

Freedom of Information Act 2000 (Section 50)

Decision Notice

3 December 2007

Public Authority: NHS London
Address: 4th Floor
Southside
105 Victoria Street
London
SW1E 6QT

Summary

The complainant wrote to North East London NHS Strategic Health Authority (the "SHA") regarding an internal inquiry carried out by East London and The City NHS Mental Health Trust (the "MHT") into the death of a patient ("Mr A") in 2001, and the subsequent decision not to hold an independent inquiry into his death – a decision that had been made by the SHA. The complainant contacted the SHA and requested all information relating to the internal inquiry carried out by the MHT and any recommendations which the SHA had made. The request was made under the Freedom of Information Act 2000 (the "Act"). The SHA provided some information but withheld the majority of the information requested, citing the exemptions listed at sections 36 and 38. After carrying out an internal review, the SHA upheld the decision to withhold the information under section 36 and also stated it believed that some of the information in question was exempt under section 41. It did, however, inform the applicant that it was no longer relying on section 38. During the course of the Commissioner's investigation the SHA confirmed that it held further documents which fell under the scope of the request, and informed him that it believed that sections 36, 41 and 44 applied to these documents – although it later dropped section 44. After considering the circumstances of the case the Commissioner decided that most of the information was exempt under sections 36 and 41. He also decided that a limited amount of information was exempt from disclosure under section 40. However, the Commissioner did decide that section 41 did not apply to all of the withheld information and that the SHA had breached the requirements of section 1 of the Act, in that it had wrongly withheld some information under this exemption. Further to this it had not fully informed the complainant of all the information it held in relation to her request. He also decided that the SHA was in breach of section 17, as it had not informed the complainant of all the exemptions it sought to rely upon. Consequently, the complaint is partially upheld and the Commissioner requires that some of the information be disclosed. NHS London has since taken over responsibilities for North East London NHS Strategic Health Authority, 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 Act. This notice sets out his decision.

The Request

2. The complainant initially contacted the MHT in regard to an internal inquiry into the death of Mr A in 2001 and the subsequent decision not to hold an independent inquiry. The complainant was informed by the MHT that the decision not to hold an independent inquiry had been made by the SHA, in consultation with the Department of Health (the "DoH") and other relevant parties. Consequently, in a letter dated 4 January 2006, the complainant contacted the SHA and requested,

“...copies of any material in your possession relating to the internal inquiry and recommendations...”

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

3. By way of background, Mr A had been a patient of the MHT and had committed suicide in 2001. Shortly before his death he had been linked to a homicide, but had never been charged or convicted in connection with this offence.
4. The SHA responded to this request on 1 February 2006. It gave some background information into the decision not to commission an independent inquiry into the death of Mr A, and informed the complainant that the primary reason for this decision was that the case had not met the criteria listed in Department of Health Guidance HSG(94)27 and Local Authority Social Services Letter LASSL(94)4 which were in place at the time of Mr A's death. It explained that under these guidelines independent inquiries were commissioned after a person with mental illness had been convicted of homicide, and stressed that as Mr A had not been convicted of this offence, his case did not meet this criteria.
5. The SHA stated that despite this it had commissioned an external agency to produce a report into the incident, which was received by the SHA in October 2004 (the ECRI Report). It went on to explain that following receipt of this Report it had decided, in consultation with Mr A's family, the London Borough of Tower Hamlets, the MHT, and Tower Hamlets NHS Primary Care Trust, that the Report did not go far enough. The SHA and the MHT consequently agreed to jointly commission an evaluation of mental health services in the borough of Tower Hamlets. The SHA stated that at that time the evaluation was in the process of being completed, and that it was planning to consult with the family of Mr A on the next stage of the process.

6. The SHA refused to disclose a copy of the ECRI Report as it believed this information was exempt under section 38. It also refused to disclose information relating to the evaluation of services, stating that it believed that this information was exempt from disclosure under section 36 as disclosure, before the evaluation of services had been completed and before it had consulted with members of Mr A's family, would mean that it would be likely that, "the conclusions of the discussions would be less robust."
7. The SHA went on to state that it had considered the public interest test for both exemptions, and it believed that the public interest in maintaining the exemptions outweighed the public interest in disclosure. The SHA informed the complainant of her right to request an internal review.
8. On 8 February 2006 the complainant contacted the SHA and asked for a review. She argued that the decision not to have an independent inquiry was flawed, due to lack of evidence, as she believed that the SHA and the MHT should have considered evidence from her and her daughter when making this decision. She went on to state that she believed the public interest lay in reopening the case.
9. The SHA conducted an internal review and the Chief Executive wrote to the complainant on 8 March 2006. The SHA identified and listed four documents which it believed were caught by the request. These documents were:
 - (a) The ECRI Report dated October 2004 – "Root Cause Analysis – East London and The City Mental Health Trust".
 - (b) A letter from the Executive Director of Partnerships at the SHA to a member of Mr A's family, dated 23 November 2004.
 - (c) Verita Report dated 6 December 2005, entitled, "Report of the Evaluation of Service Improvements in the Adult Mental Health Services in Tower Hamlets following two inquiries into the care and treatment of [Mr A]."
 - (d) An email from the Assistant Director of Mental Health to her predecessor, dated 10 November 2005.

For ease of reference these documents will be referred to as documents (a) – (d) in this notice.

