

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 18 March 2008

Public Authority: Department of Health
Address: Skipton House
80 London Road
London
SE1 6LH

Summary

The Commissioner's decision in this matter is that the Department of Health (the "Department") did not deal with the complainant's request in accordance with Part I of the Act in that it failed to comply with its obligations under section 1(1). The Commissioner found that the Department incorrectly applied the exemptions under sections 36(2)(c), 40(2) and 44 as a basis for withholding information pertaining to the number of 11,12 and 13 year olds that had abortions in England and Wales in 2003 and 2004.

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

The Request

2. In a letter to the Department of 5 January 2005 the complainant requested information pertaining to:

How many 11, 12, 13 and 14 year olds had abortions in England and Wales in 2003/2004? That is individual figures for each age group rather than one total figure.

3. On 7 February 2005 DOH issued the complainant a refusal notice. In this refusal notice the Department disclosed the total number of abortions performed on 14 year olds in England and Wales during 2003 and withheld the same data for the

year 2004 under section 22 of the Act pertaining to information intended for future publication (The Department has since published this information on its website). The Department also disclosed the total number of abortions performed on those under 14 years old in 2003. However, the Department withheld the remainder of the information pertaining to the number of abortions performed by individual age group for 11, 12 and 13 year olds on the basis that to do so would breach the prohibition on disclosure in Regulation 5 of the Abortion Regulations 1991, and therefore is exempt from disclosure under section 44 of the Act pertaining to prohibitions on disclosure.

4. In an email dated 10 February 2005, the complainant requested that the Department review its decision to withhold the remainder of the information she requested on the basis that it is exempt from disclosure under section 44 of the Act.
5. In a letter dated 14 March 2005, the Department outlined its' internal review decision which was to uphold the original refusal on the basis that the remainder of the requested information is exempt under section 44 of the Act. The Department explained that:

...data can only be lawfully disclosed if it is sufficiently abstract from the information sent to the Chief Medical Officer by doctors so as not to be caught by the prohibition on disclosure in regulation 5 of the Abortion Regulations 1991. Where small numbers of cases are involved, as is the case with data on individual age bands for 11, 12 and 13 year olds, we consider that we cannot legally publish information which may enable individuals to be identified or which could be put together with other information which is, or may, become, available.

The Investigation

Scope of the case

6. In a letter dated 29 March 2005 the complainant requested that the Commissioner carry out a review of the Department's application of section 44 of the Act to the remainder of the information regarding how many 11, 12 and 13 year olds had abortions in England and Wales in 2003/2004. In particular the complainant asserted that she did not understand in what way the potential for identifying individuals who have had abortions would be greater in the case of 11 to 13 years olds than through any of the statistics published by the Department. For instance, the complainant pointed out that that the Department published the fact that one 16 year old had an abortion in the Channel Islands in 2002/03, and that six 16 year olds has abortions in the Isle of Man in 2002/03. Further the complainant suggested that in her view it would be easier to identify a 16 year old in the Isle of Man (population approximately 75,000) than an 11 year old across both England and Wales.

7. On receipt of the complaint the Commissioner undertook to investigate the Department's application of section 44 of the Act to the remainder of the information requested by the complainant.
8. During the course of the Commissioner's investigation the Department further submitted that section 36(2)(c) and section 40(2) of the Act also apply to the information requested in this case. The Commissioner's review of the Department's application of these exemptions is also outlined below.

