Reference: FS50091230

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 25 June 2009

Public Authority: Department of Health
Address: Richmond House
79 Whitehall
London
SW1A 2NS

Summary

The complainant made a request to the Department of Health (the 'DoH') for copies of all minutes of the Board of Advisors Anti Stigma and Discrimination programme meetings that had taken place as at the date of his request. The DoH provided redacted copies of these minutes and informed the complainant that information had been withheld under section 40(2). During the course of the Commissioner's investigation of the complaint the DoH informed the Commissioner that it was also relying on section 36(2)(b) and (c). After investigating the complaint the Commissioner has decided that section 40(2) was not engaged in respect of some of the information and refused to accept the late application of section 36.He has however decided that the DoH correctly applied section 40(2) to withhold the names of the expert advisors. He has also decided that the DoH did not comply with the requirements of section 17(1) in failing to issue a refusal notice within the time for compliance with section 1(1), and also failed to meet the requirements of section 17(1)(b) and (c). In failing to comply with the requirements of section 1(1)(b) within twenty working days to the information he has ordered disclosure of the DoH also breached the time for compliance set out at section 10 of the Act. The Commissioner therefore orders disclosure of all the redacted names except the names of the expert advisors.

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

The Request

2. The complainant emailed the National Institute for Mental Health Education ('NIMHE') and the Department of Health ('DoH') on 12 August 2005, and requested the following information from NIMHE Director, Ingrid Steele under the Act:

> "I have recently studied more documentation on NIMHE's "Anti Stigma & Discrimination strategy intentions.
> It is clear to me that a Board of Advisors have met on several occasions and several more meetings are planned this year.
> I believe from Documents you are the "Chair" and overall Director on this matter.
> Could you please confirm whether these meetings are minuted? And would you please send me the minutes for those meetings that have occurred so far. You are aware of my address.
>
> This would be most helpful of you…
>
> I quote from the NIMHE documents "Anti Stigma recruitment of Advisors":
>
> "*Six Meetings of the Board of Advisors are to be held during 2005. The commissioned individuals will be asked to: Attend the Board of Directors meetings. Read papers circulated in advance of meetings. Give feedback, suggestions and ideas on discussions and papers presented in meetings.*"

3. In an undated email the complainant wrote to the Department of Health stating that his request of 12 August 2005 had not been addressed by Ingrid Steele of NIMHE and requesting a response from her.

4. On 7 October 2005 the complainant received an email from the DoH, explaining Ms Steele's role generally and in relation to these meetings and confirming that she would be willing to meet the complainant to discuss any other queries he may have. The complainant was then advised of the internal review process should he be unhappy with the DoH's response.

5. On 11 October 2005 the complainant made a complaint to the Commissioner about the DoH's failure to respond to his request.

6. The complainant replied to the DoH's email of 7 October 2005 on 20 October 2005 questioning why his request for a copy of the specified minutes remained unanswered and providing a copy of his original request of 12 August 2005. This email was copied to Ms Steele.

7. On 17 November 2005 the DoH emailed the complainant and attached redacted copies of the requested minutes. The DoH explained that the documents had been edited as some of the information fell within the exemption in section 40 (personal information) of the Act. It repeated the offer made by Ms Steele to meet and discuss any further queries the complainant may have. It also informed the

complainant of his right to seek an internal review and his right to complain to the Commissioner.

8. On 7 February 2006 the complainant spoke to one of the Commissioner's staff to confirm that his main issue of complaint was regarding the application of section 40. The complainant was advised that his complaint would be referred to a more senior case officer but due to a backlog of unallocated complaints there would be a delay before the complaint could be investigated.

9. On 12 September 2006 the DoH rang the Commissioner to advise that the complainant had not yet requested an internal review of its decision and that it would be happy to process such a request if this was received from the complainant.

10. On 15 September 2006 the Commissioner wrote to the complainant advising him to request an internal review and explaining that under section 50(2) of the Act the Commissioner was not obliged to make a decision until the complainant had exhausted any complaints procedure provided by the public authority.

11. On 26 January 2007 the Commissioner was copied in to an email sent by the complainant to the DoH requesting an internal review of his request.

12. On 29 January 2007 the Commissioner wrote to the complainant noting that he had now requested an internal review and asking the complainant to confirm the outcome of the internal review when this had been completed.

13. The DoH provided the complainant with its internal review response in an email dated 26 April 2007. The DoH stated that it upheld its use of section 40 by virtue of section 40(3) (a) (i) and informed the complainant of his right to complain to the Commissioner.

14. On 4 June 2007 the complainant emailed the Commissioner to confirm that he still wished to proceed with his complaint about the application of section 40. He provided his arguments as to why he considered this information should be disclosed. Details of these arguments are outlined in the Analysis section of this decision notice.

Background

15. The complainant directed his request to the NIHME and the DoH. NIHME was formed in 2002 to help the mental health system implement the National Service Framework for Mental Health and the NHS Plan. Its introduction followed the publication of a White Paper by the DoH about the modernisation of mental health services.

