

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 2nd June 2008

Public Authority: Hertfordshire Partnership NHS Trust
Address: 99 Waverley Road
St Albans
Hertfordshire
AL3 5TL

Summary

The complainant is acting on behalf of the family of a deceased patient ("Mr A"), and requested a copy of a Root Cause Analysis Report into the circumstances surrounding the deaths of Mr A and another patient ("Ms B"). This request was made under the Freedom of Information Act 2000 (the "Act") to Hertfordshire Partnership NHS Trust (the "Trust"). The Trust provided an edited version of the Report, stating that some information had been withheld under sections 31, 41, and 44 of the Act. During the course of the investigation the Trust also cited section 40 to withhold some of the information in question. The Trust also informed the Commissioner that it had disclosed the edited version of the Report to the complainant on a discretionary basis, outside of the Act. Therefore the Commissioner has focused his investigation on the parts of the Report not already disclosed by the Trust. After considering the details of the case the Commissioner decided that parts of the withheld information were correctly withheld under sections 40 and 41 of the Act. However, the Commissioner concluded that a small part of the withheld information was not exempt under any of the exemptions cited by the Trust. He also noted that the Trust had not cited an exemption to a small amount of the withheld information. He therefore believes that these sections of the Report should be disclosed. The Commissioner also decided that the Trust did not meet the requirements of sections 17(1), 17(1)(b) and 17(7) of the Act.

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. On 24 March 2006 the complainant wrote to the Trust and requested a copy of:

"Root Cause Analysis Report into serious adverse events... [Involving] Service Users [Mr A and Ms B]. Edenbrook Ward Lister Hospital. Dated December 2005."

This request was made under the Act. For ease of reference this document shall be referred to as the 'Report' throughout this Notice.
3. On 19 April 2006 the Trust responded to this request. It informed the complainant that it was unable to provide a copy of the Report as, "the investigation report is primarily an internal process and the report is a confidential risk management document... You will appreciate that the Trust has a duty to protect the confidence of individuals named or identifiable in the report." This letter did not refer to the Act or any exemptions. Nor did it inform the complainant of his right to an internal review.
4. The complainant wrote again to the Trust on 19 April 2006 and reiterated the request.
5. The Trust responded on 1 June 2006, and disclosed a copy of the Report to the complainant with certain sections redacted. The Trust stated that it believed that these sections were exempt from disclosure under sections 31, 41, and 44 of the Act. It stated that section 44 was engaged as it believed that the disclosure of some of the withheld information would be a breach of Article 8 of the Human Rights Act 1998. In relation to section 31 the Trust went on to consider the public interest test, and informed the complainant that it believed that the public interest in maintaining the exemption outweighed the public interest in disclosure. The Trust also informed the complainant of his right to complain to the Commissioner.
6. The complainant wrote to the Trust on 27 June 2006 and asked whether it would contact the family of Ms B and ask whether they would be willing to waive their Article 8 rights. The complainant wrote to the Trust again on 29 June 2006 and asked it to explain which exemption had been applied to which redacted section of the Report. The complainant also asked for a further explanation as to the application of the exemptions.
7. The Trust responded in a letter dated 19 July 2006. The Trust refused to contact the family of Ms B. The Trust did not respond to the questions listed by the complainant in his letter of 29 June 2006.

The Investigation

Background

8. The complainant in this case is representing a member of Mr A's family.
9. The Report concerned events in 2005 leading up to the deaths of two individuals (Mr A and Ms B) who had been patients of the Trust on the same ward. These deaths did not occur at the same time.

Scope of the case

10. On 4 July 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the Trust's refusal to disclose the redacted sections of the Report was correct.
11. Although the complainant did not raise the point, the Commissioner also considered the Trust's compliance with section 17 of the Act.

Chronology

12. The Commissioner wrote to the Trust on 13 July 2007 and asked it to provide him with a copy of the Report. He also asked the Trust to provide further submissions to support its use of the exemptions claimed, and clarification as to which part of section 31 it was relying upon. He also asked the Trust whether it wished to consider the application of section 40 to the Report.
13. The Trust responded in a letter dated 13 August 2007. It provided the Commissioner with a copy of the Report, together with its submissions as to its use of the exemptions. The Trust also provided the Commissioner with a copy of its 'Learning from Adverse Events' policy document, which sets out the process by which adverse event reports, such as the one at the centre of this case, are written.
14. The Commissioner wrote to the Trust again in a letter dated 24 August 2006 and asked further questions regarding its use of sections 31 and 41. He asked for a response by 25 September 2007.
15. The Trust contacted the Commissioner by way of a telephone call on 18 September 2007 and requested an extension to the deadline for a response. A new deadline of 15 October 2007 was agreed.
16. The Trust responded to the Commissioner in a letter dated 10 October 2007. The Trust responded to the questions asked by the Commissioner in his previous letter. The Trust also informed the Commissioner that after deliberation it was citing section 40 to some of the information in the Report. Specifically it was citing section 40 in relation to information in the Report which it considered to be the personal data of members of the Trust's staff, as well as family members of Ms B.

