

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 20 February 2008

**Public Authority:** The Rotherham NHS Foundation Trust  
**Address:** Moorgate Road  
Rotherham  
South Yorkshire  
S60 2UD

### Summary

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The complainant requested details of the retirement packages agreed between the public authority and two of their former senior employees upon their departures. The public authority withheld the requested information on the basis that it was exempt under section 40(2) of the Act. The Commissioners decision is to uphold the public authority's application of section 40(2) to withhold the information.

### 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 29 September 2006 the complainant wrote to the public authority requesting the following information;  
  
*'details of the financial packages given to former (job title and name redacted) and former (job title and name redacted) on their departures from the trust in 2004.'*
3. The public authority issued a refusal notice on 16 October 2006 relying on the exemption contained in section 40(2) because the condition provided by 40(3)(a) (i) of the Act was satisfied.

4. On 25 October 2006 the complainant requested an internal review of the public authority's decision not to disclose the information requested. The public authority concluded its review and responded in a letter dated 24 November 2006.
5. The public authority's review upheld the initial decision contained in the refusal notice and concluded that disclosure of the information would breach the first data protection principle and therefore satisfied the condition under section 40(3)(a)(i). It also added that in accordance with the requirements of the first data protection principle it does not consider the sixth condition contained in schedule 2 of the Data Protection Act 1998 (DPA) has been satisfied.
6. The public authority also added that the senior employees involved refused to give their consent for the requested information to be disclosed.

## The Investigation

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### Scope of the case

7. On 10 January 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant argued that in his view section 40 of the Act does not apply. He also added; *'There are clear and legitimate interests of the public in understanding developments in the run up to the entirely unexpected early retirement of the (redacted) and the financial impact on the trust as a result. The Yorkshire Post has a legitimate role in the public interest in reporting the scale of financial settlements made.'*
8. To further support his arguments the complainant also referred the Commissioner to his guidance on personal data (Awareness Guidance Number 1) and Decision Notices FS50102474 and FS50093734.

### Chronology

9. On 19 October 2007 the Commissioner wrote to the complainant outlining the scope of his investigation and inviting the complainant to contact the Commissioner's office if there are any further matters he believes should be addressed.
10. Whilst bearing in mind the possibility of the complainant's response to his letter of 19 October 2007, the Commissioner also wrote to the public authority on 19 October 2007 in order not to delay the case any further.
11. On 16 November 2007 the public authority responded to the Commissioner's letter. The complainant did not respond.

## Findings of fact

12. The Commissioner in the letter of 19 October 2007 asked the public authority to provide copies of a breakdown of the retirement packages as requested by the complainant, provide full and detailed explanations as to why section 40(2) is engaged in this instance, and indicate which aspects of the requested information are in the public domain.
13. The Commissioner also asked the public authority to clarify the content of the following email from the public authority to the complainant dated 18 October 2006;
14. *'The former (redacted) refused to give consent for this information to be released for other purposes and we have taken this as a refusal for any further release.'*
15. Specifically the Commissioner asked the public authority to clarify if consent was sought pursuant to the complainant's request or was part of a prior agreement or arrangement between the public authority and the former senior employees.
16. In its response on 16 November 2007 the public authority provided the Commissioner with copies of the retirement packages. The public authority also stated that the 'refusal to give consent' referred to in the email dated 18 October 2006 was part of the terms of the compromise agreements agreed between the former senior employees and the public authority. The public authority also provided the Commissioner with copies of the compromise agreements.
17. The public authority also confirmed that none of the information requested is in the public domain.
18. The public authority further explained that details of the retirement packages as set out in the compromise agreement is personal data and disclosure would be unfair and in effect contravene the first data protection principle.
19. The public authority added that the relevant condition in Schedule 2 of the DPA which applies is the sixth condition. It however argued that it does not believe this condition is satisfied since the data subjects have a legitimate expectation that their information will not be released to the general public and its information that affects their privacy, so releasing it would be likely to prejudice their rights, freedoms, and legitimate interests.
20. The public authority also referred the Commissioner to Decision Notices FS50071454, FS50129941, and FS50073128 in support of its arguments.