16. The Commissioner notes that the NIHME is not a public authority in itself but is based within the Modernisation Agency of the Department of Health. Therefore the public authority in this case was the DoH and any references to the public authority are to the DoH.

17. NIHME plays a key role in informing those involved in mental health care of proposed changes and the impact they may have, supporting implementation by service providers, directly and by signposting sources of information and providing opportunties to influence national policy.

18. NIHME was responsible for the anti-stigma and discrimination programme referred to by the complainant in his request. This programme became known as Shift. Shift was established in 2004 following a plan called "From Here to Equality". It is part of the DoH's 7 year programme to reduce the stigma and discrimination directed towards people with mental health problems. Shift is part of the NIHME in England which itself is part of the Care Services Improvement Partnership ('CSIP'), a Government-funded organisation that supports positive changes in services and in the wellbeing of vulnerable people with health and social care needs.

19. Shift's work is steered by an advisory board. Members of the Board of Advisors include people from the voluntary sector, the Department of Health and people working in CSIP in regional and national roles. Shift also recruited 14 people in 2005 to provide advice to the programme based on their personal experience of mental heath. These expert advisors have direct experience of mental health problems either as someone who has used services or as an informal carer and additionally have a wide range of life experiences both personal and professional which can be called upon to advise Shift. The Advisors act as Independent Consultants to the programme and can invoice Shift for their time spent on the programme. The work of the programme is overseen by the DoH and a cross government network focusing on mental health issues. The complainant's request is for unredacted copies of the minutes of these Board of Advisors meetings.

The Investigation

Scope of the case

20. On 4 June 2007 the complainant contacted the Commissioner to confirm that his complaint was specifically about the DoH's application of section 40 of the Act.

21. Although not raised by the complainant the Commissioner has also considered whether the DoH acted in compliance with section 10 and 17 of the Act.

Chronology

22. On 8 June 2007 the Commissioner emailed the DoH and requested unredacted copies of the withheld information. The Commissioner confirmed that the complaint was about the DoH's decision to redact all the names of the people who were involved in these meetings.

23. The Commissioner also asked the DoH to explain more fully its reasoning for the application of section 40. He requested a response within 20 working days, namely by 6 July 2007.

24. As no reply was received the Commissioner emailed the DoH again on 18 July 2007. He asked for a response by 1 August 2007 stating that an information notice would follow if this deadline was not met.

25. The DoH provided unredacted copies of the exempt information on 23 July 2007.

26. On 25 July 2007 the Commissioner emailed the DoH seeking further information regarding the backgrounds of the attendees and the application of section 40. The Commissioner noted that some of the attendees were users of mental health services, some were from outside non public sector organisations and some were public sector employees. He therefore asked for clarification as to which attendees were from which organisation. He also asked the DoH to clarify whether any assurances of confidentiality were given to attendees. He asked for this clarification by 1 August 2007.

27. As no reply was received to this email the case officer handling the complaint spoke to the DoH on 17 October 2007 reiterating the need for the DoH to provide its further submissions about the application of section 40. In this telephone conversation the DoH implied that it was considering the application of another exemption and agreed that it would confirm by 19 October 2007 which exemption it was applying and provide its reasoning by 31 October 2007. This was subsequently confirmed in an email by the Commissioner to the DoH.

28. The DoH did not respond until 23 November 2007. In its email to the Commissioner it confirmed that the only exemption it would now be applying was section 40(3)(a)(i) as set out in its internal review response of 26 April 2007, except that the names of those who attended as representatives of organisations will be shown. It wished to emphasise however that it considered there was a distinction to be drawn between those who attended as representatives of public authorities and those who represented voluntary sector organisations. It explained that it had arranged for voluntary sector representatives to be contacted to ask whether they have any objection to their names being released. It confirmed that if there were no objections it would arrange for a less redacted version of the minutes to be sent to the complainant. Therefore if consent was given by those in attendance from the voluntary sector only the names of the Shift expert advisors who attended in an individual capacity to give advice based on their personal experience would be redacted.

29. On 26 November 2007 the DoH telephoned the case officer to explain that despite the approach it had outlined in paragraph 28 it was now a little uncomfortable in disclosing the names of those individuals working in the voluntary sector. It therefore now intended writing to these individuals seeking their positive consent to disclosure. It requested a three week timescale to respond by which was agreed would be by 21 December 2007.

30. A reply from the DoH was not received until 15 January 2008 when the DoH emailed the case officer to explain that the work to write out to former members of the board of advisors was carried out by an official in CSIP and CSIP had now sent through a spreadsheet and associated document to the DoH. The DoH confirmed that it would draft a letter to the complainant and the Commissioner to accompany the revised release.