Chronology

9. In a letter dated 31 August 2005 the Commissioner asked the Department to clarify its' application of section 44 to the remainder of the requested information. In particular, the Commissioner asked the Department how the disclosure of numerical data would allow individuals to be identified and how disclosure of numerical data when put together with other information which is, or may become available would enable individuals to be identified. Given that the Department already publishes numerical data on this subject by individual age group, the Commissioner asked the Department to explain how further disclosure of numerical data would breach the Department's obligations under Regulation 5 of the Abortion Regulations 1991.
10. The Department replied in a letter dated 10 October 2005. In this letter the Department explained the background which informed its decision to no longer publish abortion data involving small numbers and to withhold the requested information. The Department acknowledged that individuals could not be identified from numerical data in isolation. However, the Department argued that in practice numerical data could lead to the identification of an individual patient or doctor when it is read together with other information which might become available. The Department outlined a particular case where it argued this had occurred. However, on considering the Department's explanation of the circumstances of that case the Commissioner found that it relates to a different category of information and that it was not the count itself, but rather other information that came into the public domain which eventually led a doctor to identify himself. Whilst there was significant media interest at no point was the identity of the patient disclosed or deduced.
11. The Department asserted that by publishing data of 10 and above only, it is much harder to identify individuals and therefore minimises the risk of breaching the Abortion Regulations. The Department submitted that its view is supported by the Office of National Statistics (the "ONS") guidance on publication of abortion data.
12. In an email of 29 November 2005, the Commissioner asked the Department to provide him with a copy of the requested information, that is the number of abortions performed in England and Wales by individual age group (11, 12 and 13 year olds) during 2003 and 2004.
13. The Department replied in an email of 22 December 2005. In this reply the Department asserted that disclosing this information to the Commissioner for the purposes of his investigation would place the Department in contravention of the Abortion Regulations and in particular Regulation 5.

14. In an email dated 13 January 2006, the Commissioner requested information regarding whether an official in the Department, including the Chief Medical Officer has ever been found in breach of the Abortion Regulations. The Commissioner requested the details of any case in which the Abortion Regulations were found to have been breached, but in particular any case involving a breach of Regulation 5. In addition, the Commissioner requested further clarification as to why the Department considers that publishing numerical data where the variables are young ages <15 at a national level would breach the Abortion Regulations, whereas publishing the same data for older age groups at a national level would not breach the Abortion Regulations. The Commissioner also invited the Department to put forward any further submissions it wished to in relation to its application of section 44.
15. The Department responded in an email on the 27 January 2006. In this response the Department stated that it was not aware of any prosecutions for breach of the Abortion Regulations. In relation to the second point raised in the Commissioner's letter of the 13 January 2006, the Department asserted that when it made the decision to change the way it publishes data by age, it changed the level of publication for older age groups as well as younger age groups in line with the ONS report on the publication of abortion data. The Department explained further that whilst younger and older age groups now have a different level of suppression applied to them, in either case figures will be suppressed if the numbers are small and the cells are considered to be unsafe. According to the ONS guidance unsafe cells are counts of abortions that are:
- Zero unless no other value is logically possible
 - Less than 5 for Government Office Region in England, the country of Wales or any larger geography
 - Less than 10 for any geography smaller than the Government Office Region in England or the country of Wales
 - Less than 10 for highly sensitive variables
 - Associated with either 1 or 2 practitioners
 - Associated with either 1 or 2 hospitals

The highly sensitive variables are:

- Young ages (less than 15 years of age)
- Late gestation (over 24 weeks)
- Procedure by gestation
- Medical conditions

The ONS guidance provides advice for managing the disclosure risks associated with unsafe cells such as table redesign, using area of residence rather than place of termination in constructing statistics, suppression, restricting geographies and categories and aggregating data over several years. This guidance was developed to assist the Department of Health and the new Health and Social Care Information Centre with interpreting the National Statistics Code of Practice and associated protocols in the handling of health statistics across the health

community, in a way that balances data confidentiality risks with the public interest in the use of the figures.

16. The Department asserted that since the publication of ONS's guidance, the Department has applied ONS recommendations to all request for such data. In this email, the Department also stated that it had no further points to make however, that it would provide answers to any further questions the Commissioner may have.
17. On the 6 February 2006 the Commissioner issued an Information Notice to the Department of Health. The Information Notice required that the Department provide the Commissioner with a copy of the requested information within the time for compliance specified in that notice.
18. The Department complied with the Information Notice on 8 March 2006 by supplying the Commissioner with a copy of the requested information. At this time the Department also stated that it wished to apply additional exemptions under the Act to the requested information. In particular, the Department asserted that it wished to apply section 40(2) and section 36(2)(c). The Department also put forward its views in relation to how these exemptions apply.
19. In brief, the Department argued that the requested information is exempt under section 40(2) of the Act because the information is personal data of a third party other than the requestor and disclosure would breach the first data protection principle of the Data Protection Act 1998 (the "1998 Act") pertaining to the fair and lawful processing of personal data. The Department asserted that the information requested is personal data because individuals can be identified by reference to the information sought together with other information held by the Department as data controller. Further, in the Department's view the information is "sensitive personal data" as defined in section 2 of the 1998 Act.
20. In relation to section 36(2)(c) the Department argued that its role in producing the abortion statistics in order to provide the public and health care professionals with information that can be used for analysing trends and planning services falls within the scope of the conduct of public affairs. Further, the Department argued that disclosure of the information requested would inhibit its ability to decide when and in what form it publishes abortion data (e.g.: in an aggregate form). In particular the Department asserted that:

