

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 12 November 2007

Public Authority: Gloucestershire NHS Primary Care Trust
Address: 1250 Lansdowne Court
Gloucester Business Park
Gloucester
GL3 4AA

Summary

The complainant submitted a request for documents which formed part of her late father's medical records and a further request for copies of contemporaneous notes made by members of a panel which reviewed the care provided to her late father. The public authority provided the complainant with some medical records but refused to disclose the panel members' notes on the basis of section 36. The complainant alleged that the public authority held further documents on her late father's medical record which had not been disclosed to her and that section 36 had been misapplied.

The Commissioner has concluded that all of the medical records held by the Trust which fell within the scope of the complainant's request have been supplied to her. However, the Commissioner decided that the medical records which were disclosed to the complainant were exempt under section 21 of the Act because they were accessible to the complainant under the Access to Health Records Act. With regard to the panel members' notes, when the Commissioner contacted the public authority and asked to be provided with a copy of the notes, the public authority informed the Commissioner that they had in fact been destroyed. The Commissioner has investigated this matter and accepts that the notes are no longer held by the Trust. However, without being able to view the notes the Commissioner is unable to make a decision as to whether section 36 was applied correctly at the time of the 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. On the 5 March 2006 the complainant wrote to the Trust and submitted a request for information concerning the care provided to her late father. The request specifically asked for:
 - '1. Copies of all Care Plans including Care Plan 5, which we believe has now been found.*
 - 2. Copies of the Doctor's notes which are legible, i.e. each sheet is copied separately not overlapping.*
 - 3. A copy of the contemporaneous notes by the Administrator to the Panel [the Panel refers to the continuing review panel held on 16 February 2006 which retrospectively reviewed the care treatment provided to the complainant's late father] .*
 - 4. The date(s) on which [name redacted] visited Charlton Lane and obtained his records'.*
3. The Trust provided the complainant with two separate responses to her request of 5 March 2006.
4. With regard to requests 1, 2 and 4 the Trust provided the complainant with a response on 31 May 2006. In this response the Trust provided the complainant with copies of the care plans, including care plan 5. With regard to the copies of the doctor's notes the Trust informed the complainant that 'these are copies of the information as it is held in the file'. The Trust also confirmed the date that [name redacted] had visited Charlton Lane.
5. With regard to request 3, the Trust contacted the complainant on 21 March 2006. In this response the Trust provided the complainant with copies of the official minutes of the panel of 16 February 2006 and the notes taken by the administrator during the open session of the panel meeting. The Trust also explained to the complainant that following the open session of the meeting the panel members met in private to consider the issues discussed during the panel meeting. However, the Trust informed the complainant that with regard to the notes taken by the panel members during the closed session of the panel meeting, it believed that these notes should not be disclosed because *'release of any notes would inhibit the free and frank discussion of evidence that must prevail in all similar hearings and to release the notes to you would have the effect of discouraging future panel members from carefully recording salient points'*.
6. On the 23 March 2006 the complainant contacted the Trust and confirmed that she wanted to be provided with copies of the contemporaneous notes made by the panel members during the closed session of the meeting. The complainant noted that if the Trust refused to disclose these notes then it must cite an exemption contained in Part II of the Act.

7. The Trust informed the complainant on 20 April 2006 that it was relying on the exemption contained at section 36 of the Act. Within this response the Trust provided the complainant with an undated certificate signed by the Trust's Chief Executive which stated that in his opinion disclosure of the withheld notes would prevent the free and frank exchange of views for the purposes of deliberation.
8. On 27 May 2006 the complainant asked the Trust to review its decision to apply section 36.
9. The Trust wrote to the complainant on 4 August 2006 and informed her that having reviewed its handling of her request, it was still relying on section 36.