31. The Commissioner finally received a response from the DoH on 2 April 2008. It explained that it felt that it needed to revert to its original position in that all the names except those already released should be withheld under section 40(3) of the Act. It added that it found it difficult to see how the minutes would be made more meaningful by including the names of attendees that for the most part do not have a clear public profile. It considered that it would be unfair to treat those representing NHS, local authority, and voluntary organisations any differently from those of civil servants at about the same levels in their organisations. The DoH concluded that further processing of this personal data would not be in accordance with the first data protection principle in that disclosure would neither be fair, nor meet a schedule 2 condition. It added the individuals had not given consent to the release of their names and so condition 1 of schedule 2 of the DPA had not been met and the only condition it considered could be applicable was condition 6(1). Its arguments regarding this condition are outlined in detail in paragraph 102 onwards.

32. In this letter the DoH did however confirm as discussed in paragraph 29 that it had endeavoured to contact the voluntary sector representatives and those representing public authorities to ask whether they had any objection to their names being released. It confirmed that it had received no objections to disclosure but many did not respond. It informed the Commissioner that of those generally present at the meetings, 3 requests bounced (the Commissioner has taken this to mean the letters were not accepted at the delivery address), 4 provided their consent to disclosure, and 16 did not reply. Of those listed as apologies 2 bounced, 13 consented and 17 did not reply.

33. In relation to those attending as representatives of public authorities the DoH stated that where meetings are exclusively attended by civil service staff it operates a general assumption that it will not release the names of staff below Senior Civil Service level, unless they are already likely to be either in the public domain or known to the applicant in the context of their work. It explained that this is on the basis that civil servants in junior and operational grades, who seldom if ever represent their employers in public forums should be able to carry out their duties without their activities being drawn to public attention. Having looked at the directory details of those in the attendees list who currently work in DoH it stated that none were at SCS level, and some a good deal more junior.
It added that most of the attendees who attended were more at operational rather than policy level. The DoH added to this argument by highlighting the Civil Service management code and that employees are entitled to neither defend publicly their actions, nor comment on the policies that they are obliged to implement. On this basis it argued disclosing their names would expose them to potential criticism and exposure that they were in no position to counter without

breaching the terms of their employment. It argued that to put them in this position would be unfair.

34. It concluded its letter by stating that it was also now applying section 36(2)(b) and 36(2)(c) of the Act. It confirmed that it had sought the approval of the relevant Minister to apply this exemption, taking into account the public interest considerations which were outlined in this letter. The Minister's opinion that the exemption should be applied was communicated on 18 March 2008.

35. On 22 April 2008 the case officer updated the complainant regarding the contents of the DoH's letter. The case officer sought clarification from the complainant as to the extent of the disclosure of the names already made to him as the DoH's letter of 2 April 2008 seemed to imply that more than one name in the minutes had in fact been disclosed.

36. The complainant responded by email on 23 April 2008. He confirmed that the only name which had not been redacted was that of Ingrid Steele, the NIMHE Director. In his letter the complainant provided further arguments as to why he considered the names of the Board of Advisors should be disclosed. In particular he commented:

> *" The cross organisational nature of NIMHE Education with its mental health policy-forming- stretch across the UK is unprecedently large. Within its subsidiary SHIFT (anti-stigma group) it has gathered MH charities and other parties into meetings to "advise" (shape policy). The public interest argument here is that Charities and other organisations have or may have been arguably in both advisory and potential beneficiary roles from information-shared even at SHIFT and which can tangibly be seen to have formed "anti-stigma policy which subsequently attracted large lottery funds into centralising mental health charity "anti Stigma projects. There have been observations of project duplication taking policy and these are matters I am still developing and can connect to parliamentary figures……If people are giving advice to Govt (Re SHIFT) which forms policy then I expect openness and transparency of effect which includes their names on minutes……..I am concerned too that practised transparency actually preserves a knowledge of openly identified people (apart from minors) so there is no secrecy around how, and who, helps to form advice basis that NIMHE or SHIFT or the DOH go on to use in shaping policy…. Major charities like Sainsbury's Centre for Mental Health and Rethink with conections to ex –DOH civil servants who themselves head major mental health charities must be seen to be completely open because they are influencing powerfully political agendas of anti-Stigma which is SHIFT's business*
> *…If people wish secrecy when giving advice I have to suggest an MP rather than use publically funded organisations where they are meeting not to discuss confidential information but thematic issues of policy forming intent for public consumption."*

37. On 10 June 2008 the Commissioner wrote again to the DoH to clarify a number of issues which had arisen from its previous letter. In particular he asked for further

information surrounding the late application of section 36, seeking clarification as to which part of section 36(2)(b) the DoH was relying on and clarification of its public interest arguments. He also asked further information surrounding the application of section 40 particularly in light of recent tribunal decisions in which the issue of names of attendees at meetings had been discussed. He also asked for clarification of the identities and backgrounds of the various individuals referred to in the minutes.

38. The DoH provided its response on 1 September 2008. It maintained its position regarding the application of section 40 and provided further clarification to support that position. It also provided information regarding its application of section 36.