10. In relation to section 36 the SHA informed the applicant that it believed that this exemption applied to all of the documents listed above, as it believed that the disclosure of this information at that time would be likely to inhibit the free and frank exchange of views. The SHA again made reference to the fact that the evaluation of mental health services in Tower Hamlets was still underway.
11. The SHA addressed the complainant's comments about the public interest, and stated, "your argument around public interest seems to be that it would be in the public interest to reopen the case, rather than it being in the public interest...to disclose material relating to the internal inquiry into [Mr A]'s care and treatment...but I cannot see how disclosing this material would mean that the

- inquiry into [Mr A]'s care and treatment would be reopened." It went on to state that it considered that the public interest in maintaining the exemption outweighed the public interest in disclosing the information, as disclosure would jeopardise any potential service improvements.
12. The SHA notified the complainant that after reviewing the initial refusal notice it was no longer relying on section 38.
 13. The SHA also cited an additional exemption, and stated that it now believed that section 41 applied to documents (a) and (c), as they contained information drawn from the medical records of Mr A. The SHA acknowledged that there was an argument for breaching confidence in matters of a substantial public interest, but said that that there was no such overriding public interest in this instance.
 14. The SHA also addressed the complainant's assertions that the decision not to hold an independent inquiry was based on lack of evidence. It again pointed out that Mr A had not been convicted of homicide, and that therefore the criteria for such an inquiry had not been met. The SHA stated that despite this it had consulted with the DoH, the MHT, the London Borough of Tower Hamlets, and Tower Hamlets PCT, and had discussed whether it should hold an independent inquiry. It had concluded that:

"The role of an Independent Inquiry is to look at the circumstances surrounding the care and treatment of the person under the care of mental health services. This can also be done by a different sort of inquiry to an Independent Inquiry, and this is what was decided in this case. [Mr A]'s care and treatment was investigated by an external agency, independent of the NHS. Following receipt of the report [document a], the Trust and the SHA commissioned a broader review of mental health services in Tower Hamlets [document c]. We hope to be able to make at least some of the information available to the public at the end of this process, but we will need to consider the interests of [Mr A]'s family when we consider what should be placed in the public domain."
 15. Finally, the SHA informed the complainant that she should speak to the Police if she had any information concerning the homicide Mr A had been linked to. It also informed her of her right to complain to the Commissioner.

The Investigation

Scope of the case

16. On 15 March 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 whether the refusal was appropriate.

17. During the course of the investigation the SHA informed the Commissioner that it held further documents which fell under the scope of the complainant's request. The SHA presented further arguments to the Commissioner as to why it believed that these documents should be withheld, and the Commissioner considered these arguments.

Chronology

18. Following a telephone call the Commissioner wrote to the SHA on 26 January 2007 and asked it to provide him with a copy of the withheld information, together with its reasoning behind the application of the exemptions it had cited. The Commissioner also asked the SHA to confirm whether it held copies of reports regarding the internal inquiry carried out by the MHT into the death of Mr A, as he believed that these would fall within the scope of the complainant's request. If it did hold copies of this information, but believed it should be withheld, the Commissioner asked the SHA to explain to him which exemptions it believed applied.
19. The SHA contacted the Commissioner by way of telephone calls on 27 February 2007 and 9 March 2007, and apologised for the delay in responding to his letter.
20. On 21 March 2007 the Commissioner wrote to the SHA and asked for a response to his letter of 26 January 2007.
21. The SHA responded to the Commissioner in a letter dated 26 March 2007, and provided the requested information. In this letter the SHA confirmed that, as well as documents (a) – (d) it also held a further internal email from 2002 which fell under the scope of the complainant's request (document e). The SHA also informed the Commissioner that it held three documents relating to the internal inquiries carried out by the MHT into the circumstances surrounding Mr A's death. These documents had been provided to the SHA by the MHT. These documents were:
 - (f) a copy of the internal inquiry completed by the MHT in October 2001.
 - (g) An addendum report completed by the MHT in July 2002.
 - (h) A copy of the panel investigation commissioned by the MHT, and the Action Plan agreed by the MHT. The SHA estimated that this was completed in December 2003.

For ease of reference these documents will be referred to as documents (f) – (h) in this notice.

22. The SHA stated that it believed that documents (f) – (h) focused on the medical care and treatment of Mr A and that they contained, "confidential patient information which would not be disclosed to a third party." The Commissioner has interpreted this as being a statement by the SHA that it believes that section 41 of the Act applies to this information.

23. The Commissioner contacted the SHA again on 30 April 2007. He noted that document (e) had not previously been referred to by the SHA, and he asked it to confirm whether it believed that this information should be disclosed or withheld, and if so, under which exemption.
24. After receiving no response the Commissioner wrote to the SHA again on 21 May 2007 and asked for a response to his previous letter.
25. The SHA responded in a letter dated 5 June 2007, and informed the Commissioner that it believed that document (e) was exempt from disclosure under section 36(2)(b)(i), as release would, or would be likely to, inhibit the free and frank provision of advice. However, it provided no information as to whether this decision had been made by the qualified person (i.e. the Chief Executive).
26. The Commissioner wrote back to the SHA again on 13 June 2007 and asked whether the decision to cite this exemption for document (e) had been made by the qualified person. He also asked some further questions in relation to document (h) and the application of section 41.
27. Following several telephone conversations with the Commissioner, the SHA provided a substantive response in a letter dated 24 July 2007. It informed him that the decision to apply section 36(2)(b)(i) in relation to document (e) had been made by the Acting Chief Executive in the Chief Executive's absence.
28. The Commissioner contacted the SHA by telephone, on 7 August 2007, and informed it that the decision had to be made by the qualified person and that it was his belief that that would be the SHA's Chief Executive. In a letter to the Commissioner dated 16 August 2007 the SHA confirmed that the decision to apply section 36(2)(b)(i) in relation to document (e) had now been made by the Chief Executive of the SHA. In relation to document (h) it referred to sections 41 and 44, although it did not directly cite these exemptions. Following a further telephone call on 21 August 2007, the SHA confirmed that it believed that sections 41 and 44 applied to document (h). In relation to section 44 it went on to explain that it had applied this exemption as it believed that the disclosure of this information would breach the rights of Mr A's family under Article 8 (Right to Privacy and a Family Life) of the Human Rights Act 1998.
29. Following the decision of the Information Tribunal in *Mrs P Bluck V The Information Commissioner and Epsom & St Helier University Hospital NHS Trust*, which stated that in the Tribunal's view, "we do not believe that the effect of the Human Rights Act is to elevate to the level of a directly enforceable legal prohibition the general terms of Article 8," the Commissioner contacted the SHA by way of an email on 1 October 2007. He noted the reliance of the SHA on section 44 in regard to document (h) and drew its attention to the above decision. He asked whether the SHA had any further submissions it wished to make.¹
30. The SHA responded by way on an email on 10 October 2007. It informed the Commissioner that it was relying upon section 41 to withhold document (h).