The Investigation

Scope of the case

10. On 15 June 2006 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - The Trust had failed respond to a number of her requests until 31 May 2006 and therefore breached section 10 of the Act.
 - The Trust did not provide all the information it held about care plan 5; it had disclosed documents entitled Problem 5, Problem 4 and Problem 2, but it failed to provide copies of documents Problem 1 and Problem 3.
 - The Trust failed to provide clear copies of the doctors' notes.
 - The complainant also asked to the Commissioner to investigate the Trust's decision to refuse to disclose copies of the notes taken by panel members during the closed session of the meeting on the basis of section 36.
11. The complainant originally submitted her request to the West Gloucestershire NHS PCT. However, this public authority merged with two other PCTs in October 2006 to form the Gloucestershire NHS PCT. In these circumstances the Commissioner considers it appropriate to serve the decision notice on the Gloucestershire NHS PCT even though it was one of its predecessors, the West Gloucestershire NHS PCT who dealt with these requests.
12. However, for narrative purposes the Commissioner has simply referred to both organisations as 'the Trust' throughout this decision notice. References to the Trust in relation to actions or correspondence before October 2006 should be taken to mean the West Gloucestershire NHS PCT and references to the Trust's actions and or correspondence after October 2006 should be taken to mean Gloucestershire NHS PCT.
13. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. These issues are outlined below:

14. The Commissioner has previously issued a decision notice in March 2006 (case reference FS50082412) into how this Trust handled an earlier request submitted by this complainant. This earlier request asked for a catalogue of documentation the Trust considered at an earlier hearing concerning the treatment provided to the complainant's late father. In this previous decision notice the Commissioner established that although the Trust had provided the complainant with a catalogue of the information it held in relation to her late father's treatment, it had failed to provide this information within 20 working days. The earlier decision notice therefore found the Trust in breach of section 10 of the Act.
15. The complainant suggested in a letter to the Commissioner in June 2006 that the Trust may have breached this earlier decision notice because she had still not received accurate copies of the doctors' notes nor copies of all the care plans, hence the need for this further request and subsequent complaint to the Commissioner. However, the Commissioner has explained to the complainant that the request which was the subject of decision notice FS50082412 only asked for a *catalogue* of information held and was not a request for actual copies of health records or other documentation. Therefore the Commissioner was satisfied that this earlier decision notice had not been breached by the failure of the Trust to supply the complainant with any actual documents.
16. At this point the Commissioner considers it necessary to highlight the rights of access provided by the Access to Health Records Act ('AHRA'). The Commissioner is of the opinion that the information requested by the complainant which consists of the care plans and doctors' notes (requests 1 and 2) should be disclosed to the complainant under the Access to Health Records Act ('AHRA') rather than the FOI Act. Section 3(f) of AHRA provides a right of access to a health record, or any part of a health record to a deceased person's personal representative and any person who may have a claim arising out of the patient's death. In the earlier case FS50082412, the Commissioner established that the complainant had a right to access her late father's medical records under AHRA.
17. As the Commissioner considers that the appropriate access regime under which the doctors' notes and care plans should have been disclosed was the AHRA, this information was exempt from disclosure under the Act by virtue of the exemption contained at section 21. Section 21 of the Act states that the information is exempt from disclosure if it is reasonably accessible to the applicant by other means. In this instance, the requested information was reasonably accessible to the applicant under the right of access provided by the AHRA.
18. However, even though this information was exempt from disclosure under the Act because it was reasonably accessible to the applicant by other means, the Commissioner considers that the Trust was still under a number of duties imposed by the Act when responding to these requests. Firstly, the Commissioner believes that the Act places an overarching duty on public authorities to respond to all information requests within 20 working days, even if the requested information is disclosed under a different access regime (e.g. AHRA).