...if aggregate reporting was necessary for this cycle, but was not possible (because of disclosure already made pursuant to [the Complainant's] request), this in turn could prejudice the reporting cycle for other categories of highly sensitive abortion statistics- i.e. as at 2006 it may not be possible to report aggregated figures for the 2003 – 2005 period. Instead a different cycle (commencing in 2005) would need to be identified for other categories of highly sensitive information...In these circumstances the release of information for the purposes of planning service requirements would be prejudiced. The Department thus considers that the exemption at section 36(2)(c) also applies.

21. In applying the public interest test the Department stated that the public interest in maintaining the exemption under section 36(2)(c) in relation to the statistical information that has not already been provided to the complainant outweighs the public interest in disclosure of this information. According to the Department in carrying out this balancing exercise it took into account the principles underpinning the recommendations in the ONS report, and the need to ensure the publication of information is consistent with those principles in order to permit service planning to be undertaken by the Department and other healthcare authorities and organisations.
22. On the 16 January 2007 the Department made a further submission to the Commissioner following a meeting of 5 December 2006. At this meeting the Commissioner requested further examples of how for instance disclosure of "0" counts could lead to the identification of an individual and further examples of how the release of the requested information would affect the Department's ability to publish information in future. In relation to the former, the Department explained that for example if a woman decided to have an abortion but didn't want to tell her family or friends the reason for it, and so instead informed them that it was necessary to save her life (statutory ground F), however, the statistics on Abortions published by the Department in relation to statutory grounds show that in that year no abortions under statutory ground F were conducted this would reveal that a different statutory ground was the reason. The Department suggested that this could potentially inform anyone who knows the patient and thus compromise her decision and situation. In relation to the latter question the Department asserted that whilst a detailed log of all request for data is kept to ensure that two or more different requests cannot be used simultaneously to deduce figures that should not be released (small numbers) in the long term there is a risk that as staff change, it may be possible for someone not fully aware of what has previously been disclosed to release data that should be suppressed. The Department stated that a consistent policy of aggregating years minimises the risk of inadvertently releasing numbers that should be suppressed, and provides better information and a more consistent picture for healthcare authorities and organisations and the public.

Findings of fact

23. Under Regulation 4 of the Abortion Regulations 1991 (the "Regulations"), any doctor who performs an abortion must send the Chief Medical Officer (CMO) notice of the termination along with the other information relating to the termination which is specified in the Regulations. The Department of Health extract data from the forms and aggregate to a level which allows publication. According to the Department the forms are held for three years, although it does hold individually identifiable data on abortions since the Abortions Act came into effect in 1968.
24. The Department pointed out that the woman's date of birth is included in the notice of the termination. The Department also explained that Regulation 5 of the Regulations prohibits disclosure of the notices given and the information furnished to the CMO under the Regulations, except as permitted by the Regulations.

25. Regulation 5 allows for disclosure to an officer of the Department of Health authorised by the CMO of that Department, or to an officer of the Welsh Office authorised by the CMO of that Office. Data derived from the information given to the CMO under the Regulations is published annually by way of the Abortion Statistics.
26. The Department of Health has been publishing abortion statistics since 1968. Up to, and including 2002, this annual publication included detailed abortions data including small numbers for those under 15 years of age. Since 2003 the Department has published totals for 14 year olds in 2003, 2004 and 2005 and the total number of abortion performed for those under 14 years old in 2003, 2004 and 2005. A three year aggregate number of abortions performed for 13 year olds between 2003-2005 and a three year aggregate for those under 13 for the same period was published in 2006.

