provide the Legal Services copy of the post mortem report.
41. The Commissioner has reached this conclusion on the assumption that that Dr X's copy of the report was the same as the copy held in the Legal Services office. Clearly, as the Dr's copy has now been destroyed the Commissioner is unable to establish whether this was the case. Based on the assumption that the two reports were identical, in this case the Commissioner considers that the Act only provides a right of access to one copy of the report, not both. By extension therefore, by confirming that it held one copy of the report and stating that it was exempt from disclosure by virtue of section 32, the Trust fulfilled its duty at section 1 of the Act and consequently did not breach section 1 by failing to explicitly confirm to the complainant that its Legal Services office also held a copy of the post mortem report.
42. However, the Commissioner notes that if the Legal Services copy of the report had extra information contained in it (e.g. post-it notes or handwritten annotations) or was in fact a different version of the report (e.g. an earlier draft) then the complainant would have had a right of access to this information in addition to being provided with the Dr X's copy of the report. In essence, any such extra information would constitute different recorded information.
43. Moreover, the Commissioner notes that the complainant's original request was for all correspondence between the Trust and the Coroner's Office. The Commissioner believes that this request encompasses all letters or emails exchanged between the two parties as well as any enclosures to these documents. Therefore, the Commissioner believes that the two copies of the post mortem report provided to the Trust by the Coroner's Office fall within the scope of the complainant's original request. The Commissioner is satisfied that all of this correspondence (i.e. emails Dr X and the Coroner's Office and emails between the Legal Services office and the Coroner's Office) have been disclosed to the complainant albeit outside the twenty working days limit.
44. Clearly, the Commissioner's conclusion on this issue does not fully address how weaknesses in the Trust's records management procedures have led to a delayed and confused response being provided to the complainant in this case, and specifically the fact the Trust was actually unaware in October 2005 that its Legal Service office held a copy of the post mortem. As noted above the

Commissioner has commented on these issues in the 'Other Matters' section of this notice.

45. Furthermore, the Commissioner recognises that this Decision Notice highlights the issue whether the Act provides a right to information or to information and documents. The Commissioner believes that the Act provides a right to recorded information held by a public authority and requests would normally be fulfilled by the disclosure of documents, although in some cases information may be provided by other means. The Commissioner's approach is consistent with the definition of the right of access in paragraph 6 of the Explanatory Notes to the Act which states that:

'The Act will permit people to apply for access to documents, or copies of documents, as well as to information itself'.

46. The Commissioner understands that the Trust considers that the copy of the post mortem report currently held by its Legal Services office is also exempt from disclosure under the Act by virtue of the exemption contained at section 32. Therefore, the Commissioner has considered the Trust's application of section 32 as a basis upon which to withhold the post mortem report.

47. The Commissioner accepts that the post mortem report falls within the description of section 32(1)(a) which states that a court record can be 'any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter'. The Act is explicit in stating that 'proceedings in a particular cause or matter' includes any inquest or post-mortem examination. Therefore, the Commissioner accepts that the post-mortem report held by the Coroner's Office falls within the scope of 32(1)(a) because it was a document which was placed in the custody of the Coroner's Office for the purposes of an inquest.

48. However, for section 32 to apply to information held by a public authority it must be included in the court record and be held by the public authority only by virtue of this. The Commissioner is satisfied that the information held within the post mortem report is only held by the Trust within the copy of the post mortem provided to the Trust by the Coroner's Office.

49. In view of the above, the Commissioner is satisfied that the exemption under section 32(1) applies to the post mortem report. As the exemption contained at section 32 is absolute, there is no need to consider the public interest test

50. The Commissioner has also considered the complainant's allegation that the Trust breached section 77 of the Act. Section 77(1) of the Act provides that:

"Where –

- (a) a request for information has been made to a public authority,
and

(b) under section 1 of this Act or section 7 of the Data Protection Act 1998, the applicant would have been entitled (subject to payment of any fee) to communication of any information in accordance with that section,

any person to whom this subsection applies is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to the communications of which the applicant would have been entitled”.