## Analysis

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### Exemption

- 21 The combined effect of sections 40(2) and 40(3)(a)(i) is that information is exempt from disclosure if it constitutes personal data under the DPA and its disclosure would contravene any of the data protection principles.
- 22 A full text of section 40 is available in the Legal Annex at the end of this Notice.
23. Section 1 (1) of the DPA defines personal data as; '*data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and indication of the intentions of the data controller or any other person in respect of the individual...*'
24. Having considered the requested information the Commissioner is satisfied it constitutes personal data as defined under the DPA.
25. In accordance with the requirements of section 40(3)(a)(i) the Commissioner has gone on to consider whether disclosure would contravene the first data protection principle.
26. The first data protection principle states that; '*Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met....*' The Commissioner agrees with the public authority that the relevant condition in schedule 2 is the sixth condition.
27. The sixth condition states that personal data may be processed for the purposes of legitimate interests pursued by the data controller or by the third party (ies) to whom the data are disclosed unless the processing would prejudice the rights and freedoms or legitimate interests of the data subject. The Commissioner considers that the third party whose legitimate interests must be considered is the general public rather than the complainant.
28. A full text of the sixth condition in Schedule 2 is available in the Legal Annex at the end of this Notice.
29. In considering whether disclosure of the former senior employees' personal data would contravene the first data protection principle the Commissioner has taken into account the existence of the compromise agreements, reasonable expectations of the data subjects vis-à-vis their personal data, and the legitimate interests of the public in knowing the financial impact on the public authority as a result of the early retirement of the data subjects.
30. The Employment Rights Act 1996 establishes the opportunity to reach a compromise agreement. They avoid the time, expense and stress of litigation in an employment Tribunal where an employer/employee relationship breaks down.

31. The Commissioner believes that the right to access official information and the right to reach an equitable compromise in private in an employment dispute are not mutually exclusive. However, the Commissioner also believes that where a compromise agreement has been agreed between parties a balance has to be struck between a public authority's duty to be transparent and accountable about how and why it decided to spend public money in a particular way and its duty to respect their employees' reasonable expectations of privacy.
32. The Commissioner notes that sections 9 and 10 of both compromise agreements contain confidentiality clauses which are binding on both parties, and although they do not specify an agreed position in the event of a request under the Act the Commissioner considers that both clauses could be read widely enough to cover disclosure of the information requested.
33. The Commissioner also believes the legitimate interests of the public in knowing how much public money was spent on the departures of both senior employees must be weighed against the senior employees' rights and legitimate interests. They both have rights under the Employment Rights Act 1996 to reach a compromise agreement with their employer and in exercising that right they are bound by the terms of the compromise agreement.
34. The Commissioner has made it clear in his guidance on the application of the exemption contained in section 40 that the seniority of officials should be taken into account when personal data about them is being requested under the Act. The Commissioner indeed considers that the more senior a person is the less likely it will be that disclosure of information about them acting in an official capacity would be unfair. (ICO Awareness Guidance 1- Personal Information)
35. However the circumstances of this case require that this should also be weighed against the legitimate interests of a senior employee who has exercised his or her rights under the Employment Rights Act 1996 and thereafter has a legitimate expectation that their personal data would not be subsequently disclosed.
36. Although Decision Notices are not binding case law the Commissioner considers that the Decision Notices referred to by the complainant in his letter of 10 January 2007 can both be distinguished from this case. This case relates to a request for retirement packages governed by compromise agreements, the compromise agreements being a vital consideration in a request for information about the retirement packages. The Newry case (FS50093734) on the other hand related to a request for salary details including benefits and pension contributions which were not included in a compromise agreement. The BBC case (FS50102474) was simply a request for specific payments made to presenters for hosting a particular programme.
37. In the circumstances of this case the Commissioner finds that disclosure would contravene the first data protection principle. The Commissioner considers that the legitimate rights of the data subject outweigh the legitimate interests of the third party and that release of the requested information would be unfair processing. The information is therefore exempt under section 40(2) of the Act.

## **The Decision**

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38. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

## **Steps Required**

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The Commissioner requires no steps to be taken.

## Right of Appeal

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40. 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).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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 20<sup>th</sup> day of February 2008**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

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

## LEGAL ANNEX

### Personal information.

**Section 40(1)** provides that –

“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.”

**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).”

**Section 40(5)** provides that –

“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) the 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)."

**Section 40(6)** provides that –

“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.”

**Section 40(7)** provides that –

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.

## **SCHEDULE 2 - Sixth Condition- Data Protection Act 1998**

“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.”