Analysis

Exemption 36(2)(c)

27. Section 36(2)(b) and (c) provides that information is exempt if disclosure would, or would be likely to inhibit the free and frank provision of advice; or the free and frank exchange of views for the purposes of deliberation or would otherwise prejudice, or would be likely to prejudice the effective conduct of public affairs.
28. Information can only be exempt by virtue of section 36 if 'in the reasonable opinion of a qualified person' disclosure would be likely to lead to the above adverse consequences. In order to establish that the exemption has been applied correctly the Commissioner:
 - Established that an opinion was given
 - Ascertained who is the qualified person
 - Ascertained when their opinion was given
 - Considered whether the opinion was both objectively reasonable and reasonably arrived at.
29. The Commissioner has established that the qualified person was the Secretary of State for Health, Patricia Hewitt and that her opinion was sought on the 7 March 2006 and given on the 10 March 2006. The Department informed the Commissioner that this opinion was also agreed by Caroline Flint Parliamentary Under Secretary of State for Public Health on the 8 March 2006 and Liam Byrne Parliamentary Under Secretary for Care Services on the 7 March 2006. The Commissioner has confirmed that the qualified person at the Department has considered whether disclosure of the requested information would, or would be likely to prejudice the effective conduct of public affairs and in doing so certified that in their opinion disclosure of the requested information would prejudice the effective conduct of public affairs under section 36(2)(c).
30. According to the Department the qualified person considered that the purpose of producing the abortion statistics is to provide information to the public and health

professionals that can be used for analysing trends and planning services and that this is a matter that falls within the ambit of 'the conduct of public affairs'. The qualified person considered that if aggregate reporting was necessary for a period such as 2003-2005 but was not possible because of disclosure already made such as the information requested in this case, this would also impact on the reporting cycle of other age categories. A different reporting cycle would need to be identified and in these circumstances the release of information for the purposes of planning service requirements would be prejudiced.

31. The Department has explained that current ONS guidance identifies that data in relation to those under 15 years of age is sensitive data and therefore figures below 10 over the whole of England and Wales should not be published. Due to the relatively small number of abortions carried out in the 11- 13 year old category the Department does not publish these figures by year but publishes an age '14' figure and an under '14' figure. According to the Department, this policy will continue unless there is an increase in number in the under 14 figure which would allow for publication under the ONS guidelines. As outlined above at paragraph 26, a three year aggregate number of abortions performed for 13 year olds between 2003-2005 and a three year aggregate for those under 13 for the same period was published in 2006.
32. However, the Commissioner is minded that in respect of much of the information requested the Department's decision whether or not to publish such data does not appear to adhere to the ONS guidance. The Department has argued that even where disclosure of information in a particular year covered by a three year reporting cycle would not breach the ONS guidance, and therefore it is disclosed, where a subsequent year's count is less than 10 publication of a three year aggregate figure by three year periods would then not be possible. For example, should the figures for 12 year olds for the years 2003 and 2004 respectively, fall within the ONS guidelines and therefore be published and then as part of its usual reporting cycle the Department published the aggregate count for 2003-2005, where there is a small number in 2005 one could simply work back to reveal that small number. Therefore, even publication of figures for 2003 and 2004 which appear not to breach the ONS guidelines could impact on the Department's ability to adhere to its three year aggregate reporting cycle. According to the Department, this would prejudice the carrying out of its function in respect of the publication of such information to inform service planning.
33. In the case of *Guardian & Brooke v The Information Commissioner & the BBC*, the Information Tribunal considered the sense in which the reasonable person's opinion under section 36 is required to be reasonable. It concluded that, "in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at." (para 64) Regarding the first point, the Tribunal stated that, "we have no doubt that in order to satisfy the statutory wording the substance of the opinion must be objectively reasonable" (para 60). It rejected the suggestion that in order to be reasonable, an opinion need only be 'an opinion within a range of reasonable opinions', but acknowledged that, "on such matters there may (depending on the facts) be room for conflicting opinions, both of which are reasonable." (para 60)

