

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 17 March 2008

**Public Authority:** Central and North West London NHS Foundation Trust  
**Address:** Trust Headquarters  
2<sup>nd</sup> Floor  
Greater London House  
Hampstead Road  
London  
NW1 7QY

### Summary

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The complainant made a request to the Trust under the Act for copies of staff witness statements. These statements had been made in regard to a serious untoward incident involving the complainant's late husband. The Trust initially refused to disclose this information citing the exemptions listed at sections 40 and 41 of the Act. In later correspondence the Trust also cited section 30. During the course of the investigation the Trust confirmed to the Commissioner that it was relying upon sections 31, 36, 40 and 41. After considering the circumstances of the case the Commissioner decided that section 40 applied to the information in question. Therefore he has decided that the information should not be disclosed. As he has decided that section 40 applied, the Commissioner did not go on to consider the application of sections 31, 36 and 41.

### 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. The complainant wrote to Central and North West London NHS Foundation Trust (the "Trust") on 14 March 2006. In this letter she referred to an incident in July 2004 involving her late husband whilst he was in the care of the Trust, which had resulted in the Trust producing a Serious Untoward Incident Report – a copy of which had been provided to the complainant. The Report contained references to witness statements given by staff members who had been involved in the events

surrounding the incident. Prior to the introduction of the Act the complainant had requested copies of the staff statements and had been refused. In her letter of March 2006 the complainant reiterated this previous request,

“I am writing to you...regarding your refusal to provide me with details of a specific member of staff’s statement of events which occurred on the night of the above incident...I understand that it is possible to have the notes with the third party blanked out and this will suffice for my requirements so I would be grateful if you could send me photocopies of the information I require at your earliest possible convenience.”

3. The Trust responded in a letter dated 10 April 2006, and refused to disclose statements. It informed the complainant that it believed that the exemptions listed at sections 40 and 41 of the Act applied to the statements. In relation to its use of section 40 the Trust stated that it believed that the statements contained personal data relating to third parties, and disclosure would be in breach of the principles of the Data Protection Act 1998 (the “DPA”). It also stated that it did not believe that the statements could be sufficiently anonymised. The Trust also provided arguments to support its use of section 41. The Trust informed the complainant of her right to request an internal review.
4. The complainant wrote to the Trust again on 27 April 2006. In this letter she suggested a number of solutions which she believed would allow the Trust to disclose the information to her without disclosing the personal data of third parties. She suggested that:
  - The Trust could blank out the third party’s name, together with any other information in the documents which identified the third party.
  - The statements could be provided to an independent person (possibly another Trust or a Solicitor) who could re-write the information without identifying the third party.
  - The Trust could attend a meeting with the complainant, with an independent adjudicator, where the complainant could ask questions in order to ascertain the contents of the statements.
  - The Trust could provide the complainant with the ‘gist’ of the information in the statements.
5. The Trust responded in a letter dated 2 June 2006. It again stated that it believed the information was exempt from disclosure under section 40, and stated that it believed the disclosure of the statements would be in breach of the first principle of the DPA. In making this decision the Trust stated that it had taken into account the staff’s expectation of confidence when making a statement in relation to the investigation of a Serious Untoward Incident. In relation to the complainant’s suggestions it informed her that:
  - It did not believe that blanking out the names of the third parties in the witness statements would sufficiently anonymise them. The Trust informed the complainant that it had spent several hours attempting to do this.
  - This solution would not be feasible as it would be too difficult and costly to make viable. Furthermore the Act does not require the Trust to create information in this manner.

- Again, this would be too costly and difficult to make viable. Furthermore this would be going beyond what the Act required.
- The Trust stated that the complainant already had the 'gist' of the contents of the statements, as it had previously disclosed the Serious Untoward Incident Report to her.

Additionally the Trust also informed the complainant that it now also believed that section 30 applied to the information in question.