17. Following a telephone conversation the Commissioner wrote to the Trust on 20 November 2007. In this letter he asked the Trust to confirm whether its disclosure of the partially redacted Report to the complainant which it had made on 1 June 2006 (see paragraph 5 above) had been made on a discretionary basis, outside of the Act.
18. In this letter the Commissioner also referred the Trust to the Tribunal's decision in *Bluck V The Information Commissioner and Epsom & St Helier University Hospital NHS Trust*,¹ and asked further questions about its use of the cited exemptions. He asked for a response from the Trust within twenty working days.
19. As he did not receive a substantive response within this time limit, the Commissioner wrote to the Trust again on 15 January 2008. He asked the Trust to provide a response to his previous letter, and reminded the Trust of his power to issue an Information Notice.
20. The Trust responded in a letter dated 24 January 2008. It confirmed that the redacted version of the Report had been disclosed to the complainant on a discretionary basis, outside of the Act. It also provided further arguments in regard to its use of sections 31, 40, 41 and 44.
21. The Commissioner contacted the Trust by way of a telephone call on 12 February 2008 and asked the Trust to confirm whether there had been a coroner's hearing into the death of Mr A. He also asked some further questions surrounding the death of Ms B. The Trust informed the Commissioner that there had been a Coroner's hearing in respect of the death of Mr A, and that the Coroner had recorded an open verdict.
22. After carefully considering the information provided by the Trust the Commissioner wrote to the complainant on 19 February 2008 and provided him with the details of the Trust's position. He informed the complainant that after considering the complaint he believed that his primary purpose in making this request was to obtain information in the Report relating to Ms B. He also informed the complainant that the Trust was willing to disclose a small amount of further information, again on a discretionary basis and outside of the Act.
23. In line with his robust case handling policy the Commissioner, where appropriate, can attempt to resolve complaints informally without the serving of a decision notice. In this case the Commissioner informed the complainant that in relation to information in the Report relating to the medical care and history of Ms B it was highly unlikely that he would order the disclosure of this information. In order to support this he referred the complainant to the findings of the Tribunal in *Bluck V The Information Commissioner & Epsom and St Helier University Hospital NHS Trust*. He informed the complainant that the Act is applicant blind, and that disclosure under the Act is to be considered as disclosure to the public at large. Based on these points, he asked the complainant whether he wished to withdraw his complaint.

¹ Tribunal Hearing, EA2006/0090.

24. In a letter dated 28 February the complainant informed the Commissioner that he wished him to issue a Decision Notice on this case. He also advised the Commissioner that he would be providing further submissions.
25. In a letter dated 18 March 2008 the complainant wrote to the Commissioner again. He advised the Commissioner that he was unable to make further submissions until he had seen the further information that the Trust was prepared to disclose. He stated that that disclosure should be made forthwith. The complainant informed the Commissioner that he reserved the right to make any further submissions until he had seen the further disclosure.
26. On 20 March 2008 the Commissioner wrote to the Trust by email and requested further information.
27. On 26 March 2008 the Commissioner wrote to the complainant and advised him that as the Trust was prepared to disclose this further information outside of the Act he was not able to compel it to make this disclosure forthwith. He also informed him that after reviewing the investigation file he believed that he had obtained sufficient information in order to proceed to a Decision Notice.
28. On 31 March 2008 the Trust responded to the Commissioner and provided him with the further information he had requested. It also informed him that it would not make the further discretionary disclosure until after the Decision Notice was issued in this case.

Analysis

Procedural matters

Section 17

29. The Commissioner considered whether the Trust's letters of 19 April 2006 and 1 June 2006 complied with the requirements of section 17.
30. Section 17(1) states that a public authority who is relying on an exemption(s) in order to withhold information must within the time for complying with section 1(1) (i.e. twenty working days) 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.
31. Section 17(7)(a) states:

"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...”