34. The Tribunal proposed that the provision that section 36 is only engaged when the qualified person is of a reasonable opinion is a protection, which, “relies on the good faith and proper exercise of judgement of that person.” (para 64) It argued that this protection would be reduced if it the qualified person wasn't required by law to give proper consideration to the formation of the opinion and therefore concluded that the qualified person should take into account relevant matters and ignore irrelevant matters. It further noted that if the process were not taken into account, the reasonableness of an opinion would very often be basically unchallengeable, because, by definition, the opinion is a judgement on what might happen in the future.
35. It is debatable whether the arguments put forward by the Department in this case demonstrate that disclosure of the information would, or would be likely to prejudice the effective conduct of public affairs, indeed there are strong arguments which suggest that disclosure of the information could enhance public affairs on a local level, by revealing more detailed information to assist local health authorities with future planning. Further to the extent that the Department's decision not to publish much of the requested information does not appear to adhere to the ONS guidance the Commissioner does not accept that such a disclosure would therefore oblige the Department to amend its aggregate reporting cycle thereby prejudicing its reporting function (this point is further considered at paragraph 41 below).
36. However, in this case the Commissioner is of the view that the qualified person's opinion can be said to be objectively reasonable and further that there is no information before him that would suggest that the opinion was in any way unreasonably arrived at. Therefore in this case the Commissioner has not sought to challenge the opinion of the qualified person as to the prejudice under section 36(2)(c). In reaching this view the Commissioner has considered in particular the Information Tribunal's view in *Guardian & Brooke v The Information Commissioner & the BBC* that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice would occur, on the balance of probabilities and therefore that the reasonable opinion, “does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant” (para 91).
37. Section 36(2)(c) is however a qualified exemption and therefore after establishing whether disclosure of the requested information would or would be likely to prejudice the effective conduct of public affairs a public authority must carryout the public interest test as outlined in section 2(2) of the Act. In this case the Department determined that the public interest in maintaining the exemption outweighed the public interest in disclosure.
38. The Commissioner has undertaken a consideration of the public interest test. In doing so the Commissioner weighed the public interest in maintaining the exemption against the public interest in disclosure as outlined under section 2(2) of the Act. Whilst the Commissioner has given due weight to the reasonable opinion of the qualified person when assessing the public interest, he has also

considered the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.

39. In the Commissioner's view there is a strong public interest in preserving the confidentiality of both patients and physicians. The Commissioner notes that the ONS guidance aims to balance the public interest in protecting the confidentiality of both patients and physicians with the public interest in making such data available to the public and healthcare authorities. Clearly, there is a public interest in allowing the Department to carry out its functions in relation to publication of this information in a way which takes account of the need to protect the privacy and confidentiality owed to both patients and physicians.
40. The Commissioner agrees with the Department that there is a public interest in making information available which will assist both the Department and other healthcare authorities and organisations to undertake service planning and therefore that there is a public interest in preserving the process through which such information is provided.
41. In considering the balance of the public interest in this case the Commissioner has also considered the level of prejudice to the Department's reporting function and considers that the level of prejudice whilst sufficient to engage the exemption is not sufficient to warrant the maintenance of the exemption when weighed against the public interest in disclosure. The Department argues that to the extent that disclosure in this case may force it to adopt differing reporting practices would or would be likely to prejudice its ability to provide such information. However, the Commissioner notes that an aggregate reporting cycle is only one method of suppression that the Department may adopt in providing such information to the public and to healthcare authorities for planning purposes. Further there are other methods of suppression that the Department could adopt that would allow it to adhere to its current three year aggregate reporting cycle.
42. In the Commissioner's view there is a public interest in access to detailed information on the number of abortions carried out by age group to allow for service planning. In fact disclosure of the requested information would provide health authorities and organisations with more detailed information than is currently available on which to undertake service planning. In respect of the information requested in this case, as outlined above the Commissioner is of the view that there is a public interest in the use of the figures for instance to inform service planning by the Department and other healthcare authorities and organisations. However, the Commissioner is also of the view that there is a general public interest in access to information which may assist the public to participate more meaningfully in the development of government policy and to hold government to account in respect of its policies and programs. On balance the Commissioner is of the view that the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information.