51. In this case the information that may have been destroyed after the receipt of the request was the post mortem report held by Dr X. However, as has been demonstrated above the Commissioner has been unable to establish if this report was even held at the time of the request, on 16 September 2005. It has therefore not been possible for the Commissioner to categorically establish that the report was destroyed after the receipt of the request. Furthermore, the Commissioner notes that even it had been possible to establish that this information was destroyed *after* the receipt of the request, in order to uphold a section 77 offence the Commissioner has to prove that there was a clear *'intention'* to destroy or amend information. Clearly, without being able to establish even when this information had been destroyed, it is not possible to establish if this destruction was with the intention of preventing disclosure.

Complaint (v)

52. The Commissioner has investigated whether the Trust were correct to refuse to answer the complainant's outstanding request, request 6, on the basis that it was vexatious under section 14 of the Act. Section 14(1) provides that:

“section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious”.

53. The Commissioner has produced awareness guidance 22 as a tool to assist in the consideration of what constitutes a vexatious request.
54. In line with the above guidance, the Commissioner's general approach in this case was to consider whether the Trust had clearly demonstrated whether the request, which was the latest in a series of requests, would impose a significant burden and:
- clearly does not have any serious purpose or value;
 - is designed to cause disruption and annoyance;
 - has the effect of harassing the public authority; or
 - can otherwise be fairly characterised as obsessive or manifestly unreasonable.

Significant burden

55. The Commissioner does accept that the complainant made a number of requests for information and in responding to these requests the Trust generated a relatively extensive amount of correspondence. The Commissioner also recognises that the Trust estimated by February 2006 it had spent more than 18 hours answering the complainant's various requests.
56. The Commissioner acknowledges that if a public authority such as the Trust estimates that to fulfil a request would take more than 18 hours, it may be legitimately refused on the basis of section 12. However, if a public authority seeks to refuse a request on the basis of section 14 because of the significant burden placed upon it by a number of requests, this burden must equate to substantially more than 18 hours work. The Trust appear to have conflated the cost limit provisions under section 12 and the vexatious request provisions under section 14. There is no basis for this in law.
57. In a recent decision notice (FS50110741) the Commissioner accepted that the complainant's requests had placed a significant burden on the public authority – however, this decision was made on the basis that the public authority provided the Commissioner with a breakdown of the time spent fulfilling the complainant's 15 requests, the amount of time equating to 175 hours. Furthermore, the Commissioner notes that in order to support the use of section 14, the Trust has not sought to quantify how many hours were spent answering the complainant's requests.
58. Having reviewed the correspondence in this case, the Commissioner does acknowledge that the complainant did email the Trust relatively frequently. However, the Commissioner has established that a significant number of these emails were not requests or queries about information already supplied, rather they were simply brief emails, often only one or two sentences, asking when he could expect a response to an outstanding issue. Furthermore, the Commissioner has noted that the Trust did not reply to a number of these emails thus generating further emails from the complainant chasing a response from the Trust. Therefore it could be correctly argued that the Trust's failure to respond to a number of the complainant's emails led directly to the further demands placed upon it.
59. In summary, the Commissioner does not accept that the Trust has demonstrated that a significant burden was placed upon it by answering the complainant's requests.

Purpose or Value/disruption and annoyance

60. Although the Act is both applicant and purpose blind, when considering the application of section 14, in line with his own guidance, the Commissioner recognises that some weight has to be given to the purpose of the request. The Commissioner notes that the Trust did not explicitly argue that the complainant's requests lacked a clear purpose or value. The Commissioner considers that the complainant clearly had a genuine interest in the issues which were the focus of his request (namely the medical care provided to his late wife) and therefore the

request did have a legitimate purpose and value. By, extension the Commissioner recognises that the requests submitted by the complainant were therefore not designed to cause either disruption or annoyance to the Trust. The Commissioner notes that the Trust did not argue that this was in fact the case.