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

31. The Commissioner contacted the SHA again on 30 October 2007 and asked for further clarification about its use of section 41. In particular he asked the SHA to provide further information as to the sources of some of the information in documents (f) – (h).
32. The SHA responded in a letter dated 5 November 2007 and provided further information about its use of this exemption.

Analysis

Procedural matters

33. 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.”
34. The SHA did not inform the complainant of all the documents which fell under her request, and it was only during the course of the Commissioner’s investigation that it confirmed that there were further documents which it sought to withhold, i.e. documents (e) – (h).
35. Section 17(1) states that a public authority who is relying on an exemption(s) in order to withhold information must give the applicant a notice which:
 - (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if it would not otherwise be apparent) why the exemption applies.
36. During the course of the investigation the SHA identified further documents which fell under the scope of the request, but which it sought to withhold. It did not inform the complainant of this or the exemptions it sought to rely upon.
37. The full text of section 17 can be found in the Legal Annex at the end of this notice.

Exemptions

Section 36(2)(b)(ii)

38. In the internal review the SHA stated that it believed that the disclosure of documents (a) – (d) would be likely to inhibit the free and frank exchange of views. Having considered this response the Commissioner believes that the SHA is relying upon section 36(2)(b)(ii) to withhold these documents.
39. Section 36(2)(b)(ii) states that information is exempt from disclosure if in the reasonable opinion of the qualified person disclosure of the information would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.
40. The full text of section 36 can be found in the Legal Annex at the end of this notice.
41. The Commissioner initially considered whether the decision to cite section 36 had been made by the qualified person. During the course of the investigation he asked the SHA how and when the decision to cite this exemption had been made. Unfortunately due to the administrative restructuring of the SHA, and its merging with several other authorities, it proved problematic to obtain detailed information from the SHA. Consequently, the SHA was only able to provide copies of the refusal notice and the outcome of the internal review in response to the Commissioner's questions about its application of section 36.
42. The Commissioner has examined these documents and noted that the outcome of the internal review was signed by the Chief Executive of the SHA, who was the qualified person at that time. For this reason, and as there is no evidence to the contrary, the Commissioner accepts that the decision to cite section 36, in relation to documents (a) – (d), was made by the qualified person.
43. The Commissioner has gone on to consider whether the opinion of the qualified person was "reasonable."
44. In reaching a view on this the Commissioner has followed the approach taken by the Information Tribunal in *Guardian Newspapers Limited and Heather Brooke vs. Information Commissioner and the BBC* (Appeal Numbers: EA/2006/0011 and EA/2006/0013). The Tribunal expressed the view that a reasonable opinion is one which is both reasonable in substance and reasonably arrived at. The Tribunal stated that,

"On the wording of section 36(2) we have no doubt that in order to satisfy the statutory wording the substance of the opinion must be objectively reasonable. We do not favour substituting for the phrase "reasonable opinion" for some different explanatory phrase, such as "an opinion within the range of reasonable opinions." The present context is not like the valuation of a building or other asset, where a range of reasonable values may be given by competent valuers acting carefully. The qualified person must take a view on whether there either is or is not the requisite degree of likelihood of inhibition. We do, however, acknowledge the thought that lies

behind the reference to a range of reasonable opinions, which is that on such matters there may (depending on the particular facts) be room for conflicting opinions, both of which are reasonable.”²

45. The Commissioner has first considered whether the substance of the opinion could be considered to be objectively reasonable.
46. The SHA informed the complainant that the information in question related to an ongoing evaluation of mental health services in the borough of Tower Hamlets, which had been initiated following the death of Mr A. The SHA stressed to the complainant that this review was still underway and stated, “this work is in the process of being completed and decisions about sharing the results of this work will be made after consultation with family members to ensure their wishes are respected. We do not believe that it is appropriate to share the information arising from the evaluation until it is completed and we have understood the views of [Mr A]’s family about the next stage of the process.”
47. Taking this into consideration the SHA argued that the disclosure of these documents would inhibit the free and frank exchange of views. The SHA stated that, “we want any possible lessons to be learned from these events and from the inquiries into the care and treatment provided by the services.”
48. Whilst considering these points the Commissioner has noted that document (c) was received by the SHA less than one month before the request was received from the complainant. The Commissioner finds the timing of the request a compelling factor in considering both the application of this exemption, and the potential for prejudice that the disclosure of this information may have caused.
49. After considering the above points the Commissioner has formed the view that the opinion of the qualified person was objectively reasonable.
50. The Commissioner has gone on to consider whether the opinion was reasonably arrived at and whether the qualified person gave their opinion prior to the exemption being claimed. As he has stated at paragraph 41 above, the Commissioner has been hampered in considering the application of section 36 by a lack of available information. However, in the absence of evidence to the contrary, and after considering the internal review, he has formed the view that the opinion was reasonably arrived at, and was reached prior to the exemption being claimed.
51. Having formed this view, the Commissioner has gone on to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information in question.

Considering the public interest test

² Appeal Numbers EA/2006/0011 and EA/2006/0013, paragraph 60 & 64.

52. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's Decision in *Guardian Newspapers Limited and Heather Brooke vs. Information Commissioner and BBC*, where the Tribunal considered the law relating to the balance of public interest in cases where section 36 applied.³ The Commissioner has followed the interpretation of the law relating to the public interest test, as set out in this Tribunal, and notes and adopts in particular its conclusions that:

- Unless there is any relevant exemption under the Act then the section 1 duties will operate. The “default setting” in the Act is in favour of compliance – requested information held by a public authority must be disclosed except where the Act provides otherwise.
- The public interest in maintaining an exclusion or exemption must outweigh the public interest in disclosure.
- The “presumption” in the Act will only operate in cases where the respective public interests are equally balanced.
- There is an assumption built in to the Act that the disclosure of information by public authorities on request is in itself of value and in the public interest, in order to promote transparency and accountability in relation to the activities of public authorities. The strength of that interest, and the strength of the competing interest in maintaining any relevant exclusion or exemption, must be assessed on a case by case basis.
- When it comes to weighing the balance of public interest, it is impossible to make the required judgement without forming a view on the likelihood, nature and extent of any prejudice.
- It is important to note the limits of the reasonable person's opinion required by section 36(2). The opinion is that disclosure of the information would have (or would be likely to have) the stated detrimental effect. That means that the qualified person has made a judgement about the degree of likelihood that the detrimental effect would occur, “does not necessarily imply any particular view as to the severity or extent of such inhibition or the frequency with which it will or may occur.”⁴
- The right approach, consistent with the language and scheme of the Act, is that the Commissioner, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely to, have the stated detrimental effect, must give weight to that opinion as an important piece of evidence in his assessment of the balance of public interest. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view on

³ Appeal Numbers EA/2006/0011 and EA/2006/0013.

⁴ Appeal Numbers EA/2006/0011 and EA/2006/0013, paragraph 91.

the severity, extent and frequency with which detrimental effect will or may occur.

53. Whilst considering whether the public interest in maintaining the exemption outweighs the public interest in disclosure the Commissioner recognises that there are competing arguments. He has gone on to consider these arguments in turn.

Public interest – in favour of disclosing the information

54. In considering the public interest in disclosing the information the Commissioner has been mindful of the strong generic public interest in openness, transparency, and accountability in relation to the activities of public authorities. He has also considered the public interest in increasing the public understanding of the decisions made by public authorities. Furthermore he also believes that there is a public interest in informing the debate about the treatment of people with mental health problems in the community.
55. The complainant has argued that there is a public interest in holding an independent inquiry into the death of Mr A, as she believes that the decision not to do so was flawed, because the SHA did not consider the evidence of her and her daughter.
56. In considering this argument the Commissioner has taken into account the comments of the SHA in the internal review, which informed her that that the decision not to hold an independent inquiry was due to the reasons as outlined in paragraph 59 below. He also notes the SHA's statement that if the information in question was released, this would not in itself lead to the commissioning of a new independent inquiry. Furthermore he notes that the MHT and the Coroner also investigated, or carried out an inquest, into the circumstances surrounding Mr A's death. In relation to Mr A's death the coroner gave a verdict of suicide.
57. Whilst the Commissioner accepts that the complainant feels strongly about this issue, he has not been provided with any compelling evidence to show that the disclosure of this information would add value to the debate as to whether there was a need for a new independent inquiry to be commissioned into the death of Mr A.
58. However, the Commissioner does believe that there is a public interest in increasing the public understanding of the actions of public authorities and, in this instance, in understanding why an independent inquiry was not commissioned. He also believes that there is a strong public interest in the accountability of a public authority – especially one which is responsible for the care of patients with mental health problems – being held accountable for any alleged poor treatment which leads to the harm or death of one of its patients.
59. In regard to these points the Commissioner has noted that in the refusal notice the SHA provided the complainant with a detailed response as to why it had not commissioned an independent inquiry into the death of Mr A, and what action it had taken:

“Under [Department of Health Guidance Health Service Guidelines] (94) 27, Independent Inquiries were commissioned after a person with mental illness had been convicted of a homicide. Under the guidance, Independent Inquiries were commissioned once an internal inquiry by the organisation providing care and treatment – in this case [the MHT] – had been completed and it was clear there were sufficient grounds from its conclusions to justify commissioning a further, independent inquiry.

[Mr A]’s case did not meet the criteria for commissioning an Independent Inquiry as there had been no conviction. However, [the SHA], the London Borough of Tower Hamlets, Tower Hamlets Primary Care Trust and the [DoH] did agree that the case required further investigation and commissioned an external agency to do this. [The SHA] received the [ECRI] report of this investigation in 2004 and it was concluded that the work, although useful, did not go far enough in its analysis and exploration to help us understand key issues...Following detailed discussions between [the SHA], [Mr A]’s family, the London Borough of Tower Hamlets, [the MHT], and Tower Hamlets Primary Care Trust, a new approach was agreed. In view of the length of time that had passed since [Mr A]’s suicide and the findings of two previous investigations it was agreed that an evaluation of services in Tower Hamlets would be commissioned jointly by [the SHA] and [the MHT]. This work is in the process of being completed and decisions made about sharing the results of this work will be made after consultation with family members to ensure their wishes are respected.”

60. The Commissioner has gone on to consider the public interest arguments in favour of maintaining the exemption, and has weighed these against the significant public interest arguments in openness, accountability and public understanding.

Public Interest – in favour of maintaining the exemption

61. The Commissioner gives due weight to the qualified person’s reasonable opinion that disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.
62. From the information provided to him the Commissioner notes that the SHA consulted with members of Mr A’s family, and kept them informed of its actions, and that their views were taken into account. The Commissioner believes that these actions go towards satisfying the public interest in openness and accountability.
63. In considering the public interest in maintaining the exemption the Commissioner is mindful that there is a public interest in ensuring the free and frank exchange of views and the effective running of the process of deliberation within public authorities. He also accepts that this in itself can lead to better decision making and accountability within public authorities.

