

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 19 March 2008**

**Public Authority:** St George's Healthcare NHS Trust  
**Address:** St George's Hospital  
Blackshaw Road  
London  
SW17 0QT

### Summary

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The complainant requested the names of the doctors who had previously worked in a particular hospital department between the years 2000 and 2004. The public authority initially refused the request on the basis of section 12 but in subsequent correspondence confirmed that it was withdrawing its reliance on section 12 and instead refused to disclose the information citing section 40 of the Act. The Commissioner has concluded that the public authority was correct to withhold the information on the basis of section 40 but breached section 17 of the Act by failing to provide the complainant with an adequate refusal notice within 20 working days of the date of her request.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. On the 8 September 2006 the complainant requested the names of registrars who had worked for a particular consultant plastic surgeon between the years 2000 and 2004. (The complainant had been a patient of this surgeon during this period).
3. The Trust responded to this request on 10 October 2006. The Trust informed the complainant of the name of a female registrar that had been involved in her treatment.

4. However, with regard to the names of the other registrars covered by the scope of the request the Trust explained that it could not disclose these names for two reasons. Firstly, with regard to the names of the registrars between 2000 and February 2004 because of the way in which its human resources records for that period were stored the Trust explained that the cost of interrogating its systems in order to extract the relevant information would exceed the appropriate cost limit and therefore this part of the request was refused on the basis of section 12. Secondly, with regard to the registrars' names post February 2004 the Trust explained it was able to identify these doctors because this information was stored on a different type of human resources system. However, the Trust explained that as these registrars were not involved in the complainant's treatment the names of these staff would be withheld on the basis of section 40 of the Act.
5. The complainant contacted the Trust on 4 and 23 November 2006 expressing her dissatisfaction with the Trust's response of 10 October 2006.
6. The Trust wrote to the complainant on 4 December 2006 and informed her that it had now established the names of the registrars for the period 2000 to February 2004 covered by her request by an alternative means. This alternative means consisted of the duty rosters which had been retained for longer than the two year period. Based on the information contained on the duty rosters the Trust confirmed the name of the female registrar involved in her treatment (see paragraph 3 above) and also provided her with name of a male registrar who was involved in her treatment. However, the Trust also informed the complainant that with regard to the names of the other registrars it had decided to withhold them on the basis of section 40 of the Act. The Trust suggested that in its opinion disclosure of these names would be unfair because these staff had not been involved in the complainant's treatment and disclosure would breach the first data protection principle.
7. The complainant contacted the Trust again on 1 March 2007 in order to complain about the Trust's decision to refuse to disclose the names of the remaining registrars on the basis of section 40.
8. On the 28 March 2007 the Trust informed the complainant that it had conducted an internal review and decided to uphold the decision not to disclose the names of the remaining registrars on the basis of section 40. The Trust explained that it had attempted to contact a number of the registrars whose names had been withheld and suggested to the complainant that the registrars had refused to give their consent to the disclosure of their names.

## **The Investigation**

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### **Scope of the case**

9. On 25 April 2007 the complainant contacted the Commissioner to complain about a number of issues about the way the Trust had handled her request, including

the Trust's decision to refuse to disclose the names of the registrars not involved in her treatment.

10. The Commissioner wrote to the complainant on 9 May 2007 and confirmed that he would investigate the Trust's decision to rely on section 40 of the Act to withhold the names of the registrars not involved in her treatment.
11. However, the Commissioner also informed the complainant that he did not intend to investigate whether the Trust had been correct to initially refuse the request on the basis of section 12 of the Act as the Trust had now discovered an alternate means of identifying who the registrars were (namely the duty rosters) and it was more practical to focus on whether the information should be disclosed or withheld on the basis of section 40. The Commissioner also informed the complainant that it was his understanding that the Trust had provided her with the names of the two registrars involved in her treatment on the basis that it was her personal data and she had a right of access to this information under the Data Protection Act 1998 ('DPA') rather than under the Act.