19. Secondly, as the appropriate access regime which should have been applied by the Trust was the AHRA, as explained in paragraph 17 above, strictly speaking the Trust should have provided the complainant with a refusal notice compliant with section 17 of the Act.
20. Thirdly, the exemption contained at section 21 of the Act, unlike other exemptions contained within the Act, does not remove the duty placed on public authorities by section 1(1)(a) of the Act to confirm or deny whether it holds the information being requested. Practically, this means that the Commissioner can investigate whether a public authority has correctly confirmed or denied whether it holds a piece of information, even if this information is otherwise dealt with under a different access regime. In this case then the Commissioner can investigate whether the Trust has correctly confirmed or denied whether it holds copies of the documents entitled Problem 1 and Problem 3.
21. Finally, with regard to the complaint that the doctors' notes provided by the Trust were illegible. As had been noted in the preceding paragraphs, as the doctors' notes were effectively disclosed under the AHRA rather than the Act, the Commissioner can only investigate whether in disclosing these notes the Trust has complied with the duty at 1(1)(a) of the Act. The Commissioner understands that the complainant is not arguing that the Trust has failed to disclose any doctors' notes following the request of 5 March 2006. Rather, the complainant's complaint is that the notes that have been disclosed are unclear. As the doctors' notes themselves have been disclosed under the AHRA, a piece of legislation that the Commissioner is not empowered to regulate, he cannot require the Trust to provide the complainant with more readable copies of the notes. Furthermore, even if this information was disclosed under the Act, the Act only places a duty on public authorities to disclose information requested by an applicant; there is no duty placed on public authorities to decipher information.

Chronology

22. The Commissioner wrote to the Trust on 18 April 2007. He explained to the Trust the scope of his investigation in relation to the request of 5 March 2006 and how the interaction of the Act and AHRA, as outlined above, affected the issues he would address in this case.
23. The Commissioner specifically asked the Trust to respond to the following points:
24. With regard to the Trust's response to the request for care plan 5, the Commissioner suggested that he believed that it was logical to assume that as the complainant had been provided with documents entitled problems 2, 4 and 5, the Trust may hold documents entitled problem 1 and 3 which comprised part of care plan 5. The Commissioner specifically asked the Trust to respond to the following points:
 - Is the Trust's position that it does not hold documents entitled Problem 1 and Problem 3 or rather that it does hold these documents but for some reason has previously failed to disclose these to [the complainant]?

- If the Trust's position is that it does not hold these two documents, please outline the steps taken to locate this information.
 - Were these documents held at one point, but subsequently destroyed?
 - If so, when did the Trust cease to retain this information?
 - Does the Trust have a record of the documents destruction?
 - What does the Trust's records management policy say about the retention and deletion of records of this type?
 - Are there any statutory requirements to keep the information requested?
25. With regard to the Trust's application of section 36, the Commissioner needed to be satisfied that not only is the opinion of the qualified person a reasonable one, but that it had arrived at through a reasonable process. To this end, the Commissioner asked the Trust to clarify the following issues:
- Confirmation of the date on which the Chief Executive gave his opinion in relation to section 36.
 - Details of any evidence considered by the Chief Executive in determining whether disclosure of the requested information would be likely to have an inhibiting effect.
 - The factors that were considered by the Chief Executive in reaching his decision. This will assist in determining that only relevant matters were considered.
26. The Commissioner also asked the Trust to explain the public interest arguments it had considered in deciding to withhold this information on the basis of section 36, and in particular, why the Trust concluded that the balance of the public interest in withholding this information outweighed the public interest in disclosing this information.
27. The Trust acknowledged receipt of the Commissioner's letter on 30 April 2007.
28. The Trust provided the Commissioner with a substantive response on 25 May 2007. The Trust began by outlining to the Commissioner the significant changes within the NHS in Gloucestershire since the date of the review panel in February 2006. The Trust explained that the West Gloucestershire PCT (the public authority to which the complainant had originally submitted her request) had merged with a two other local PCTs to form the Gloucestershire PCT in October 2006. Consequently responsibility for dealing with the Commissioner's investigation now fell to the Gloucestershire PCT. The Trust explained that given this re-organisation, and the time delay between the events which formed the basis of the complainant's complaint, a number of staff involved in responding to the requests had moved posts or left the organisation altogether.
29. The Trust explained that its position was that it did not hold the documents entitled Problem 1 and Problem 3. The Trust explained that in order to reach this conclusion it had searched the files relating to the 2nd Continuing Health Care Review Panel in 16 February 2006. Having reviewed these files the Trust concluded that either the notes copied for the panel were incomplete; or the notes on Problem 1 and Problem 3 were not considered relevant to the assessment of need the panel was reviewing and therefore the decision was taken at the time