64. However, the Commissioner is mindful that there is a public interest in public authorities being able to take decisions in difficult and sensitive matters, and he believes that in order to do so they have to be able to consider various views in a free and frank manner. In the individual circumstances of this case at the time of the request the SHA, in conjunction with several other authorities, were considering the events which led to the suicide of a mental health patient, and were evaluating the provision of mental health services in the borough of Tower Hamlets. The Commissioner believes that there is a strong public interest in the SHA, and the other public authorities who were involved in the care of the Mr A, being able to consider the circumstances surrounding the death of a mental health patient, in order to learn lessons, and to take steps to improve their services and procedures.
65. From the information provided to him the Commissioner is satisfied that the evaluation of mental health services was ongoing at the time the request was received. The Commissioner has also noted that the request for information was made on 4 January 2006, less than a month after the Verita Report (document (c)), which was dated 6 December 2005, had been received by the SHA.
66. Bearing this in mind, the Commissioner is persuaded that the disclosure of the requested information at the time the request was received would have (or would have been likely to have) caused substantial prejudice to the evaluation of mental health services which was underway at that time. He does not believe that this would be in the public interest.
67. Taking the above points into account the Commissioner has formed the view that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The main points that have led him to reach this conclusion are:
- The public interest in the SHA (and other public authorities who were involved) being able to carry out an evaluation of mental health care services in Tower Hamlets and to learn lessons from the events surrounding the death of Mr A.
 - The severity and extent of prejudice which disclosure of the information would have, or would have been likely to have, caused.
 - The actions taken by the SHA which the Commissioner believes go towards satisfying the public interest in openness and accountability, as listed at paragraphs 59 and 62 above.

After considering these points, the Commissioner believes that the public interest lies in favour of exempting the information. Therefore he believes that documents (a) – (d) are exempt from disclosure.

68. In reaching this view the Commissioner has noted that Mr A was not charged or convicted of the homicide he was linked to. He has also noted that the information in question focused on the medical history of Mr A, and the events surrounding his death, not on the homicide he was linked to.

Section 36(2)(b)(i)

69. In its letter to the Commissioner dated 5 June 2007 the SHA stated that it believed that document (e) was exempt from disclosure under section 36 as disclosure would, or would be likely to, inhibit the free and frank provision of advice. From this response the Commissioner has concluded that the SHA has cited section 36(2)(b)(i).
70. Information is exempt from disclosure under section 36(2)(b)(i) if in the reasonable opinion of the qualified person disclosure of the information would, or would be likely to, inhibit the free and frank provision of advice.
71. In a letter to the Commissioner dated 24 July 2007 the SHA stated that it believed that the public interest in maintaining the exemption outweighed the public interest in disclosing the information, and that, "were such information to be regarded as disclosable we take the view that free and frank provision of advice in similar circumstances in the future would be inhibited in a way that would not serve the public interest." Therefore the Commissioner is satisfied that the SHA has considered the public interest test.
72. In a letter to the Commissioner dated 16 August 2007 the SHA confirmed that the decision to cite this exemption had been made by the Chief Executive.
73. The Commissioner is therefore satisfied that the decision to cite this exemption has been made by the qualified person, in this case the Chief Executive of the SHA.
74. In considering an exemption only applied by a public authority after the Commissioner began his investigation, the Commissioner is following the finding of the Information Tribunal in *Bowbrick v Nottingham City Council*.⁵ In this case, the Tribunal considered, as an aside to the main issues raised by the appeal, what was the correct approach to be taken in a case in which the public authority only refers to an exemption after the Commissioner has commenced an investigation. The Tribunal found that the Commissioner was indeed under a duty to consider the application of the exemption.
75. In considering whether the decision to cite the exemption was objectively reasonable and reasonably arrived at the Commissioner has considered the points listed at paragraph 71. He has also noted that the request was made whilst the evaluation of mental health services was still ongoing, and the family of Mr A being consulted, at the time the request was received. Bearing these points in mind, the Commissioner has formed the view that the decision to cite the exemption was both objectively reasonable and reasonably arrived at.
76. Having formed this view, the Commissioner has gone on to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information in question.

⁵ Appeal Number EA/2005/0006

77. In considering the public interest arguments in favour of disclosure the Commissioner has considered the same factors as listed in paragraphs 54–60 above.
78. In considering the public interest in favour of maintaining the exemption the Commissioner gives due weight to the qualified person's reasonable opinion that disclosure would, or would be likely to, inhibit the free and frank provision of advice.
79. Having considered the contents of document (e) the Commissioner is satisfied that the disclosure of this document would, or would be likely to, inhibit the free and frank provision of advice in the future
80. He has also taken into account the factors he has listed in paragraphs 59 and 62 above, which he believes show actions taken by the SHA which go towards satisfying the public interest in openness and accountability.
81. The Commissioner is mindful that there is a public interest in public authorities being able to take decisions in difficult and sensitive matters, and he believes that in order to do so they have to be able to take advice as to their options in a free and frank manner. The Commissioner believes that this argument has to be balanced against the public interest in openness and accountability. As stated above, in this case he believes that the actions of the SHA has gone some way to satisfying these interests.
82. After taking the above points into account, the Commissioner has formed the view that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
83. Therefore, the Commissioner believes that the public interest lies in favour of withholding the information, and the information contained in document (e) is exempt from disclosure.

Section 41

84. The SHA cited section 41 to the complainant in relation to documents (a) and (c). During the course of the investigation the SHA also cited section 41 in relation to documents (f) – (h).
85. The SHA has informed the complainant that some of the information contained in these documents was drawn from the medical records of Mr A. The SHA has also informed the Commissioner that in relation to documents (f), (g) and (h) some of the information contained in these records was also obtained from other sources, namely the Police and the Coroner's inquest into the death of Mr A.
86. Section 41 provides that information is exempt if it was obtained by the public authority from any other person and the disclosure of the information to the public would constitute a breach of confidence actionable by that or any other person.