61. In this case, the Commissioner accepts that a number of the Trust's responses to the complainant whilst not designed to be deliberately contradictory or inaccurate, understandably caused the complainant to be confused as to when the post mortem report held by Dr X was originally requested and at what point it was destroyed. Given this confusion, the Commissioner believes that it was reasonable for the complainant to submit further requests in order to seek clarification on a number of issues. Therefore, whilst not wanting to judge the complainant's motives for submitting request 6, the Commissioner is of the opinion that this request had a clear purpose – seeking clarification of a confused situation largely caused by the Trust's earlier responses.

Harassment/Obsessive or manifestly unreasonable

62. Again, the Commissioner notes that the Trust did not advance any specific arguments with reference to the request equating to harassment or the manifestly unreasonable nature of the request.
63. With regard to obsessive or manifestly unreasonable requests, the Commissioner's awareness guidance suggests that:

'It will be easier to identify such requests when there has been frequent prior contact with requester or the request otherwise forms part of a pattern, for instance when the same individual submits successive requests for information. Although such requests may not be repeated in the sense that they are requests for the same information, taken together they may form evidence of a pattern of obsessive requests so that an authority may reasonably regard the most recent as vexatious'.

64. Although the Commissioner accepts that the complainant's requests did focus on a relatively narrow issue and therefore could be viewed as part of a pattern, he does not accept that it is obsessive for an applicant to seek clarification of earlier responses which were unclear. In essence the Trust's use of Lord Bach's quote (see paragraph 26) can be viewed as alternative way of suggesting that a request is unreasonable because no further information can be supplied. However, as has been demonstrated and noted above, the Commissioner does not accept that request 6 came at a point where no further information could be provided to the complainant. Clearly, as the Trust's submissions to the Commissioner have demonstrated, more information covered by the original request, but not identified by the Trust at the time of its responses to the complainant, has now been discovered (i.e. the copy of the post mortem report held by the Legal Services Manager). Furthermore, it is now clear that the Trust's response of January 2006 in which it stated that Dr X's copy of the post mortem was still held by the Trust was incorrect.

65. In summary, for the reasons outlined above, the Commissioner is not satisfied that the Trust has demonstrated that request 6 meets the criteria of a vexatious request as outlined in his guidance. As is evident above, this decision was based significantly on the fact the Commissioner considers it to be very difficult for a request which was seeking clarification on a number of issues, when this clarification was necessary because of the public authority's earlier misleading responses, to be correctly deemed vexatious.

The Decision

66. The Commissioner's decision is that the public authority did not deal with the following requests for information in accordance with the Act:
67. The Commissioner has concluded that in responding to request 1, the Trust breached section 10 by failing to provide the information it disclosed within 20 working days.
68. The Commissioner has concluded that the Trust breached section 1 of the Act by incorrectly informing the complainant in January 2006 that Dr X held a copy of the post mortem report.
69. The Commissioner has also concluded that the Trust breached section 1 of the Act by incorrectly citing section 14 of the Act as a basis for refusing to answer request 6. Therefore, the Commissioner has considered whether he should order the Trust to fulfil request 6. Having studied request 6 the Commissioner considers that this request contains both FOI and non-FOI questions; some of the parts of the request clearly ask for recorded information whilst other questions ask for opinions or justifications of the Trust's actions. The Commissioner believes that the only FOI request contained within the complainant's email of 3 March 2006 is the question which asks: 'exactly when was this document shredded, by whom and upon whose authority?' The Commissioner is satisfied that a response to this question has been effectively given by the Trust stating that they do hold this information. Therefore, the Commissioner does not intend to order the Trust to respond further to this outstanding request and he requires no steps to be taken.
70. However, the Commissioner has decided that the Trust was correct to rely on the exemption contained at section 32 of the Act as a basis to refuse to provide the complainant with a copy of the post mortem report.

Steps Required

71. For the reasons outlined above, the Commissioner requires no steps to be taken.

Other matters

72. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
73. Despite conducting several searches of its records at the time of the request, the Trust only located the existence of the post mortem report held by the Legal Services Office during the course of the Commissioner's investigations. Furthermore, the Trust has conceded that it is unable to establish when the copy of the post mortem report requested by Dr X was destroyed. As has been noted in the main body of this decision notice, given the circumstances of this case, these failings did not lead directly to a breach of the Act (paragraphs 40 and 41). However, the Commissioner considers that these failings led directly to the complainant being provided with belated and contradictory responses to his requests. Furthermore, these failings resulted in the Commissioner being unable to reach a decision as to the compliance or otherwise with the Act (paragraph 38). Therefore, the Commissioner considers that the Trust should ensure that its records management policies conform to section 46 Records Management Code of Practice in order to improve its ability to respond to requests for information promptly and accurately.