not to copy these two documents onto the file. The Trust noted that the original copies of the care plans were in fact held by a further separate organisation, the Gloucestershire Partnership NHS Trust (GPNHST).

30. With regard to the request for copies of the contemporaneous notes made by the panel members in the closed session of the meeting, the Trust explained that it had some difficulty in establishing the details relating to the reasonable opinion provided by the Chief Executive when the request was refused in April 2006. These difficulties arose for two reasons; firstly, the Chief Executive who had provided this opinion, Stephen Golledge, was employed by the West Gloucestershire PCT and was not employed by the new Trust, and therefore he could not be asked personally about the decision he had made at the time. Secondly, the Trust did not hold any records on file that related to the reasonable opinion which would answer the Commissioner's questions. Therefore the Trust informed the Commissioner that it could not provide him with any information as to what factors had been considered by Mr Golledge on determining whether disclosure of the requested information would have had an inhibiting effect, and similarly, it was not possible to explain what factors Mr Golledge had considered in reaching his decision. The Trust also explained that the 'Gloucestershire Primary Care Trust has been unable to locate any contemporaneous notes which have previously been withheld by the West Gloucestershire Primary Care Trust'. Given that the Trust no longer held the requested information, it also informed the Commissioner that it was not possible explain the public interest arguments the Trust had considered deciding to withhold this information, save for the arguments outlined in the correspondence to the complainant.
31. The Trust acknowledged to the Commissioner that 'as part of the Gloucestershire Primary Care Trust's Annual Health Check Declaration to the Healthcare Commission April 2007, the Trust has reported that Standard CO9 Management of Records is not being met. The Trust Board has agreed that an implementation Plan derived from the Information Toolkit is to be taken forward by the Information Governance Steering Group, which reports to the Integrated Governance Committee, a sub-committee of the Trust Board'.
32. The Commissioner contacted the Trust again on 18 June 2007. The Commissioner suggested to the Trust that although he accepted that the documents entitled Problem 1 and Problem 3 may not have been held on the file relating to the panel hearing, it was possible that the information may have been held elsewhere in the Trust. The Commissioner suggested that in response to the complainant's request the Trust should have provided her copies of the two documents, regardless of where, or how, they were held. This was because the request simply asked for copies of all care plans, and not copies of all care plans considered by the panel or held on the file prepared for the panel. The Commissioner again noted that given the numbering system employed it would seem logical to conclude that the documents entitled Problem 1 and Problem 3 were created at some point.
33. The Trust provided the Commissioner with response dated 11 July 2007. In this response the Trust provided a further explanation to support its position that in relation to the documents entitled Problem 1 and Problem 3 these documents

were in fact never held by it. The Trust clarified that the original documents were not in fact held by it, but originated from the GPNHST which is a separate provider of health care services. The Trust explained that it had asked GPNHST to retrieve the patient's medical records from the archive so that it could establish if it held either of the two missing documents. The Trust provided the Commissioner with a signed letter from the Health Records Manager of the GPNHST. In this letter the records manager explained that she had retrieved the complainant's late father's health records from two sources, firstly, the case notes from the off site storage facility which were originally provided to the Trust, and secondly, the paperwork retained following the closure of the Pineview Nursing Home.