32. The letter of 19 April 2006 did not contain details of the Trust's internal review procedures, as required by section 17(7). Whilst the letter of 1 June 2006 did contain details of the exemptions cited by the Trust, this was provided outside the twenty working days required by section 17(1). Furthermore, although the letter of 1 June 2006 did contain references to exemptions, it did not specify which part of section 31 or section 44 the Trust was relying upon, as required by section 17(1)(b).
33. The full text of section 17 can be found in the Legal Annex at the end of this Notice.

Exemptions

34. In reaching a view on the application of exemptions in this case, the Commissioner has not been able to take into account the unique circumstances of the complainant, or their relationship to Mr A. The Commissioner has had to consider that if the information were to be disclosed, it would in principle be available to any member of the public. This is because the Act is designed to be applicant blind and disclosure under the Act should be considered in the widest sense – that is, to the public at large.
35. There are some unusual circumstances in this case. The request initially focused on the adverse event report into the circumstances surrounding the deaths of two patients. A substantial part of the Report has already been disclosed to the complainant, outside of the Act. Therefore the Commissioner has focused his investigation, and this Decision Notice, on the parts of the Report which the Trust has not already disclosed to the complainant. For clarification, this includes the information which the Trust has informed him it is prepared to disclose outside of the Act. He has not considered whether the other information already disclosed to the complainant should be disclosed under the Act.
36. Therefore the Commissioner has considered the applicability of the exemptions cited by the Trust in relation to the information from the Report not already disclosed (or that which the Trust is prepared to disclose) to the complainant.
37. During the course of the investigation of this case the Trust informed the Commissioner that it was relying upon sections 31, 40, 41 and 44 to withhold the information in question.

Section 41

38. The Trust has applied section 41 to parts of the Report which deal with the medical care and treatment of Ms B. It informed the complainant that it had applied section 41 to this information as the information had been obtained from its staff in confidence, and the disclosure of this information would result in an actionable breach of that confidence.

39. In its correspondence with the Commissioner the Trust has reiterated this argument. To support its position the Trust also drew the Commissioner's attention to the 'Learning from Adverse Events' policy document, which contains guidelines for producing such an adverse event report.
40. 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.
41. 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.
42. The full text of section 41 can be found in the Legal Annex at the end of this Notice.
43. In reaching a view on the applicability of section 41 to the relevant sections of the Report the Commissioner has been mindful of the decision of the Information Tribunal in *Bluck V The Information Commissioner and Epsom & St Helier University Hospital NHS Trust*, which dealt with a request 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.
44. In this instance the Commissioner believes that some of the withheld information in the Report is information obtained from the medical records of Ms B either directly, or indirectly and in such a way as that details of her medical care and condition can be easily identified.
45. The Commissioner has also considered the applicability of this exemption to a limited amount of the withheld information which relates to the medical care and treatment of Mr A. He believes that this information was also obtained 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. As stated above, the Commissioner has had to consider that the disclosure of this information under the Act would be a disclosure to the world at large.
46. Therefore the Commissioner has considered whether the information in the Report which was obtained from the medical records of either Ms B or Mr A, either directly or indirectly and in such a way as that details of her or his medical care and condition can be easily identified, is exempt from disclosure under section 41.
47. Having examined the Report the Commissioner is satisfied that a large proportion of the information contained therein has been drawn directly from the medical records of either Ms B or Mr A. He also believes that the Report contains information which has been written after close consideration of their medical records and has been drawn from these records, or from interviews with the health professionals involved in the medical care and treatment of Ms B and Mr

- A. The Commissioner believes that details of Ms B's and Mr A's medical care and conditions could be easily identified from this information.
48. Whilst the Commissioner acknowledges that the information in the Report is not the actual medical records of Ms B and Mr A, he is satisfied that the information in the Report has been drawn from medical records and from interviews with the relevant health professionals involved in their care, and has been combined into a Report about the circumstances surrounding their deaths. 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 persons as their medical records and has been obtained in connection with the provision of health services to Ms B and Mr A by the Trust.
49. The Commissioner is satisfied that the information which relates to Ms B's and Mr A's medical records is information that was obtained from third parties, as it was obtained from Ms B and Mr A. The Commissioner is also satisfied that the information has the necessary quality of confidence in that it is neither generally accessible nor trivial.
50. The Report contains a substantial amount of information that has been drawn from the medical records of Ms B and Mr A. 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. The Commissioner is also satisfied that the information was imparted in circumstances importing an obligation of confidence.
51. 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.
52. 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.
53. 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.