Right of Appeal

74. 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 19th day of April 2007

Signed

**Graham Smith
Deputy Commissioner**

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

Request Annex

Request 1 (Submitted 16 September 2005)

Under the FOI Act 2002 I request copies of all correspondence, notes and documents, including emails, regarding contact between any employee of the Maidstone and Tunbridge NHS Trust and any department of the West Kent Coroner's Office regarding the death of my late wife [wife's name and date of birth redacted] and the ensuing post mortem investigation.

Request 2 (Submitted 28 October 2005)

It is a fact that at Dr X's behest the Trust asked for, and Dr X was provided by the Trust with, information relevant to the investigation into my wife's death well before July 1.

Are you categorically stating that this is not the case?

If you are not:

Who made the request for this information to the Coroner's Office?

How was this request made?

Did the individual who made the request understand that, at that juncture, the request could be deemed as improper?

How does the Trust justify releasing the information to Dr X before he had any involvement in the post mortem enquires?

Request 3 (Submitted 29 December 2005)

You state that "there is no further correspondence outstanding in this matter" and yet it is clear that Dr X received a copy of the post mortem report from whomever he requested. If this document is no longer held by Dr X's office, am I to understand that Dr X has disposed of it? (If this is the case, when did he do this?)

The email dated 8 November 2005 12:01 states that a medical practitioner may only be supplied with a copy of the post mortem report if he or she has a "legitimate interest in the patient's care". What "legitimate interest" did Dr X have when he requested the post mortem report in this case?

Request 4 (Submitted 16 February 2006)

I would be grateful for formal clarification of the term "attending physician" as used to describe Dr X in your email dated 11 January 2006.

Request 5 (Submitted 17 February 2006)

You say that the documents in question are no longer held by the Trust.

The Trust previously confirmed that they were in Dr X's possession on 12/01/06. I would be grateful for an explanation of what happened to them since that date.

Request 6 (Submitted 3 March 2006)

You claim that Dr X requested a copy of the post mortem report only after he had been contacted by the Coroner's Office advising him that he would be required to attend the inquest into my wife's date. This is not so.

Dr X requested a report in May 2005, several weeks before the issue of the inquest had been raised with the Trust.

Do you dispute this? If so I would be pleased to receive evidence to the contrary.

Dr X held a copy of the report until at least 11 January 2006. It was later destroyed, presumably with any accompanying documentation.

Exactly when was this document shredded, by whom and upon whose authority?

Are you suggesting that all of them [i.e. all doctors who may at some point have seen his wife during the course of her life] could be deemed to be "THE attending physician" and therefore have a "legitimate interest" in the post mortem report? If not, how do you justify the assertion that Dr X could rightfully be described as "the attending physician"?

Legal Annex

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 10(1) provides that –

“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.”

Section 14(1) provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious”

Section 14(2) provides that –

“Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with a previous request and the making of the current request.”

Section 32(1) provides that –

“Information held by a public authority is exempt information if it is held only by virtue of being contained in-

- (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,
- (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or
- (c) any document created by-
 - (i) a court, or
 - (ii) a member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter.”

Section 32(2) provides that –

“Information held by a public authority is exempt information if it is held only by virtue of being contained in-

- (a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or
- (b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.”

Section 32(3) provides that –

“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 this section.”

Section 32(4) provides that –

“In this section-

- (a) "court" includes any tribunal or body exercising the judicial power of the State,
- (b) "proceedings in a particular cause or matter" includes any inquest or post-mortem examination,
- (c) "inquiry" means any inquiry or hearing held under any provision contained in, or made under, an enactment, and
- (d) except in relation to Scotland, "arbitration" means any arbitration to which Part I of the Arbitration Act 1996 applies.