34. The records manager stated that 'I have been asked as an independent witness to check both the GPNHS Trust[']s case notes and copies from Pineview, and I am not able to confirm sight of a document called Problems 1 and 3, I have however seen copies of Problems 2, 4 and 5 dated 23 September 1997 to the 1 October 1997.'
35. The Commissioner wrote to the Trust again on 31 July 2007. In this letter the Commissioner explained that it was his understanding that the Trust's position was that the copies of the panel members' contemporaneous notes were no longer held by the Trust. The Commissioner suggested to the Trust that if this was the Trust's position it would require it to respond to the following points.
 - Does the Trust have any record of when the panel notes in question were destroyed?
 - Were the contemporaneous notes definitely held at the time of the *[name redacted]* request in March 2006?
 - Did the Trust issue any guidance to panel members in relation to how long any notes they made during review panels should be retained?
 - Having received notification of the Commissioner's investigation in the complainant's allegations, what steps has the Trust taken to ensure that it now longer holds the relevant notes? Were the respective panel members contacted? What types of files were searched etc, etc...
36. The Trust provided the Commissioner with a response on 14 September 2007. In this response the Trust explained that there was no formal record of when the contemporaneous notes were destroyed. The Trust also explained that no official guidance was issued to panel members in relation to how long they should retain any notes that they made during review panels. However, the Trust suggested that in line with the established practice at the time the contemporaneous notes were shared and then destroyed following sign-off of the typed record.

Analysis

Procedural matters

Section 1

37. Section 1 of the Act provides a general right of access to information held by public authorities. Section 1(1) states 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.”

38. The information which the complainant alleged that the public authority held, but was not supplied to her, consisted of the documents entitled Problem 1 and Problem 3 which formed part of the complainant's late father's medical notes.
39. As the Commissioner has explained in detail in the preceding paragraphs in his opinion the AHRA provided a more appropriate access regime under which the complainant could access this information if it were held by the Trust. If it were held by the Trust it would then be exempt from disclosure by virtue of section 21 because it was reasonably accessible to the complainant by other means, i.e. under the AHRA. However, as also noted above section 21 does not remove the duty placed on public authorities contained at section 1(1)(a) of the Act, i.e. to confirm or deny whether it holds the information covered by the scope of the request.
40. The Commissioner has established that the Trust did hold documents entitled Problems 2, 4 and 5 and that these were provided to the complainant. He therefore accepts given the numerical reference system employed it is logical to assume that at some point documents entitled Problems 1 and 3 would have been created by the medical staff involved in the care given to the complainant's late father.
41. However, having considered all of the evidence available to him, the Commissioner has concluded that at the time of the request in March 2006 the Trust did not hold the documents entitled problems 1 and 3. The Commissioner has reached this decision on the basis of number of factors.
42. Firstly, the Commissioner has established that the original copies of the care plans were not in fact held by the Trust. Rather, the care plans were held by a separate health organisation, namely the GPNHST. However, the review panel referred to in the complainant's request was conducted by the Trust. By way of preparation for this panel the Commissioner understands that copies of the care plans were provided by the GPNHST to the Trust.