### Chronology

12. The Commissioner wrote to the Trust on 9 May 2007 and outlined the scope of his investigation in this case. The Commissioner asked the Trust to explain which part of section 40 it was relying on to withhold the names of the registrars and why it considered it to be applicable in this case. The Commissioner also asked the Trust to provide him with further details of the registrars' refusal to consent to the disclosure of their names.
13. The Trust responded on 18 June 2007 and explained that it considered the requested information to be exempt by virtue of section 40(3)(a) because disclosure would breach the first data protection principle. The first data protection principle states that information must be processed fairly and lawfully. The Trust explained that it believed that it would not be fair to disclose the names of the registrars. Its reasons that:

*'...releasing all of the names may have caused undue distress was that the complainant had numerous correspondence with the Trust and [the consultant surgeon] himself. The Trust felt that there was a reasonable chance that each of the registrars would be subject to similar correspondence and that, in the case of the people that were not directly involved in the care of the complainant, this would constitute unnecessary and unjustified distress...although physical or verbal harassment was not relevant, the reasonable chance of the complainant entering into numerous correspondence could be interpreted as harassment that we had a duty to protect those members of staff'.*

14. The Trust also explained that when dealing with this request it had attempted to contact each of the registrars in order to establish whether they would consent to their name and the dates they worked at the Trust being disclosed. However, the Trust explained that the person who had been responsible for contacting the registrars had now left the Trust and it was proving difficult to

locate the responses the Trust had received. Therefore, the Trust explained to the Commissioner that it would provide him with details of the registrars' response within a further 10 working days.

15. The Commissioner received a further letter from the Trust on 28 June 2007. The Trust explained that there were in fact nine registrars who worked for the consultant surgeon during the period of the complainant's request. The complainant had already been provided with the names of two of those registrars under the DPA as they were involved in her treatment. Of the remaining seven, the Trust had either failed to contact or not attempted to contact five of the registrars. The two remaining registrars had both been contacted by the Trust and both refused to consent to their names being disclosed. One of these registrars had simply declined for his name to be given out over the telephone so the Trust was unable to provide the Commissioner with any documentary evidence of this refusal. The other registrar had emailed the Trust to confirm that she did not want her name to be disclosed.

## Analysis

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### Procedural matters

16. Section 17 of the Act states that when a public authority refuses a request on the basis that an exemption in Part II of the Act applies or refuses the request citing section 12 or section 14, then the public authority must issue the complainant with a refusal notice stating that fact. A refusal notice must be issued within 20 working days of receipt of the request.
17. In this case the Trust initially issued a refusal notice citing section 12 as a basis to withhold some of the registrars' names. However, the Trust later explained to the complainant that it had been incorrect to cite section 12 as it could in fact fulfil her request within the appropriate cost limit specified by the Freedom of Information and Data Protection Regulations. The Trust subsequently issued the complainant with a refusal notice citing section 40 of the Act as a basis to withhold the requested information. However, the section 40 refusal notice was not issued to the complainant within 20 working days of the date of her request and therefore the Trust breach section 17(1) of the Act.

### Exemption

18. Section 40(2) provides an exemption for information which is the personal data of any third party where disclosure would breach any of the data protection principles contained in the DPA.
19. In order to rely on the exemption provided by section 40, the information being requested must therefore constitute personal data as defined by the DPA. The DPA defines personal data as:

*'...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 intention of the data controller or any other person in respect of the individual.'*

20. The Commissioner is satisfied that the requested information constitutes the personal data of the individual registrars; clearly disclosure of their names allows the individuals to be identified.

*The first data protection principle*

21. The first data protection principle has two components.

1. Personal data must be processed fairly and lawfully and
2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

22. As noted above, the Trust has argued that disclosure of the requested information is exempt under section 40 because disclosure would be unfair.

23. The Commissioner's guidance on section 40 suggests a number of issues that should be considered when assessing whether disclosure of information would be fair, namely:

- The registrar's reasonable expectations of what would happen to their personal data;
- The seniority of the registrars within the Trust;
- Whether the registrars specifically refused to consent to the disclosure of the requested information;
- Whether disclosure would cause any unnecessary or unjustified distress and damage to the registrars;
- The legitimate interests in the public in knowing the requested information weighed against the effects of disclosure on the registrars.

24. Furthermore, the Commissioner's guidance suggests that when assessing fairness, it is also relevant to consider whether the information relates to the public or private lives of the third party.

25. The Trust's argument that disclosure of the registrars' names would be unfair centres around the unnecessary and unjustified stress that the registrars would suffer if their names were disclosed. This would occur, the Trust have suggested, because the complainant has a history of contacting the Trust as an organisation, and the consultant surgeon directly, in relation to issues relating to the treatment provided to her by the Trust.

26. In response to this point the Commissioner notes that the exemption contained at section 40(2) is applicant blind and requires the public authority to consider

whether disclosure of the information would breach the DPA. Given that the Act is applicant blind, in effect disclosure is considered to be to the world at large. However, in this case, included in that wider public is the complainant who the Trust believe will harass the registrars. Therefore, the Commissioner accepts that the Trust is able to take account of the complainant's potential actions when considering whether disclosure would be unfair.