39. In relation to those attending as representatives of their organisations or charities the DoH reiterated its concerns that "revealing the names of independent experts and those involved at operational level by voluntary sector organisations and public authorities who are participants in specific initiatives such as the SHIFT programme will expose them to unwarranted personal interest."

40. In answer to the complainant's concerns regarding the role of those involved in shaping policy the DoH informed the Commissioner that SHIFT has a very small role in advising generally on Government mental health policy. It stated that:

> "The SHIFT Board of Advisors exists to advise SHIFT, a Department of health funded programme. As with any specialised work programme there may be opportunities for those involved as Board members or advisers to be funded by SHIFT at some point to provide services. However, the SHIFT programme management plan and its budget are signed off by the DoH and Care Services Improvement Partnership (CSIP) each year. SHIFT uses good practise tendering processes that are overseen by CSIP. This addresses concerns that individual advisory members may gain some advantage from their involvement with SHIFT…….Presentations are given at relevant conferences and meeting and regular project updates are provided on the SHIFT website at http://www.shift.org.uk"

41. In relation to its late application of section 36(2)(b) and (c) the DoH confirmed that the decision to apply section 36 was made by the Parliamentary Under- Secretary of State for Care Services, following a Ministerial submission made on 7 February 2008.

42. It stated that disclosing the names would inhibit the free and frank provision of advice and would be likely to prejudice the effective conduct of public affairs. It went on to state that the submission to the Minister reflected the fact that it considered that it had established an agreement with the Commissioner about the names of expert advisers who were also service users and drew the Minister's attention to the legitimate expectations for privacy of staff at relatively junior levels and that individuals named may be exposed to unwarranted personal interest making it more difficult for them to carry out their duties(whether civil servants or representatives of public bodies). From this (although not specifically cited by the DoH) the Commissioner has assumed that it is applying both section 36(2)(b)(i) and (ii).

43. In relation to the question raised by the Commissioner about the late application of section 36, the DoH advised that it became more aware of the potential prejudices as it learned more about the way the Board had conducted its business and the potential impact on collaborative and partnership approaches, which it considered were vital to the future effectiveness of Health and Social Care service delivery.

44. The DoH did not provide any further public interest arguments to support its application of section 36. However the Commissioner notes in the DoH's letter of 2 April 2008 it drew the Commissioner's attention to the public interest arguments it had outlined earlier in that letter when discussing section 40. The Commissioner has listed what he considers these arguments to consist of in the analysis section of this notice.

45. Following a telephone call with the complainant on 18 November 2008 to update him on the present status of his complaint, the Commissioner wrote to the DoH again to ask a number of further points including what assurances were given to those involved in the meetings about confidentiality and whether expert advisors were paid for attending meetings.

46. The DoH responded on 27 November 2008. It also explained that in fact 14 and not 4 regular participants of the meetings had consented to the disclosure of their names. However the DoH argued that consent was given nearly a year previously and it had previously highlighted to the Commissioner that an individual's willingness to have their name disclosed and associated with the Department programmes varies. This being the case it argued that it would have to contact them again with this request to ascertain if they were still willing for their names to be disclosed. It also confirmed that there were no records of assurances of confidentiality in the minuted records of Shift meetings. However as these meetings took place 3 to 5 years ago it argued that the need for assurances of confidentiality have only become more apparent since the implementation of the Act. It maintained however that there was a real possibility that alerting volunteers and stakeholders that their names may be disclosed in the future would be a deterrent to their involvement. It added that those contributing to the Shift meetings were either contributing their experience and expertise with a reasonable expectation that their names would be withheld, or were operating at levels in their organisation at which they would not expect their activities to be in the public domain. It also confirmed that expert advisors were not paid a salary or a fee but were able to invoice for time spent on Shift programme work and to claim expenses incurred.

Findings of fact

47. The Commissioner understands that the Shift Board of Advisors consists of the following categories of individuals. These are:

- Expert Advisors (also known as service users) who have direct experience of mental health issues either as patients or as carers of individuals suffering from mental health issues

- Those attending as representatives of public authorities
- Those attending as representatives of charity or voluntary organisations
- Those attending as representatives of professional bodies
- Consultants commissioned by NIMHE
- Representatives from a private sector communications company

48. The Commissioner has therefore considered the application of the section 40(2) by the DoH to these various categories of individuals.

49. Prior to the setting up of SHIFT two documents were produced by the DoH in April and June 2004 entitled 'Scoping Review on Mental Health and Anti Stigma and Discrimination '[1] and 'From Here to Equality , A Strategic Plan to tackle anti stigma and discrimination on mental health grounds'[2] respectively. Both these documents were in the public domain at the time the request was made and both documents provided a list of the names of the Board of Advisors in relation to the anti stigma and discrimination programme at that time. Most of these names are referred to in the redacted minutes.