43. The Commissioner therefore accepts that the reason that the Trust would hold copies of the care plans is by virtue of the fact that they were copied by the GPNHST and provided to it for the purposes of the review panel. Consequently, the Commissioner accepts that it is logical to suggest that if the missing documents were held by the Trust they would be held on the files relating to the review panel. The Commissioner understands that these files have been searched not only in order to respond to the complainant's original request but also following the Commissioner's investigation and no record of the missing documents has been found.
44. Secondly, the Commissioner has established that the Trust contacted the GPNHST in order to respond to the Commissioner enquires. As suggested in the above paragraphs, the GPNHST conducted separate searches of its records in an attempt to locate the missing documents. The Commissioner notes that these searches were undertaken by the GPNHST's Health Records Manager and accepts that a person in such a position would have a good working knowledge of where the missing documents, if held by the GPNHST, would be located. The Commissioner also notes that the Health Records Manager searched not only the case notes in the off site storage facility (the location where the documents entitled Problems 2, 4 and 5 were stored) but also the paperwork from the Pine View nursing home of which the complainant's late father had been a resident. The Commissioner notes that although the GPNHST's Health Records Manager located the documents entitled Problems 2, 4 and 5 she could not locate the documents entitled Problems 1 and 3.
45. As outlined above, the Commissioner is satisfied that the care plans in the possession of the Trust were only there by virtue of the fact that they had been provided copies by the GPNHST for the purposes of the review panels. The Commissioner has also established that the GPNHST, despite thorough searches cannot locate copies of the missing documents. Therefore, the Commissioner considers it logical to assume that at the time the review panel the missing documents were not provided to the Trust because they were not in fact held by the GPNHST. Therefore, on the balance of probabilities, in the Commissioner's opinion the Trust does not hold copies of the documents entitled 'Problem 1' and 'Problem 3' which formed part of care plan 5.
46. The Commissioner is consequently, satisfied that the Trust has complied with its obligations under the Act at section 1(1)(a) by accurately confirming that it did not hold the documents entitled Problem 1 and Problem 3.

Section 10

47. Section 10(1) of the Act states 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."

48. The Commissioner has established that the complainant submitted her requests on 5 March 2006 and the Trust did not provide her with a response to request

number 4 until 31 May 2006, outside of the twenty working day limit stipulated by the Act. Therefore, by failing to respond to request 4 within twenty working days the Trust breached section 10 of the Act.

Section 17

49. The Commissioner is also aware that the Trust failed to respond to requests 1 and 2 until 31 May 2006. However, as outlined in paragraphs 16 to 20, the Commissioner believes that the information the Trust provided to the complainant in response to requests 1 and 2 was exempt from disclosure under section 21 of the Act as it was reasonably accessible to the complainant by other means, namely the AHRA. Therefore, in response to her freedom of information request, the Trust should have provided the complainant with a refusal notice compliant with section 17 of the Act which cited section 21 of the Act. By failing to provide such a refusal notice for requests 1 and 2, and by failing to respond to these requests within 20 working days, the Trust breached section 17 of the Act.

Exemptions

Section 36

50. As has been noted above, in March 2006 the Trust refused to disclose the contemporaneous notes made by the Panel members in the closed section of the review meeting on the basis of section 36 (2)(b)(ii) – disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.
51. However, as also is noted above when the Commissioner contacted the Trust and asked to be provided with a copy of these notes so that he could consider the application of the exemption, the Trust explained that it no longer held copies of these notes.
52. The Commissioner is mindful of the fact that his duty under section 50 of the Act is to make a decision as to whether a public authority was correct to refuse to disclose information *at the time* of refusing a request. Therefore, in cases such as this where the requested information may have been destroyed subsequent to the request being refused, under the Act the Commissioner could still make a decision as to whether, at the time of the request, the Trust was correct to rely on section 36 of the Act as a basis to withhold the information. Clearly, in scenarios such as this should the Commissioner conclude that the requested information had been incorrectly withheld any decision notice issued could not order disclosure of information that had been destroyed.
53. It also follows that in cases such as this the Commissioner would obviously have to make a decision as to applicability of an exemption without having the opportunity to review the exempt information itself. In this case the Commissioner does not believe that it is possible for him to do this; without being able to view the requested information the Commissioner does not feel that he can establish whether the qualified person's opinion was objectively reasonable and reasonably arrived at nor would it be possible to consider the public interest issues related to

this specific information. Consequently, the Commissioner cannot determine whether, at the time of the request, it had correctly refused to disclose the information on the basis of section 36 of the Act.