27. This approach would appear to be inline with the Tribunal's approach in a recent case involving section 40, *London Borough of Camden v Information Commissioner* (EA/2007/0021) in which the Tribunal placed weight on what the requester intended to do with the information. This case involved a request by a journalist, Mr David Leigh, for information about Anti-social Behaviour Orders issued by the London Borough of Camden which the public authority had refused on the basis of section 40 of the Act. In considering the public authority's application of section 40, the Tribunal noted that:

'Though the motive of the requester is, of course, generally immaterial, it is fair to observe that Mr Leigh's intention was to pursue legitimate research into the effectiveness of a comparatively new tool in the penal toolbox.'  
(Tribunal at paragraph 1)

28. Ultimately though the Tribunal concluded that condition 6 of Schedule 2 was not satisfied because in this case disclosure of the requested information was 'not shown to be necessary for the purposes of his research' (Tribunal at paragraph 32),
29. However, even taking into account the potential actions of the complainant following disclosure of the registrars names, the Commissioner is not satisfied that disclosure would necessary result in significant level of distress or harassment to any of the registrars. As the Trust itself has acknowledged, it did not believe that the complainant would subject the registrars to any physical or verbal harassment. Rather the Trust believed that the complainant was likely to enter into numerous correspondence with the registrars which could be interpreted as harassment. In the Commissioner's opinion such behaviour is very similar to that public authorities receive from persistent correspondents and that public authorities have established procedures in place for dealing with such situations. Consequently, the Commissioner believes that if the requested information was disclosed any harassment that would occur would be minimal and manageable.
30. In considering whether the registrars would have had a reasonable expectation that their names would be disclosed under the Act, the Commissioner is mindful of the fact that this request, which was submitted in September 2006, asks for the names of registrars who worked at the Trust for the period 2000 to 2004. Therefore this request is essentially asking for historical data which goes back over a significant period of time and can be clearly distinguished from a request which asks for the names of registrars currently working at a particular hospital.
31. In the Commissioner's opinion, if the Trust received a request for the names of a registrars currently working at one of its hospitals, these registrars should expect

their names to be disclosed under the Act. The Commissioner's basis for this point of view is that the registrars would be in public facing roles and interacting with the public on a daily basis. Furthermore, the Commissioner understands that the registrars are relatively senior in terms of the medical staff; a registrar is a doctor who is in his or her final stages of training towards becoming a consultant. As the Commissioner's guidance on section 40 suggests, more senior staff at a public authority should expect to have more details about them disclosed.

32. However, the Commissioner accepts that it is possible that registrars who previously worked at the Trust may have different expectations in relation to whether the Trust would disclose details of their previous employment. Furthermore, the Commissioner notes that the period covered by this request predates the right of access introduced by the Act in January 2005. Therefore, the Commissioner accepts that the individual registrars covered by the scope of this request may have had an expectation that the fact they previously worked at the Trust would not be disclosed.
33. The Trust's attempts to seek the registrars' consent to disclose of the requested information provides some further details about the expectations of these registrars. The Commissioner has established that the Trust only managed to contact two of the registrars whose names it withheld on the basis of section 40 (see paragraph 15 above). With regard to the doctor who refused to consent verbally, the Commissioner does not feel he can comment on this individual's reasons for refusing consent. With regard to the registrar who provided a written refusal of disclosure in writing, the Commissioner has viewed this document. The Commissioner wishes to note that although this individual refused consent for their name to be disclosed, this was on the basis that although they worked at the Trust during the period covered by the scope of the request, this doctor did not work there during the time the complainant was a patient. Therefore, in the opinion of this doctor their name should not be disclosed because 'my name should be of no relevance to the complainant'.
34. However, as the Commissioner has explained above, the Act is both purpose and applicant blind (save for some sections which do not apply here). Therefore, a request cannot be refused on the basis that the public authority considers that the information will be of no interest or relevance to the requester. Equally, the Commissioner does not think that the potential lack of relevance to the requester is a sufficient reason for a third party to refuse disclosure of their personal data following a request under the Act. Therefore, although some of the doctors may have refused to consent their names being disclosed, the Commissioner does not accept that this refusal can be described as reasonable.
35. As is outlined above, for third party personal data to be disclosed under the Act, disclosure not only has to be fair and lawful but also has to meet one of the conditions for processing in schedule 2 of the DPA. In this case the Commissioner considers that the most relevant condition is six. This states that:  
  
    'the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any

particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.'