Analysis

Procedural matters

50. Section 17 of the Act sets out the obligations on public authorities when refusing information requests. The relevant text of the legislation can be found in the Legal Annex to this Notice.

51. This section provides that a refusal notice must be issued within the time allowed under the Act, namely as soon as possible after receipt of the request or in any event no later than 20 working days. In this case, the DoH did not issue a refusal notice until 17 November 2005, which is more than 20 working days after the request was received and therefore in breach of section 17(1).

52. The DoH also sought to rely upon an additional exemption to the one originally cited during the course of the Commissioner's investigation.
In failing to cite the exemption at section 36 in its refusal notice the public authority breached section 17(1) (b) and (c).

53. As the Commissioner finds that the DoH did not make some of the requested information available to the complainant (as detailed in the Commissioner's decision) by the time of the internal review it breached section 1(1)(b).

54. It also breached section 10(1) by failing to provide the information detailed in the Commissioner's decision within twenty working days.

[1] http://213.121.207.229/upload/AntiStigma12pp.pdf

[2] http://213.121.207.229/upload/FIVE%20YEAR%20STIGMA%20AND%20DISC%20PLAN.pdf

Exemption

Section 40

55. 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.

56. One of the conditions, listed in section 40(3)(a)(i), includes where the disclosure of the information to any member of the public would contravene any of the principles of the DPA.

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

58. In this case the DoH is seeking to rely upon section 40(2) and 40(3)(a)(i) to withhold the names of those cited on the SHIFT Board of Advisor minutes as attendees or as apologies and/ or where comments are attributable to named individuals in the minutes. These names can be classified into the categories outlined in paragraph 47.The only exception to this was the disclosure of the name of the most senior individual involved in the meetings, Ingrid Steele, an NIHME Director.

59. The DoH has argued that the disclosure of this information would be in breach of the first data protection principle.

60. In order to reach a view on the DoH's arguments the Commissioner has first considered whether the withheld information is the personal data of third parties.

61. Section 1 of the DPA defines personal data as information which relates 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.

62. The Commissioner notes that the minutes include individuals' names, and on occasion comments they made at a meeting on a particular date, or the names of those who may need to be contacted and/or involved in the programme.

63. The Commissioner believes that the individuals are identifiable from this information. He also believes that the information is biographical in nature in relation to the individuals concerned. Therefore he is satisfied that it is the personal data of the individuals concerned.

64. Having concluded that the information does fall within the definition of 'personal data', the Commissioner has gone on to consider whether disclosure of these names would breach any of the data protection principles as set out in schedule 1 of the DPA.

65. He has firstly considered the position of those who have consented to disclosure and has then moved on to consider those individuals representing public authorities, those representing other bodies and finally the expert advisor group.

Would disclosure of the names of those individuals who have consented to disclosure breach any of the data protection principles?

66. The first data protection principle requires that the processing of personal data should be fair and lawful and that personal data should not be processed unless at least one of the conditions in Schedule 2 of the DPA is met.

67. The Commissioner has noted that 14 individuals provided their consent to disclosure of their names. This was confirmed by the DoH in its letter to the Commissioner dated 27 November 2008.These individuals come from both the public authorities, voluntary organisations and professional bodies.

68. The DoH considers that as the agreement of these individuals was obtained a year ago, it would be necessary to contact them again to see if they were still prepared for the disclosure of their names as their circumstances may have changed. The DoH explained in correspondence with the Commissioner that it would be unfair to treat those who replied to the DoH and gave consent for the disclosure of their names to be treated differently from others from whom it did not receive a reply. It also emphasised again that these individuals operated at levels within their organisations at which they would not expect their activities to be in the public domain.

69. The Commissioner does not accept that it is necessary for the DoH to seek consent again. The Commissioner has taken into account the passage of time since this request was made, but in the Commissioner's view there is likely to be limited sensitivity surrounding the contents of the minutes themselves. He does not see any clear reason to suppose that those previously consenting to disclosure might now wish to withdraw that consent. As set out above, he acknowledges the DoH's argument that these individuals may hold junior operational positions in their organisations but this is only one factor to be taken into account in determining fairness. On this basis the Commissioner does not consider it necessary for the DoH to actively check that those who previously provided their consent do not now wish to withdraw it.

70. In light of the fact that these individuals freely provided their consent the Commissioner considers that the disclosure of their names would be fair and lawful and that the first condition of Schedule 2 can be met, namely that the data subject has given his consent to the processing**.**

Would disclosure of the names of those individuals representing public authorities who did not give their consent breach any of the data protection principles?

71. As stated above the first data protection principle requires that the processing of personal data should be fair and lawful and that personal data should not be processed unless at least one of the conditions in Schedule 2 of the DPA is met.

72. The term 'processing' has a wide definition and includes disclosure of information to a third party. Therefore, for personal data to be disclosed in accordance with the first principle, the authority must satisfy three tests; that the disclosure is fair, that it is lawful, and that at least one of the conditions in Schedule 2 is met.