87. The full text of section 41 can be found in the Legal Annex at the end of this notice.
88. After considering the information provided by the SHA in relation to the documents listed at paragraph 84 above, the Commissioner believes that the SHA has argued that the documents are made up of three kinds of information, which it believes are all exempt under section 41. The three kinds of information are:
- Information obtained from Mr A's medical records, either directly, or indirectly and in such a way as that details of his medical care and condition can be easily identified.
 - Information obtained from the Police.
 - Information obtained from the Coroner's Inquest.
89. Therefore the Commissioner has considered the application of section 41 to each of these groups of information in turn.

Information obtained from Mr A's medical records

90. In the internal review the SHA informed the complainant that it believed that documents (a) and (c) were exempt from disclosure under section 41, as they contained information drawn from the medical records of Mr A. In this letter the SHA acknowledged that there was an argument for breaking confidence in matters of a substantial public interest, but said that that there was no such overriding public interest in this instance.
92. The SHA has also informed the Commissioner that documents (f) – (h) contain information drawn from the medical records of Mr A, and that therefore it believes that section 41 applies.
93. The Commissioner has considered whether the SHA was correct to apply section 41 in relation to the information drawn from Mr A's medical records in these documents.
94. Whilst taking into account the particular circumstances of this case, the Commissioner has been mindful of the decision of the Information Tribunal in *Mrs P Bluck V The Information Commissioner and Epsom & St Helier University Hospital NHS Trust*. In that case a request had been received for a deceased person's medical records from an individual who was not the deceased person's personal representative. The Tribunal upheld the Commissioner's decision that the requested information was exempt from disclosure under section 41 of the Act.⁶
95. Having examined these documents the Commissioner is satisfied that a large proportion of the information contained therein has been drawn directly from Mr A's health records. He also believes that the documents contain information which has been written after close consideration of Mr A's medical records and

⁶ Appeal number EA/2006/0090.

- has therefore drawn from those records, and from which details of Mr A's medical care and condition can be easily identified.
96. Therefore the Commissioner is satisfied that the information in question has been drawn from clinical records and from interviews with the relevant health professionals involved in Mr A's care, and has been combined into reports into the circumstances surrounding his death. While the information is not in the form of medical records the Commissioner believes that it is of the same sensitivity and relevance to the deceased as his medical records and has been obtained in connection with the provision of health services to Mr A by the MHT.
 97. Furthermore, from the information provided to him, and from the nature of the documents themselves, the Commissioner believes that documents (f) – (h) were disclosed to the SHA by the MHT for the sole purpose of determining whether to hold an independent inquiry into the death of Mr A.
 98. Therefore the Commissioner is satisfied that the information which relates to Mr A's medical records is information that was obtained from a third party. The Commissioner is also satisfied that the information has the necessary quality of confidence in that it is not generally accessible nor trivial.
 99. The Commissioner is also satisfied that the information was imparted in circumstances importing an obligation of confidence required to sustain an action for breach of confidence. When patients submit to treatment from doctors and other medical professionals whether this is in surgeries, hospitals or other institutions, they do so with the expectation that that information would not be disclosed to third parties without their consent. He is satisfied that an obligation of confidence is created by the very nature of the doctor / patient relationship and the duty is therefore implicit. This is further supported by the oath which doctors take guaranteeing to protect doctor / patient confidentiality.
 100. The Commissioner has gone on to consider whether the duty of confidence can survive the death of the individual to whom the duty is owed. The argument is considered on the basis of both principle and authority contained in relevant case law.
 101. The argument of principle is that the breach of confidence would affect the conscience of the defendant. Where the disclosure of such information could be said to be unconscionable, it may be restrained by the Court even where it would not damage the confider. The Commissioner finds the argument of principle to be a reasonable one, particularly given the fact that the disclosure under the Act is disclosure to the world at large.
 102. Having considered the argument of principle, the Commissioner has examined the argument of authority. While this may be less powerful than the argument of principle, there would appear to be no binding authority against the argument of principle. In view of this, the Commissioner is satisfied that the duty of confidence attached to medical / health records can survive the death of the person to whom the records relate.

103. The Commissioner's decision is therefore that the duty of confidence would survive the death of Mr A and disclosure of information by the SHA would be a breach of the duty of confidence owed to Mr A.
104. The duty of confidence is not absolute. The courts have recognised three broad circumstances in which information may be disclosed in spite of a duty of confidence. These include where the disclosure is consented to by the confider, where disclosure is required by law, and where there is a greater public interest in disclosing the information which overrides any duty of confidence which may be owed.
105. There are no issues surrounding consent or law in this case. This leaves a consideration of the public interest. The Commissioner must therefore balance the public interest in disclosing the requested information against the public interest in maintaining the duty of confidence, with a view to deciding if the duty of confidence should be maintained.
106. In considering whether the disclosure was in the greater public interest, the Commissioner was mindful that in some circumstances there may be a public interest in the disclosure of such information, such as instances where there were suspicious circumstances surrounding a person's death – although he considers such circumstances will be rare.
107. In reaching a view on this the Commissioner has had regard for the findings of the Coroner, who pronounced a verdict of suicide in respect of Mr A's death. Furthermore, as stated at paragraph 68 above, the Commissioner also noted that the information in question focused primarily on the death of Mr A, not on the homicide he was linked to. The Commissioner has also noted that Mr A was neither charged nor convicted in connection with this offence.
108. Having considered these points, and the other information he has been provided with, the Commissioner has formed the view that in this case there is no overriding greater public interest, and that therefore the public interest does not override the duty of confidentiality.
109. One of the requirements for section 41 to apply is that the disclosure of the information would constitute an actionable breach of a duty of confidence. Given that the Commissioner accepts that in this case a duty of confidence exists, the questions to be addressed are whether such a disclosure would be actionable, and if so, who could bring the action?
110. In regard to whether this disclosure would be actionable, the Commissioner considers this to be the case, though it is unlikely that damages could be awarded for a breach of the duty of confidence to the deceased person, as there is no obvious financial loss. Instead, any remedy would most likely be in the form of an injunction to prevent publication of the information requested.
111. After reaching this view, it is therefore necessary to establish who would be able to bring the action if the duty of confidence was breached.