6. In a letter dated 29 July 2006 the complainant requested an internal review. In relation to the use of section 40 the complainant questioned why the witnesses were offered confidentiality when they made their statements. She argued that as she had requested the Report, the information was "obviously intended to end up in my hands." The complainant also questioned the use of section 30. She stated that the Report had been produced because she had requested it, not because of any statutory requirement. Finally she stated that the Report which had been disclosed to her did not provide extensive information on the staff statements, and that she still had no idea of what actually happened to her husband on the night the incident occurred.
7. The Trust responded in a letter dated 24 August 2006. It informed her that the Report had been drawn up as per the Trust's serious untoward incident policy, which was in line with the requirements of the Strategic Health Authority and with guidance issued by the Department of Health. The Trust stated that the Report had not been produced as a result of her request, and it refuted her statement that, "...the information was obviously intended to end up in my hands." It went on to state that it believed that the contents of the Report already provided to her adequately set out the events on the night the incident occurred, and provided sufficient information extracted from the witness statements to enable an understanding of the actions of the members of staff. It stated that it believed it had already explained why the witness statements were treated as confidential documents. It again stated that it had spent several hours trying to sufficiently anonymise the statements, but had failed to do so. It also responded to her comments about its use of section 30. Lastly the Trust advised the complainant of her right to complain to the Commissioner.

## The Investigation

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### Scope of the case

8. On 3 September 2006 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider whether the Trust's refusal to disclose the information in question was correct.

## Chronology

9. Following a telephone conversation the Trust wrote to the Commissioner on 5 July 2007, and provided the Commissioner with copies of some of the correspondence between the Trust and the complainant. It also provided a copy of the withheld information and a copy of the Serious Untoward Incident Report.
10. Following a further telephone conversation the Trust wrote to the Commissioner on 9 July 2007 and provided him with a copy of the complainant's initial request, and a copy of the Trust's refusal notice.
11. Following further contact with the Commissioner the Trust wrote to him on 27 November 2007 with what it stated was its final position on the matter. In this letter the Trust cited the exemptions listed at sections 31, 36, 40 and 41, and provided submissions to support its use of these exemptions. It also provided a copy of its handbook, "Root Cause Analysis," which sets out the Trust's methodologies for investigating untoward serious incidents.

## Analysis

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### Exemptions

12. The Trust's letter to the Commissioner dated 27 November 2007, which it stated represented its final position, cited several exemptions – namely sections 31, 36, 40 and 41. The Commissioner has initially considered the application of section 40 to the witness statements.

#### Section 40

13. 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.
14. 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 DPA.
15. In its letter to the complainant dated 2 June 2006 the Trust stated that the statements contained personal data of third parties. It went on to explain that:

“In particular, disclosure would breach the first Data Protection principle (disclose only if 'lawful' and 'fair' to do so). Having considered this aspect in detail it is my view that it would not be 'fair' to disclose the personal information because of the expectations of staff concerning the confidentiality of their statements. Staff provided witness statements in confidence on the understanding that they will not be released but would only be used to inform the SUI investigation and subsequent written report.”

16. The Trust has informed the Commissioner that it believes that the witness statements contain the personal data of the witnesses themselves, and that the disclosure of these statements would be both unfair and unlawful, and therefore in breach of the first principle of the DPA.
17. In order to reach a view on the Trust's arguments the Commissioner has first considered whether the witness statements contain the personal data of third parties.
18. Section 1 of the DPA defines personal data as information which relates 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 is likely to come into the possession of, the data controller.
19. In this instance the information in question is witness statements given by staff members who were involved in the events surrounding a serious untoward incident involving a patient. These statements identify the staff by name and job title, and detail their actions and opinions, as well as details of the actions of some of their colleagues. On this basis the Commissioner is of the view that the witness statements are the personal data of the witnesses. He also believes that the statements contain personal data relating to other individuals who are referred to in the statements.
20. The Commissioner has gone on to consider whether the disclosure of this information would be in breach of 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 initially considered whether the disclosure of the witness statements under the Act would be fair.
21. When considering whether the disclosure of this information under the Act would be fair, the Commissioner has to take into account the fact that the Act is applicant blind and that disclosure under the Act should be considered in the widest sense – that is, to the public at large. The Commissioner is not able to take into account the unique circumstances of the applicant, or her relationship to the deceased person. Instead 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.
22. In order to support its argument that the disclosure of the witness statements would be unfair, the Trust has informed the Commissioner that the witnesses made their statements with the expectation that this was being done in confidence. It has argued that disclosure would be unfair as it would not be in the reasonable expectation of the witness for their statements to be made available to the public at large through disclosure under the Act. Instead, the witnesses believed that the statements were provided in confidence, and would only be used for the Trust's internal investigation into the serious untoward incident.
23. To support this point the Trust has provided the Commissioner with a copy of its handbook, "Root Cause Analysis." It has stated that this handbook is used in staff