54. The Commissioner's decision is therefore that the duty of confidence would survive the deaths of Ms B and Mr A and disclosure of this information by the Trust would be a breach of the duty of confidence owed to both patients.
55. 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.
56. 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.
57. 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.
58. In reaching a view on this the Commissioner has had regard for the finding of the Coroner who, the Trust has informed the Commissioner, pronounced an open verdict in respect of Mr A's death. The Commissioner has also considered the information relating to the circumstances surrounding the death of Ms B – although the Commissioner does not believe that it is appropriate to record details of these circumstances in this Notice, as this information is not itself in the public domain.
59. The Commissioner has also noted that no member of staff was reported to a regulatory authority (such as the Police, the General Medical Council or the Nursing and Midwifery Council) as a result of this Report.
60. Having considered these points, 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.
61. 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?
62. 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.

63. 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.
64. 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 Ms B or Mr A, namely the executors or administrators of the estate. It would be unlikely that surviving relatives other than Ms B's or 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 evidence that Ms B and Mr A have surviving family members and he is satisfied that the breach of confidence which would arise from the disclosure would be actionable by them.
65. In view of the above, the Commissioner considers that disclosure of this information is exempt under section 41 of the Act, and that the Trust was correct to apply this exemption in relation to the parts of withheld reports which contain information drawn from Ms B's and Mr A's medical records.
66. Although the Trust has not sought to apply this exemption to them, the Commissioner also believes that the above arguments apply to other parts of the withheld information, namely:
- Page 12 – 4th bullet point on the page.
 - Page 14 – last 5 bullet points on the page.
 - Page 15 – 2nd, 3rd, 4th, and 7th bullet points on the page.
 - Page 19 – last 2 bullet points on the page.
 - Page 24 – 1st bullet point on the page.

[NB: The page numbers & details of paragraph locations are based on the unredacted version of the Report provided to the Commissioner by the Trust on 24 January 2008.]

The Commissioner believes that this information is also exempt from disclosure under section 41. Although the Commissioner does not normally apply exemptions on behalf of a public authority, where that public authority has not applied that exemption, given the sensitivity of the information in question, and the Tribunal's finding in *Bluck V The Information Commissioner and Epsom & St Helier University Hospital NHS Trust*, he believes that in the circumstances of this case it is appropriate for him to do so.

67. The Commissioner has gone on to consider the applicability of section 40 to the withheld information.

Section 40

68. Section 40(2) provides 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.

69. One of the conditions, listed in section 40(3)(a)(i), is where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act 1998 (the "DPA").
70. Personal data is defined in the DPA as data relating to a living individual who can be identified from that data or from that data and other information which is in the possession of, or likely to come into the possession of, the data controller.
71. In its letter to the Commissioner dated 10 October 2007 the Trust stated that it had withheld sections of the Report which contained the personal data of staff members, who could be identified from the Report or, in some cases, from the medical records of Mr A (which had already been disclosed to the complainant). The Trust argued that the disclosure of this information would impact on these staff members both in their personal and professional lives. The Trust also informed the Commissioner that the Report contained some personal data relating to the family of Ms B. Finally, the Trust stated that it believed that the disclosure of this information would not be fair or lawful, and would therefore be in breach of the first principle of the DPA.
72. In order to support its arguments the Trust pointed out that the staff members had provided information to the authors of the Report in the expectation that the Report would only be used for internal purposes. The Trust also drew the Commissioner's attention to its policy document, 'Learning from Adverse Events', which states that information provided by staff in the course of serious untoward incident inquiries will be treated in confidence.
73. After considering the withheld information the Commissioner is of the view that the withheld information contains personal data which can fall into three categories:
 - (a) information relating to statements given by individual members of staff which is attributable to that individual,
 - (b) comments on the actions or performance of individual members of staff, or on small groups of members of staff, and
 - (c) a limited amount of information which relates to individual family members of Ms B, and statements given by them to the authors of the Report.
74. The Commissioner believes that (a) and (c) are personal data of the individuals involved as these statements are directly attributable to those individuals. In relation to (c) some of this information identifies members of Ms B's family. In relation to (b) the Commissioner considers that as this information relates to a small number of staff who worked in a particular section of a named hospital on a particular date, this information is closely linked to the individuals concerned, and is sufficiently identifiable to be considered the personal data of the individuals concerned.
75. Therefore the Commissioner is satisfied that the withheld information contains the personal data of third parties.