Exemption 40(2)

43. The exemption under section 40(2) allows a public authority to withhold information requested if that information is personal data of a third party other

than the individual making the request and disclosure would breach any of the data protection principles under schedule 1 of the Data Protection Act 1998. Personal data as defined by the 1998 Act is:

“data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”

44. The Department is applying section 40(2) of the Act on the basis that the numerical information when combined with other information with the Department holds is personal data under the 1998 Act (the Abortion Notification Forms are held by the Department for a period of three years and contain the woman's date of birth).
45. The numerical information that has been requested is not personal data, to the extent that none of the individuals concerned can be identified by someone who possesses that information alone. The Abortion Notification forms, from which the numerical information is gleaned and which contains the individual's date of birth, are personal data – but the disclosure requested will be of statistical information *extracted from* that personal data. The Department accepts that an individual cannot be identified by the requested information alone.
46. Whilst the information covered by the request in this case namely the age of the individual concerned and the year that the abortion was carried out in respect of the whole of England and Wales is sufficiently removed from the information contained on the abortion notification form and as such does not amount to personal data in and of itself the Commissioner has considered the likelihood of an individual being identified from this information and other information which the data controller reasonably believes may come into the possession of a member of the public. In reaching a view on this point the Commissioner considered the population size involved, the geographical area concerned, the size of the cell count and the scenarios presented by the Department.
47. In larger populations it is more difficult to identify individuals from the data released in such tables. According to the 2001 Census for England and Wales females aged 11 numbered 334,169, females aged 12 numbered 332,155 and females aged 13 numbered 337,034.
48. The Department was not able to suggest a specific example by reference to the information requested in this case and the other information contained in the tables it publishes on abortions which would highlight for the Commissioner how information such as that requested in this case could be combined with other information contained in another table or available to a member of the public to reveal the identity of an individual patient or doctor.

49. The Commissioner accepts that even where the population size is relatively large there would be a greater likelihood of identification where that population is contained within a small geographic area. For instance, one 11 year-old who had had an abortion in a small geographic region, where the statistic coupled with a certain amount of local knowledge could increase the risk of identification. However, the Commissioner is of the view that for an individual to use the requested information at a national level to identify an individual patient or doctor a considerable amount of additional knowledge about the person would be needed and the likelihood of this occurring is remote. In the Commissioner's view the Department has not sufficiently demonstrated that there is a reasonable likelihood of an individual being identified from the information requested in this case and other information which the data controller reasonably believes may come into the possession of a member of the public.
50. The Commissioner notes that simply because a cell contains small numbers, the cell is not automatically suppressed. The ONS guidance makes it clear that a public authority should consider each case on its merits applying the relevant guidance. Further, for example, the Scottish Centre for Infection and Environmental Health published statistics on the incidence of HIV/AIDS. For the three month period from October 2004 to December 2004 a table sets out new reported incidences of HIV infection by health board and method of infections. Many of the cells contain small numbers and in many cases number of 1 or 2. The Commissioner notes that in this case no suppression took place despite the sensitive nature of the information and the fact that the geographical area was smaller than in the present case (the table is by health board).
51. In the Commissioner's view reliance on a policy of non-disclosure in respect of such information is not a sufficient basis to withhold that information when requested under the Act.
52. Where there is a "0" count the Commissioner is minded that according to the ONS, in considering the guidance on publication of abortion statistics an organisation should undertake its own analysis of the actual risks in the context of both the ONS guidance and the effects of the actual information. However, in respect of this type of figure the information is not personal data as it does not relate to a living individual who can be identified by it or any other information in the possession, or likely to come into the possession of the data controller or any other person.
53. The Commissioner notes that the Department also stated that the information is 'sensitive personal data' as defined by section 2(e) and (f) of the DPA, section 2(e) and (f) states that personal data relating to a persons physical or mental condition or their sexual life is sensitive personal data. The Commissioner acknowledges that if the information fell within the definition of personal data in section 1 of the 1998 Act it is likely that the information would constitute sensitive personal data as defined by section 2 of the DPA Act.