54. The Commissioner has also given consideration to the accuracy of the Trust's position that the contemporaneous notes made during the closed session of the meeting are no longer held. The Commissioner is mindful of the fact that the Trust does not have a formal record of when the notes were destroyed. However, the Commissioner understands that the notes made during the closed panel meeting were essentially only made as an aide memoire to assist panel members. The Commissioner therefore accepts that they were not created in order to form part of the official or formal record of the meeting. The Commissioner therefore accepts that at some point following the creation of the official record of the meeting, the notes were destroyed. Therefore, the Commissioner accepts on the basis of the facts outlined above the notes requested by the complainant are no longer held.

The Decision

55. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
56. The Trust correctly confirmed to the complainant that it did not hold the documents entitled Problem 1 and Problem 3.
57. However, the Commissioner's decision is that the public authority did not deal with the following elements of the request in accordance with the requirements of the Act:
58. The Trust technically breached section 17 by failing to provide the complainant with a refusal notice within 20 working days which cited section 21 when disclosing copies of the doctors' notes and copies of the care plans it did hold.
59. The Trust also breached section 10 of the Act by failing to respond to request 4 within 20 working days.

Steps Required

60. The Commissioner requires no steps to be taken.

Other matters

61. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
62. As the Commissioner has explained in the main body of this decision notice, having refused the complainant's request for copies of the panel members' notes on the basis of section 36, the Trust then destroyed these notes. Without being able to review the requested information the Commissioner was unable to assess the validity of the section 36 exemption. Furthermore, even if the Commissioner had been able to assess the application of section 36, and concluded that the exemption did not provide a basis to withhold the notes, it would obviously not have been possible for the Commissioner to order disclosure of the requested information because the notes themselves had been destroyed.
63. The Commissioner has given consideration as to whether the Trust breached section 77 of the Act in destroying the panel members' notes. Section 77 of the Act states 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'.
64. The Commissioner notes that in order to uphold a section 77 offence the he has to prove that there was a clear 'intention' to destroy or amend information.
65. The Trust has acknowledged that it did not have a formal records management destruction policy for documents such as the panel notes and has suggested that under the informal practice in place at the time, the meeting notes were destroyed after they were no longer needed in the course of normal business (see paragraph 36). However, the Trust has not provided any explanation as to why it destroyed the notes, despite the fact that it had refused the complainant's request for them and she had referred the matter to the Commissioner. Nevertheless, the Commissioner has concluded that there is insufficient evidence to suggest that the Trust destroyed the notes with the *deliberate* intention of preventing their disclosure under the Act.

66. Although the Trust's actions of destroying the notes do not represent a breach of the Act, such practice does not comply with the guidance outlined in the Section 46 Code of Practice on records management. On the issue of disposal arrangements the Code states that:

'If a record due for destruction is known to be the subject of a request for information, destruction should be delayed until disclosure has taken place or, if the authority has decided not to disclose the information, until the complaint and appeal provisions of the FOIA have been exhausted. '

(Paragraph 9.9).

67. The Commissioner's publication 'Freedom of Information Act – Awareness Guidance Number' also advises public authorities on their obligations if they receive a request for information which is due to be destroyed. This publication can viewed at:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_8_-_records_management_faqs_v2001.pdf

Right of Appeal

68. 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 12th day of November 2007

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Freedom of Information Act 2000

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 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 17(1) provides that -

“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.”

Section 21(1) provides that –

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

Section 21(2) provides that –

“For the purposes of subsection (1)-

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection)

to members of the public on request, whether free of charge or on payment.”

Access to Health Records 1990

Section 3(1) provides that-

“An application for access to a health record, or to any part of a health record, may be made to the holder of the record by any of the following, namely—

- (a) the patient;
- (b) a person authorised in writing to make the application on the patient’s behalf;
- (c) where the record is held in England and Wales and the patient is a child, a person having parental responsibility for the patient;
- (d) where the record is held in Scotland and the patient is a pupil, a parent or guardian of the patient;
- (e) where the patient is incapable of managing his own affairs, any person appointed by a court to manage those affairs; and
- (f) where the patient has died, the patient’s personal representative and any person who may have a claim arising out of the patient’s death.”