76. Having determined that this information constitutes the personal data of third parties, the Commissioner has considered whether the disclosure of the information would contravene the first principle of the DPA. The first principle requires, amongst other things, that the processing of personal data is fair and lawful. The Commissioner has first considered whether the disclosure of this information would be fair.
77. In relation to the staff members who provided information to the authors of the Report, the Trust stated that these employees believed that this information would be treated as confidential and would only be used for the purposes of the internal investigation. They believed that the information was given to the Trust on the understanding that it would not be disclosed to third parties, other than the authors of the Report and those in the Trust who were required to read the Report and undertake actions based on its content. Those who contributed information were, therefore, of the view that it would only be used for internal purposes, i.e. in the investigation and the creation of the Report.
78. During the course of the investigation, the Trust provided the Commissioner with a copy of its 'Learning from Adverse Events' policy in order to support its arguments. The Commissioner has examined this policy and notes that it emphasises that adverse events reports, such as the one at the centre of this case, are to be regarded as an internal confidential risk management document, "produced solely for the purpose of learning from a detailed analysis of an adverse event." The policy document emphasises the confidentiality of the process, and states that, "all involved need to be aware that families will not be given a copy of the Internal Investigation Report."
79. Finally the Trust has argued that the disclosure of the information would affect both the personal and professional lives of the staff members concerned. It therefore does not believe it would be fair or lawful to disclose this information.
80. The Commissioner accepts that where members of staff are interviewed by their employer as part of an investigation into a serious untoward event concerning an individual's medical care, there is likely to be an expectation that the information they provide will generally be treated with a degree of confidence and will not be placed into the public domain. The Commissioner believes that this expectation would be heightened in this case by the Trust informing those who were to be interviewed that the information they provided would be treated as confidential and would only be seen by the people who needed to have sight of it to determine what action should be taken by the Trust.
81. The Commissioner acknowledges that the disclosure of comments on the actions or performance of individual members of staff or on small groups of members of staff, as well as the observations of the authors, contained within the Report would be likely to cause those individuals concerned considerable distress and impact on both their private and their professional lives (for example in their relationships with their colleagues or causing damage to their employment prospects). In reaching a view on this the Commissioner has noted that the observations and comments of the authors of the Report were based on interviews with the staff members concerned – where staff were asked for a free

- and frank contribution in the full expectation that the Report would not be put into the public domain – as well as reference to the medical records of Ms B and Mr A. Furthermore the Commissioner has noted that the staff members concerned were not of senior rank within the Trust.
82. The 'Learning from Adverse Events' policy recognises that in certain circumstances, where the investigation of an incident raises concerns about the actions of a Trust employee the Trust will consider whether to refer the matter on to an appropriate regulatory authority. However, the Trust has informed the Commissioner that no member of staff was reported to a regulatory authority as a result of this Report.
 83. After considering the above points the Commissioner is of the view that the disclosure of the information listed at (a) and (b) in paragraph 73 above would be unfair and therefore in breach of the first principle of the DPA. Therefore he believes that the information is exempt from disclosure under section 40(2) of the Act.
 84. Finally, as listed at paragraph 73 above, having considered the contents of the Report the Commissioner believes that there is a small amount of information which he believes forms the personal data of some of the family members of Ms B.
 85. As the Commissioner has formed the view that some of the information in the Report is the personal data of some of the family members of Ms B, he has gone on to consider whether the disclosure of this information would be in breach of any of the DPA principles.
 86. The Commissioner has primarily considered the first principle of the DPA which requires, amongst other things, that personal data is processed fairly and lawfully. The Commissioner has therefore first considered whether the disclosure of this information would be fair.
 87. Given the nature of the contents and subject matter of the Report, and the likely sensitivity of this information to Ms B's family members, the Commissioner does not believe that it would be appropriate to discuss the nature of this information in any further detail in this Notice. However, given the nature and focus of this report, and the sensitivity of the subject, the Commissioner believes that it would be unfair to place this information into the public domain through disclosure under the Act.
 88. 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 of the DPA. Therefore he believes that section 40(2) is engaged and that this information is exempt from disclosure.
 89. This is an absolute exemption and is therefore not subject to the public interest test as listed in section 2(1)(b) of the Act.