Exemption 44

54. Section 44 of the Act allows a public authority to withhold information if disclosure by the public authority is prohibited under any other enactment. The Department has asserted that disclosure of the information requested would breach their obligations under Regulation 4 of the Abortion Regulations and therefore would breach section 44(1)(a) of the Act.
55. The Department argued that disclosure of the number of abortions performed for 11, 12 and 13 year olds in England and Wales in 2003/2004 is prohibited by Regulation 5 of the Abortion Regulations 1991. The Commissioner notes that these Regulations were amended in 2002 and the amended version of Regulation 5 of the Regulations states that:

5. A notice given or any information furnished to a Chief Medical Officer in pursuance of these Regulations shall not be disclosed except that disclosure may be made –

(a) for the purposes of carrying out their duties-

(i) to an officer of the Department of Health authorised by the Chief Medical Officer of the Department , or to an officer of the Welsh Office authorised by the Chief Medical Officer of that Office, as the case may be; or

(ii) to the Register General or a member of his staff authorised by him; or

(iii) to an individual authorised by the Chief Medical Officer who is engaged in setting up, maintaining and supporting a computer system used for the purpose of recording, processing and holding such a notice or information; or...

56. The Commissioner understands that the Abortion Notification form contains the following:
- Details of practitioner terminating the pregnancy (name, address, GMC number)
 - Certification including the name and address of the two doctors who provide the opinion to say that the woman has grounds for an abortion.
 - Patient's details (date of birth, postcode, ethnicity, marital status, hospital/clinic number or NHS number, parity – number of previous pregnancies resulting in (i) live or still birth, (ii) spontaneous miscarriage or ectopic pregnancies, or (iii) an abortion)
 - Treatment details (name and place of termination, funding (e.g. NHS, NHS agency or Non-NHS), feticide, surgical terminations, medical terminations)
 - Gestation
 - Grounds
 - Selective termination
 - Chlamydia screening
 - Complications

- Death of woman
57. While the Regulations do not make express provision for statistics to be released, abortion statistics have been published from this information since 1968. According to the Department this is because the data is considered to be anonymised and different from the information sent to the CMO. Further according to the Department, neither an official in the Department nor the CMO has ever been found to be in breach of these Regulations. In fact the Department has published these types of figures by age group since 1968. The total number of abortions performed in England and Wales each year is information which is gleaned from the Abortion Notification forms given to the CMO under Regulation 4 of the Abortion Regulations. Specifically, the Department gleans this information using the patient's date of birth which is included in the Abortion Notification form. The Commissioner is minded that if the Department's view is correct and the publication of such data by age group at a national level is in breach of Regulation 5, then in essence the Department would be in breach of the Regulations each time it publishes data by age group which is gleaned from information contained in the Abortion Notification forms held by the Department.
58. The Commissioner notes that from the wording of section 5, it would appear that only the information directly supplied to the CMO whether on the certificate or otherwise is caught by the statutory prohibition.
59. It is for the above reasons that the Commissioner finds that disclosure of the information requested would not breach the Departments obligations under Abortion Regulation 5.
60. In reaching his decision the Commissioner considered:
- The guidance provided by the ONS on publishing abortion data.
 - The fact that the Department publishes this information for other age groups and has done so since 1968 without breaching the Abortion Regulations. The statutory bar is worded broadly and if it applies to statistics gleaned from the certificate than any publication by any age group or other category such as gestation period and reason for termination would also be in breach of the bar.
 - The wording of the regulation refers to information supplied directly to the CMO and not the manipulation of this information to produce statistics.

The Decision

61. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with requirements of the Act. The Department breached section 1(1) of the Act in that it incorrectly applied the exemptions under sections 36(2)(c), 40(2) and of the Act to the information requested in this case.

Steps Required

62. In view of the matters referred to above the Commissioner hereby gives notice that in exercise of his powers under section 50 of the Act he requires that:
63. The Department shall, within 35 calendar days from the date of this notice, disclose the requested information in accordance with its duty under section 1(1) of the Act.

Failure to comply

65. 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

66. 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 18th day of March 2008

Signed

**Richard Thomas
Information Commissioner**

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

Legal Annex

Relevant Statutory Obligations under the Act

3.1 **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.

3.2 **Section 36(2)(c)- Effective conduct of public affairs**

36. - (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

3.3 Section 40(2)- Personal information

40. - (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.

3.4 **Section 44- Prohibitions on disclosure**

44. - (1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

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

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