73. In assessing whether the disclosure of the requested information would be fair, the Commissioner has considered the following factors:

- the reasonable expectations of individuals named in the minutes as to the use and subsequent disclosure of their names
- whether consent has been provided or expressly refused
- whether disclosure would cause unnecessary or unjustified distress or damage to the individuals concerned
- the level of seniority of the individuals concerned
- were any assurances of confidentiality provided
- the disclosures already made by the DoH

74. In order to establish reasonable expectations the Commissioner has paid particular attention to the individuals' status within the sector they represent, the nature of the role they performed for the Shift meetings, and the representatives own actions when informed that the DoH had received a request for the disclosure of their names under the provisions of the Act.

75. The Commissioner has considered the DoH's arguments in favour of withholding the names of attendees. It stated that:

> "…as part of the constitutional necessity of an independent and politically neutral Civil Service, such employees are entitled neither to defend publicly their actions, nor to comment on the policies that they are obliged to implement…To release their names into the public domain and therefore expose them to potential criticism of their opinions would result in a degree of exposure that they are in no position to counter without breaching the terms of their employment. It is for this reason that they have a reasonable expectation of their identities being protected: to breach this expectation is neither 'fair'…nor 'necessary'… for the legitimate interest in accountability."

76. Although not all the withheld individuals were civil servants the DoH considers that revealing the names of independent experts and those employed at operational level by voluntary sector organisations and public authorities who are participants in specific initiatives such as the Shift programme will expose them to unwarranted personal interest. The matter of whether the names of independent experts should be disclosed will be addressed later in this notice.

77. The Commissioner has considered the DoH's view in light of the comments of the Tribunal in *Dept for Business Enterprise and Regulatory Reform v ICO Friends of the Earth* EA/2007/0072 (DBERR), which discussed the publication of the identities of civil servants and lobbyists, and the application of section 40(2). In considering this the Tribunal noted, amongst other things, that:

a. Senior officials of both the government department and lobbyist attending meetings and communicating with each other can have no expectation of privacy;

b. The officials to whom this principle applies should not be restricted to the senior spokesperson for the organisation. It should also relate to any spokesperson.

c. Recorded comments attributed to such officials at meetings should similarly have no expectation of privacy or secrecy.

d. In contrast junior officials, who are not spokespersons for their organisations or merely attend meetings as observers or stand-ins for more senior officials, should have an expectation of privacy. This means that there may be circumstances where junior officials who act as spokespersons for their organisations are unable to rely on an expectation of privacy;

e. The question as to whether a person is acting in a senior or junior capacity or as a spokesperson is one to be determined on the facts of each case.

The Commissioner considers points (d) and (e) are of particular relevance in this case.

78. The Commissioner's guidance on section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn between whether the information relates to the third party's public or private lives. Although the guidance acknowledges that there are no hard and fast rules it states that:

> *'Information which is about home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned'*

79. Having considered this guidance and the Tribunal decision referred to above the Commissioner is of the view that public sector employees and those representing or acting as spokespersons for their organisations should expect that some information about their roles and the decisions they take might reasonably be disclosed under the Act.

80. This approach is also supported by the Information Tribunal decision *(House of Commons v Information Commissioner and Norman Baker MP EA/2006/0015 and 0016)*. In its decision the Tribunal noted that:

"where data subjects carry out public functions, hold elective office or spend public funds they must have an expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives." (Tribunal at paragraph 78)

81. The Commissioner accepts that the information in this case relates to the individuals' public lives, i.e. it is information relating to them carrying out their roles as officials of the organisations they represent. The Commissioner also accepts that a distinction can in some cases be drawn between the levels of information senior staff should expect to have disclosed about them compared to the information junior staff should expect to have disclosed about them. This is because the more senior a member of staff is the more likely it is that they will be responsible for making influential policy decisions and/or decisions related to the expenditure of significant amounts of public funds.

82. The Commissioner notes the DoH's comments regarding the relatively junior ranking of many of the individuals concerned and that most of those attending would be at an operational rather than a policy level and not public facing. In particular, he acknowledges the DoH has stated that the representatives of public sector organisations operated at a level below that of the Senior Civil Service, and the DoH's policy was not to disclose the names of individuals below that grade. However the Commissioner notes that the DoH has failed to clarify which staff it believes do not have a clear public profile other than to say that it considers that it has already disclosed the names of the level of staff at the level it believes it could normally release. The Commissioner understands however that this is limited to the one individual, namely Ingrid Steele the most senior individual involved in the project.