training, and sets out its methodology for investigating serious untoward incidents. It also confirmed that this handbook was used by the investigating team when investigating the incident involving the late husband of the complainant. The Trust has drawn the Commissioner's attention to the section in the handbook which deals with interviewing witnesses. This section states that before a staff member is interviewed, they should be informed that the interview is confidential.

24. The complainant has also made arguments as to why she, as the widow of the deceased, should have access to the information in question. She has also argued that the witnesses should not have been given promises of confidentiality as she had instigated the investigation into the serious untoward incident concerning her husband, and therefore the results of that investigation were "obviously intended to end up in my hands". The Trust has refuted this point in its correspondence with both the complainant and the Commissioner, and has argued that the investigation was carried out in line with guidance issued by the Department of Health.
25. The Commissioner believes that it is wholly understandable that a person in such a position as the complainant would wish to access as much information as possible in order to learn as much as she could about an incident prior to her husband's death. However, as stated above, the Act is 'applicant blind' and disclosure under the Act has to be considered as disclosure to the public at large rather than to particular individuals with a private interest in the information. Therefore the Commissioner is unable to take the complainant's unique position into account, and instead has to consider whether the disclosure of the witness statements under the Act and therefore into the public domain would be fair.
26. After considering the arguments presented by both parties, in order to reach a view on whether the disclosure of this information would be fair or unfair, the Commissioner has considered the nature of the information itself.
27. The withheld information consists of several witness statements, given by staff members of various ranks who were involved in the events surrounding an incident involving a patient on a hospital ward. The statements were given in the course of an internal investigation carried out by the Trust as to what had happened, and witnesses were informed prior to giving their statement, that the statements were confidential. The statements themselves reflect, in their own words, each witness's recollection of the events surrounding the incident.
28. After considering the nature of the witness statements, as well as the "Root Cause Analysis" handbook that was used by the people who carried out the internal investigation, the Commissioner believes that the witnesses would have had the reasonable expectation that their statements would only be used for the Trust's internal investigation procedures, and would not be placed into the public domain.
29. After considering the nature of the withheld information, and the reasonable expectation of the witnesses, the Commissioner believes that the disclosure of the witness statements under the Act would be unfair and in breach of the first principle of the DPA.

30. Therefore the Commissioner believes that section 40(2) of the Act is engaged, and provides an exemption from disclosure under the Act. As such he believes that the witness statements should be withheld.
31. The Commissioner has gone on to consider whether the statements could be sufficiently redacted to a level which would make them anonymous. After considering the contents of the witness statements he does not believe that this would be possible. The Commissioner is also aware that the Report which was disclosed to the complainant contains a synopsis of the witness statements, which he believes makes it impossible for the statements to be successfully anonymised.
32. As the Commissioner has upheld the use of section 40 he has not gone on to consider the application of the other exemptions cited by the Trust.
33. The full text of the section 40 exemption can be found in the Legal Annex at the end of this Notice.

## **The Decision**

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34. The Commissioner's decision is that the Trust dealt with the request for information in accordance with the Act, as he believes that it correctly withheld the witness statements under section 40 of the Act.

## **Steps Required**

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35. The Commissioner requires no steps to be taken.

## Right of Appeal

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32. 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@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.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 17<sup>th</sup> day of March 2007**

**Signed .....**

**Gerrard Tracey  
Assistant Commissioner**

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



## Legal Annex

### 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.