112. While again there would appear to be no binding authority on this point, the Commissioner has reached the view that an action could be brought by the personal representatives of Mr A, namely the executors or administrators of the estate. It would be unlikely that surviving relatives other than Mr A's personal representatives would be able to bring an action based on a breach of the duty of confidence. The Commissioner has been provided with ample evidence that Mr A has surviving family members and he is satisfied that the breach of confidence which would arise from the disclosure would be actionable by them.
113. In view of the above, the Commissioner considers that disclosure of this information is exempt under section 41 of the Act, and that the SHA was correct to apply this exemption in relation to the parts of documents (a), (c), (f) – (h) which contain information drawn from Mr A's medical records.

Information obtained from the Police

114. The SHA has informed the Commissioner that some of the information contained in documents (f) – (h) was obtained by the MHT from the Police.
115. Whilst making a determination on the application of section 41 to this information the Commissioner has first considered whether this information was obtained from a third party. From the information provided by the SHA the Commissioner is satisfied that it was.
116. In order for the Commissioner to be satisfied that the exemption applies to this information he has gone on to consider whether this information has the necessary quality of confidence.
117. The information in question contains detailed information relating to the homicide that Mr A had been linked to. The Commissioner believes that this information is very sensitive in nature, especially to the families of both the deceased and the victim of the homicide. As such the Commissioner believes that this information is highly sensitive information which clearly has the appropriate quality of confidentiality.
118. The Commissioner has gone on to consider the circumstances under which this information was obtained.
119. The SHA has informed the Commissioner that it has contacted the MHT that produced these documents, and that although the MHT had been unable to provide any information as to the conditions under which this information was obtained, the MHT had stated that, "it is, however, normal practice for the Trust to request information from the Police...and the Trust would not normally disclose that information to third parties."
120. Although the SHA has been unable to provide much detail as to the circumstances under which this information was obtained the Commissioner has taken into consideration that it was obtained by the MHT from the Police for the purposes of an internal inquiry into the death of Mr A. Furthermore, the reports produced by the MHT were then passed to the SHA solely for the purposes of

determining whether to hold an independent inquiry into the death of Mr A. Bearing this in mind he believes that given that:

- the information relates to the death of Mr A, and his alleged links with a homicide;
- the information is of a very sensitive nature;
- and that it is highly likely that disclosure would be distressing to the families of both Mr A and the victim of the homicide,

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

121. As stated above, the duty of confidence is not absolute. The courts have recognised three broad circumstances in which information may be disclosed in spite of a duty of confidence. These include where the disclosure is consented to by the confider, where disclosure is required by law, and where there is a greater public interest in disclosing the information which overrides any duty of confidence which may be owed.
122. There are no issues surrounding consent or law in this case. This leaves a consideration of the public interest. The Commissioner must therefore balance the public interest in disclosing the requested information against the public interest in maintaining the duty of confidence, with a view to deciding if the duty of confidence should be maintained.
123. After considering the factors listed at paragraphs 106 and 107 above the Commissioner believes that in this case there is no overriding greater public interest, and that therefore the public interest does not override the duty of confidentiality.
124. Therefore the Commissioner believes that the exemption is engaged, that disclosure of this information is exempt under section 41 of the Act. He believes that the SHA was correct to apply this exemption in relation to the parts of documents (f) – (h) which contain information obtained by the MHT from the Police.

Information obtained from the Coroner

125. The SHA has informed the Commissioner that some of the information contained in documents (f) – (h) was obtained by the MHT from the Coroner's hearing into the death of Mr A.
126. Whilst making a determination on the application of section 41 to this information the Commissioner has first considered whether this information was obtained from a third party. From the information provided by the SHA the Commissioner is satisfied that it was.
127. In order for the Commissioner to be satisfied that the exemption applies to this information he has gone on to consider whether this information has the necessary quality of confidence.

128. During the course of the investigation the Commissioner asked the SHA whether the Coroner's hearing into the death of Mr A was held in public. The SHA was unable to provide a definite answer, but pointed out that document (h), "states that the inquests were widely reported in the media which suggests that the hearings were held in public."
129. The Commissioner is aware that coverage appeared in the press at the time which published details of the Coroner's hearing. Bearing this in mind, and as the SHA has not provided any evidence to show that the Coroner's Inquest was a closed hearing, the Commissioner does not believe that this information has the necessary quality of confidence, and that therefore the section 41 exemption is not engaged in respect of this information.
130. Therefore the Commissioner believes that information contained in documents (f) – (h) which was obtained from the Coroner's hearing should be disclosed.

Other Information in documents (a), (c), (f) – (h)

131. Having considered the contents of these documents the Commissioner also believes that there is a fourth kind of information contained in them. He believes that there is some information which was not obtained from Mr A's medical records (either directly or indirectly), the Police or the Coroner's hearing, but was instead produced by the authors of these documents.
132. The Commissioner notes that documents (a) and (c) were produced by the SHA itself. Therefore he does not believe that this information was obtained from a third party. Therefore in relation to information in these reports which was not obtained from Mr A's medical records, the Police or the Coroner's inquest, the Commissioner does not believe that section 41 is engaged. He notes, however, that the SHA also claimed section 36 for these documents, and that he has agreed with this decision. Therefore, due to the reliance on section 36, the Commissioner does not believe this information should be disclosed.
133. In relation to documents (f) – (h) the Commissioner accepts that these reports were obtained by the SHA from a third party (i.e. the MHT). However, after considering this information, the Commissioner believes that as it does not relate to Mr A's medical records or information obtained from the Police, and as details of Mr A's medical condition or care cannot be easily deduced from the information, the Commissioner does not believe that it is information obtained from a third party.
134. Therefore the Commissioner believes that section 41 does not apply to information contained in documents (f) – (h) which was not obtained from the medical records of Mr A, from the Police, or from the Coroner.
135. Section 41 is an absolute exemption, and is therefore not subject to the public interest test as listed in section 2(1)(b) of the Act.