90. The full text of the section 40 exemption can be found in the Legal Annex at the end of this Notice.

Section 31

91. Section 31(1)(g) states that information is exempt if its disclosure under the Act would be likely to prejudice, “the exercise by any public authority of its functions for any of the purposes specified in subsection (2).” In this case the Trust has stated that it believes that the following purpose applies:

- Section 31(2)(e) – the purpose of ascertaining the cause of an accident.

92. The Trust has argued that this exemption is engaged as the disclosure of this information would be likely to deter staff in the future from volunteering to be part of the investigating team, or providing information in the future. This in turn would prejudice their ability to ascertain the cause of an accident.

93. The Commissioner has only considered the application of this exemption to one part of the withheld information which the Trust has not applied section 40 or section 41 to. Specifically, this is the information contained on page 6 of the Report which was withheld by the Trust under section 31 (as noted above, the page number stated here is based on the unredacted version of the Report provided to the Commissioner by the Trust on 24 January 2008).

94. For this exemption to be engaged, disclosure has to prejudice, or be likely to prejudice the purpose stated by the Trust. Therefore the Commissioner has initially considered whether the disclosure of this information would prejudice, or be likely to prejudice, the function of the Trust as listed above.

95. After considering this information in question the Commissioner does not believe that its disclosure would prejudice this function. Therefore he does not believe that in relation to this section of the report the exemption is engaged.

96. The full text of section 31 can be found in the Legal Annex at the end of this Notice.

Section 44

97. The Commissioner has not gone on to consider the applicability of section 44 as he is satisfied that the information to which this exemption has been applied is also exempt under either section 40 or section 41.

Other information contained in the Report

98. After considering the withheld sections of the Report the Commissioner has also noted that there is a small amount of information which the Trust has not cited an exemption in connection with, namely:

- Page 14 – the two lines preceding point 8.2.

- Page 23 – the paragraph preceding point 8.4, the title of this point, and the paragraph following this point.

99. The Commissioner has considered these sections, and does not think that they attract either section 40 or section 41. Therefore he believes that these sections should be disclosed.

The Decision

100. The Commissioner's decision is that the Trust dealt with the following elements of the request in accordance with the requirements of the Act:

It correctly withheld some of the information in question under sections 40(2) and 41 of the Act.

101. However, the Commissioner also decided that the Trust did not deal with the request for information in accordance with section 1(1)(b) of the Act in that it incorrectly relied upon section 31 to withhold some of the information in question. He also decided that the Trust had withheld a section of the Report which it did not apply an exemption to, and having viewed this information he is satisfied it should be disclosed and no exemption applied. Finally, he also decided that the Trust failed to satisfy the requirements of section 17(1), section 17(1)(b) and section 17(7), in that its letter of 19 April 2006 did not contain details of the Trust's internal review procedures, as required by section 17(7). Whilst the letter of 1 June 2006 did contain details of the exemptions cited by the Trust, this was provided outside the twenty working days required by section 17(1). Furthermore, although the letter of 1 June 2006 did contain references to exemptions, it did not specify which part of section 31 or section 44 the Trust was relying upon, as required by section 17(1)(b).

Steps Required

102. The Commissioner requires the Trust to take the following steps to ensure compliance with the Act:

The Trust should disclose the following information –

- Page 6 – the information previously withheld under section 31.
- Page 14 – the two lines preceding point 8.2.
- Page 23 – the paragraph preceding point 8.4, the title of this point, and the paragraph following this point.

[NB: The page numbers & details of information location are based on the unredacted version of the Report provided to the Commissioner by the Trust on 24 January 2008.]

103. The Trust must take the steps required by this Notice within 35 calendar days of the date of this Notice.

Right of Appeal

104. 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 2nd day of June 2007

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

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 section (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 31

- (1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-
 - (a) the prevention or detection of crime,
 - (b) the apprehension or prosecution of offenders,
 - (c) the administration of justice,
 - (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
 - (e) the operation of the immigration controls,
 - (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
 - (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
 - (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
 - (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her

Majesty's prerogative or by virtue of powers conferred by or under an enactment.

- (2) The purposes referred to in subsection (1)(g) to (i) are-
- (a) the purpose of ascertaining whether any person has failed to comply with the law,
 - (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
 - (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
 - (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
 - (e) the purpose of ascertaining the cause of an accident,
 - (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
 - (g) the purpose of protecting the property of charities from loss or misapplication,
 - (h) the purpose of recovering the property of charities,
 - (i) the purpose of securing the health, safety and welfare of persons at work, and
 - (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work."
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

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.