83. The DoH's policy is not of itself sufficient to make disclosure unfair. Therefore the Commissioner has considered the roles of the individuals involved in the meetings. The DoH explained that most of the individuals do not have a clear public profile and/or were fairly junior operational staff. It has not however specifically identified which individuals are of junior or senior rank. However through his own research the Commissioner has in fact noted that many of the individuals referred to in the minutes were in relatively senior roles or in public facing positions within the organisations they represented at the time of the request. These positions included the role of Chief Executive, Policy and Development Managers and Directors of Public Affairs and Communications covering both voluntary and public sector organisations.
The Commissioner also notes that some of the individuals are authors of articles, involved in media campaigns, etc. relating to mental health and the anti stigma and discrimination programme and therefore already had a public profile at the time of the request. He does however accept that not all individuals fell into this category but in the absence of a clear breakdown by the DoH he has proceeded on the basis that the names which have been redacted were of different ranks.

84. The Commissioner has also noted that no assurance of confidentiality was given to representatives attending these meetings. However the DoH has explained that because of the junior level of these representatives they had a reasonable expectation when contributing to these meetings that their activities would not be in the public domain. The DoH explained that this was a reasonable expectation to have because they were effectively operational staff rather than being spokespersons for their organisations and therefore their tasks and role would be to some extent influenced by the Board. As the Commissioner has commented

above however not all the individuals whose names were withheld could be said in his view to hold junior non public facing positions. Furthermore the Commissioner has noted that those who attended the meetings did so in a professional capacity as representatives of their organisations helping to shape future mental health anti stigma and discrimination policy

85. In assessing the reasonable expectations of the individuals concerned he has also noted, as explained in paragraph 49 that the identities of the original Board of Advisors (most of whom are referred to in the redacted minutes which are the subject of this request) had already been made public through the documents outlined in paragraph 49 by the time of the request and therefore the Commissioner considers these individuals were in public facing roles through their involvement in this area as outlined in these documents. The Commissioner therefore takes the view that in the case of these particular individuals they should expect that their identities and the role they played in these meetings might reasonably be placed in the public domain.

86. The Commissioner has then gone on to consider whether revealing their identities could expose them to unnecessary or unjustified damage or distress and therefore make disclosure unfair. The Commissioner notes that redacted copies of the minutes themselves have been disclosed under the Act without any complaints. The DoH has not provided any compelling argument to explain why revealing the involvement of any particular individual in relation to the information discussed in the minutes would cause unjustified distress or damage to any individual. The Commissioner has noted the DoH's arguments regarding the reasonable expectations of those involved but does not consider this provides any indication of the likelihood of specific distress or damage being caused to any of these individuals.

87. Furthermore the Commissioner has noted that in the redacted copies of two of the minutes (25 May 2005 and 28 October 2005) provided by the DoH the first names of three attendees have not been redacted but there is no evidence of this resulting in any specific damage or distress to these two particular individuals.

88. The Commissioner has also noted that subsequent to the complaint being made to him, the DoH wrote to the voluntary sector representatives and representatives of public authorities to ask them if they had any objection to their names being released. The Commissioner understands that no objections were received but many did not respond. However as confirmed by the DoH in paragraph 46,14 participants did agree to have their names disclosed, although the DoH commented that most of those providing consent had attended few meetings and few of those who attended regularly responded. He has also noted that the DoH received no objections to the disclosure of names. Whilst receiving no objections does not in itself make disclosure fair the Commissioner does consider this has a bearing in concluding disclosure would not be unfair, particularly in conjunction with the lack of specific arguments presented by the DoH explaining how the disclosure of the names of individuals in relation to this specific information would cause damage or distress.

89. Given the above, the Commissioner does not believe that the disclosure of the names of individuals representing public sector bodies referred to in the minutes and any comments attributed to them would be unfair.

Would disclosure of the names of those representing other bodies be fair?

90. The Commissioner notes that most of the DoH's arguments have focused on the role of civil servants in determining why disclosure would be unfair and that it has provided very generic arguments to encompass all the withheld names. However as outlined in paragraph 47 representatives from various bodies participated in the anti stigma and discrimination meetings. The Commissioner therefore considers it appropriate to consider the roles played by representatives of other bodies, as detailed in paragraph 47 when deciding whether their names should be disclosed.

91. Having done so he considers that many of the arguments outlined in paragraphs 71 to 88 above and particularly the comments of the Tribunal in the DBERR case are equally relevant to the other bodies. He does not therefore consider it necessary to repeat these arguments again. In particular he has noted that the DoH has not been able to provide any specific evidence that disclosure would be likely to cause damage or distress to these bodies.

He considers that these individuals still played a part in shaping mental health policy and therefore this is a compelling argument in concluding disclosure would be fair. He has also noted that many of these individuals were in senior or public facing roles within the organisations they represented.

92. Given the arguments outlined in paragraphs 71 to 88 above he has therefore concluded that disclosure of the names of those representing other bodies would also be fair.

Is there a DPA Schedule 2 condition?

93. The Commissioner has however gone on to consider whether any of the conditions in Schedule 2 of the DPA can be met in relation to all of the above categories where consent has not been provided.

94. The Commissioner considers that the most applicable condition is likely to be schedule 2(6) (1) of the DPA which gives a condition for processing data where:

- 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.