36. The Information Tribunal in *House of Commons v Information Commissioner and Norman Baker MP* (EA/2006/0015 and 0016) commented on how condition 6 should be interpreted and applied. The Tribunal found that the application of condition 6:
- ‘involves a balance between competing interests broadly comparable, but not identical, to the balance that applies under the public interest test for qualified exemptions under FOIA. Paragraph 6 [i.e. condition 6] requires a consideration of the balance between: (i) the legitimate interests of those to whom the data would be disclosed which in this case are members of the public...and (ii) prejudice to the rights, freedoms and legitimate interests of the data subjects which in this case are MPs’. (Tribunal at paragraph 90).
37. The Tribunal also found that ‘because the processing must be “necessary” for the legitimate interests of members of the public to apply we find that only where (i) outweighs or is greater than (ii) should personal data be disclosed’. Thus the burden of proof built into the public interest test that is applied to qualified exemptions is reversed.
38. The Tribunal’s approach to condition 6 has influenced the Commissioner’s view in this case. As is clear from the above, the requested information relates to the professional and public life of the registrars rather than their private lives and therefore any invasion of privacy would be limited. Furthermore, the Commissioner acknowledges that the information itself is simply factual data detailing the names and dates certain doctors held the position of registrar in the plastics department at this particular hospital. That is, the information is not about decisions the doctors made or opinions they may have expressed. Furthermore, the Commissioner believes that there is an underlying legitimate interest in openness and transparency; this could be particularly true of public authorities, such as the Trust, who have a duty of care towards patients.
39. However, the Commissioner believes that these issues must be weighed against the following factors: As the Commissioner has argued above, he accepts that these doctors may have an expectation that the fact they held a particular position in this Trust at some point over the last five years would not be disclosed. Whilst registrars should expect their current position to be disclosed, to disclose details of where they have worked in the past would, to a small degree, represent an infringement of their privacy. Furthermore, whilst the Commissioner obviously acknowledges that the general principle of openness and transparency is a legitimate one, he has not identified any other separate and distinct legitimate interest in favour of disclosure of this specific information.
40. For example, the Commissioner believes that the general public has a strong legitimate interest in access to information about the proper and efficient use of public money in the NHS, especially given the fundamental role the NHS plays in delivering healthcare for the country as a whole. Therefore, there would be a



legitimate argument for disclosure of information relating to how individuals at public authorities had spent public funds, particularly if there had been concerns raised about the management of that money (e.g. decision notice FS50116822 which concerned issues of alleged financial mismanagement at a hospital trust). However, the Commissioner does not see how disclosure of this specific information which is simply historical data which details the names of doctors who worked in particular department at a hospital would add to a particular debate or advance a specific legitimate interest of the public.

41. In conclusion, the Commissioner does not accept that disclosure of the requested information would be unfair for the reasons advanced by the Trust (e.g. concerns over what the complainant would do with the information). However, he does acknowledge that some of the registrars may have expected that details relating to their previous employment with the Trust would not be disclosed.. Furthermore, in this case the Commissioner does not believe that the interests of those to whom the information would be disclosed (i.e. the general public) do not outweigh those of the registrars and therefore a condition in schedule 2 of the DPA is not met.

## The Decision

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42. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The Trust was correct to withhold the names of the registrars covered the by scope of the complainant's request on the basis of section 40 of the Act.
43. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The Trust breached section 17(1) of the Act by failing to provide the complainant with a refusal notice within 20 working days which specified an exemption upon which it subsequently relied upon to withhold the requested information.

## Steps Required

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44. The Commissioner requires no steps to be taken.

## Right of Appeal

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45. 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](mailto: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 19<sup>th</sup> day of March 2008**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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

## **Legal Annex**

### **The Freedom of Information Act 2000**

**Section 1(1)** provides that –

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

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

**Section 40(2)** provides that –

“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.”

**Section 40(3)** provides that –

“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.”

**Section 40(4)** provides that –

“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).”

## **The Data Protection Act 1998**

### **Part I**

1) In this Act, unless the context otherwise requires—

“personal data” means 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;

### **Schedule 1**

The first principle states that:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

### **Schedule 2**

Conditions relevant for purposes of the first principle: processing of any personal data

1. The data subject has given his consent to the processing.

2. The processing is necessary— (a) for the performance of a contract to which the data subject is a party, or (b) for the taking of steps at the request of the data subject with a view to entering into a contract.

3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4. The processing is necessary in order to protect the vital interests of the data subject.

5. The processing is necessary—

(a) for the administration of justice

- (b) for the exercise of any functions conferred on any person by or under any enactment
- (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department
- (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

**6.** — (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.