Section 40(2)

136. The Commissioner has gone on to consider whether documents (f) – (h) contain any personal data relating to any of the members of Mr A's family.
137. Section 1 of the Data Protection Act 1998 (the "DPA") defines personal data as data which relate to a living individual, who can be identified:
- from those data, or
 - from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
138. Having considered the contents of these documents the Commissioner does believe that there is a small amount of information which he believes forms the personal data of some of the members of Mr A's family.
139. As the Commissioner has formed the view that some of the information in the reports is the personal data of some of the members of Mr A's family, he has gone on to consider whether this information is exempt from disclosure under section 40(2).
140. Section 40(2) gives an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied.
141. One of the conditions listed in section 40(3)(a)(i) is where disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act 1998 (DPA).
142. The Commissioner has considered the first principle of the DPA, which requires, amongst other things that personal data is processed fairly and lawfully. The Commissioner has initially considered whether the disclosure of this information would be fair.
143. Given the nature of contents of the documents and the likely sensitivity of this information to members of Mr A's family, the Commissioner does not believe that it would be appropriate to discuss the nature of this information in any detail in this notice. However, given the nature and focus of these documents, and the sensitivity of the subject, the Commissioner believes that it would be unfair to disclose this information.
144. As the Commissioner believes that the disclosure of this information would be unfair he has formed the view that disclosure would be in breach of the first principle, and that this information is exempt from disclosure under section 40(2) of the Act.
145. This exemption is an absolute exemption, and is not subject to the public interest test as listed in section 2(1)(b) of the Act.
146. The full text of section 40 can be found in the Legal Annex at the end of this notice.

Section 38

147. As the SHA informed the complainant at the review stage that it was no longer relying upon this exemption the Commissioner has not gone on to examine the application of this exemption in this case.

Section 44

148. In regard to this exemption, as the SHA has informed the Commissioner that it is now relying solely on section 41 to withhold document (h), the Commissioner has not gone on to examine the application of this exemption in this case.

The Decision

149. The Commissioner's decision is that the SHA dealt with the requests in accordance with the requirements of the Act in that it correctly withheld the following information:

- The Commissioner believes that the SHA correctly withheld documents (a) – (e), and correctly applied section 36 to these documents.
- Information on documents (a), (c), (f) – (h) which was drawn from the medical records of Mr A, either directly or indirectly and in such a way as that details of his medical care and condition can be easily identified.
- Information on documents (f) – (h) which was obtained from the Police.
- Information on documents (f) – (h) which is the personal data of members of Mr A's family.

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

- The SHA incorrectly withheld information in documents (f) – (h) which does not form the personal data of members of Mr A's family, and which was not obtained from Mr A's medical records or from the Police. Further to this it had not fully informed the complainant of all the information it held in relation to her request. The SHA therefore failed to meet the requirements of section 1.
- Section 17(1) in that it did not issue a Refusal Notice, in relation to the additional information it held which fell within the scope of the request. It also did not inform the complainant of some of the exemptions it relied upon to withhold this information.

Steps Required

151. The Commissioner requires that the SHA disclose the information in documents (f) – (h) which is not exempt under sections 40 and 41.

152. The SHA must take the steps identified by this notice within 35 calendar days of the date of this notice.

Failure to comply

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

Right of Appeal

154. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

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

Dated the 3rd day of December 2007

Signed

**Steve Wood
Assistant Commissioner**

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

Legal Annex

Section 1

- (1) 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.
- (2) Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
- (3) Where a public authority –
- (a) reasonably requires further information in order to identify and locate the information requested, and
 - (b) has informed the applicant of that requirement,
- the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.
- (4) The information –
- (a) in respect of which the applicant is to be informed under subsection (1)(a),
or
 - (b) which is to be communicated under subsection (1)(b),
- is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.
- (5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).
- (6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

Section 17

- (1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.
- (2)** Where –
- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim –
 - (i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
 - (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.
- (3)** A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming –
- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
 - (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- (4)** A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.
- (5)** A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
- (6)** Subsection (5) does not apply where:
- (a) the public authority is relying on a claim that section 14 applies,
 - (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
 - (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

- (7)** A notice under subsection (1), (3) or (5) must-
- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
 - (b) contain particulars of the right conferred by section 50.

Section 36

- (1)** This section applies to-
- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
 - (b) information which is held by any other public authority.
- (2)** Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-
- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
 - (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
- (3)** The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).
- (4)** In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".
- (5)** In subsections (2) and (3) "qualified person"-
- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,

- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
 - (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
 - (d) in relation to information held by the House of Commons, means the Speaker of that House,
 - (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
 - (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
 - (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
 - (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
 - (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
 - (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
 - (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
 - (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
 - (m) in relation to information held by the Greater London Authority, means the Mayor of London,
 - (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
 - (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
 - (i) a Minister of the Crown,
 - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
 - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.
- (6)** Any authorisation for the purposes of this section-
- (a) may relate to a specified person or to persons falling within a specified class,
 - (b) may be general or limited to particular classes of case, and
 - (c) may be granted subject to conditions."
- (7)** A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-

- (a) disclosure of information held by either House of Parliament, or
- (b) compliance with section 1(1)(a) by either House,

would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

Section 40

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if-
 - (a) it constitutes personal data which do not fall within subsection (1), and
 - (b) either the first or the second condition below is satisfied.”
- (3) The first condition is-
 - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
 - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
- (4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).
- (5) The duty to confirm or deny-
 - (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
 - (b) does not arise in relation to other information if or to the extent that either-
 - (i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act

- 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
- (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."
- (6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.
- (7) In this section-
- "the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
- "data subject" has the same meaning as in section 1(1) of that Act;
- "personal data" has the same meaning as in section 1(1) of that Act.

Section 41

- (1) Information is exempt information if-
- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
- (2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.