95. The sixth condition establishes a three part test which must be satisfied. This means that:

- there must be legitimate interests in disclosing the information

- the disclosure must be necessary for a legitimate interest of the public and,
- even where the disclosure is necessary it nevertheless must not cause unwarranted interference (or prejudice) to the rights, freedoms and legitimate interests of the data subject

96. The Commissioner has first sought to identify the legitimate interests pursued by the parties to whom the data are disclosed i.e. the public at large. The Commissioner has considered the arguments put forward by the complainant outlined in paragraph 36 to be legitimate and relevant. The Commissioner believes these can be summarised as follows:

- Furthering the public's understanding and participation in debates on issues of public importance such as, in this case, the development of mental health strategy and ensuring the appropriate use of resources and allocation of public money in relation to the mental health anti stigma/discrimination programme
- The public gaining a better understanding of the workings of an expert group, whose actions have helped shaped government policy in areas where that policy can fundamentally affect the public, i.e. the improved well being, care and health of a particular section of the community
- To promote openness and transparency of the actions and deliberations of this expert group
- Increasing public confidence in officials representing their organisations carrying out their roles in an appropriate manner particularly in circumstances where they may be acting in both an advisory and beneficiary capacity in relation to the spending of public money
- Increasing public confidence in decisions taken by Government in matters regarding mental health

97. The Commissioner has gone on to consider whether the disclosure of the information withheld under section 40 is necessary for those interests. The DoH has stated in correspondence with the Commissioner that:

> *" …Shift has a very small role in advising generally on Government mental health policy. The Shift Board of Advisors exist to advise Shift, a Department of Health funded programme.*
> *Shift publicises its work via presentations at relevant conferences and meetings. Regular project updates are provided on the Shift web site at http://www.shift.org.uk/*
> *It remains the department's view that* (name redacted) *request for information about Shift has largely been met and that there would be little, if any, benefit to* (name redacted), *or the public, by now interfering with the privacy of officials and volunteers."*

In separate correspondence it also added:

> *"Whilst we accept that there are circumstances when there is a legitimate interest in knowing the names of officials (for example at very senior levels, or in the case of misfeasance), we do not accept that this generally applies to officials below the Senior Civil Service….We do not believe that there is*

a public interest in the release of such names except in exceptional circumstances. The nature of the work conducted by such civil servants is such that they are not responsible for projects and policies of sufficiently high profile as to merit a public interest in knowing their identities. Accountability for such projects and policies is properly at SCS grades, and there are mechanisms in place for holding such individuals to account. We do not believe that releasing these names would add any value to the legitimate interest of knowing that there is named accountability for the actions of civil servants: there is no legitimate interest in knowing the names of officials at this grade."

98. The Commissioner is not persuaded by this argument. Given that the Board of Advisors is an expert group, brought together by their involvement or experience in mental health issues, he believes that knowing who attended, the part they played and who said what is important for the above interests.

99. The Commissioner believes it is an important element in furthering public confidence in decision making of this nature for the public to gain an understanding of who the people were whose opinions shaped policies such as this and the influence they had in this process when acting in potentially an advisory and beneficiary capacity.

100. In view of this the Commissioner is satisfied the disclosure is proportionate and that the legitimate aims of the complainant cannot be achieved by any other reasonable means which would interfere less with the privacy of the data subjects.

101. The Commissioner has then gone on to consider whether the disclosure of this information would nevertheless be unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects- in this case, namely those individuals referred to in paragraph 47.

102. The DoH has informed the Commissioner that even if there is a legitimate interest in the release of the names referred to in the minutes, then processing would be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the named individuals, as:

- these individuals took part with a reasonable expectation of anonymity that extends to all civil servants below SCS level
- civil servants are not entitled to publicly defend themselves, nor to comment on the policies they are obliged to implement, and disclosure of this information would expose them to potential criticism; and
- revealing the names of those at lower organisational level could expose them to unwarranted personal interest and make it more difficult from them to carry out their duties (whether civil servants or representatives of external bodies)

103. In reaching a view on this the Commissioner has again noted the generic nature of the DoH's arguments, and the fact that it has not identified any particularly sensitive or controversial part of the information. He has noted that many of its

arguments focus on the role of civil servants whereas in fact many of the individuals referred to in the minutes were not civil servants but were senior figures or experts in their field, called upon to contribute to the government's commitment to build a fairer and more inclusive society for people with mental health problems. Whilst therefore he acknowledges the DoH's arguments about the expectation of anonymity, he does not accept that these individuals could have a reasonable expectation of anonymity at the time they took part in the meetings or that this expectation of anonymity, in itself, would lead to prejudice to the rights and freedoms or legitimate interests of the named individuals.

The Commissioner is not persuaded that the disclosure of this information would cause prejudice to the rights and freedoms or legitimate interests of the named individuals. In reaching this view, the Commissioner notes that the DoH confirmed that none of the individuals it contacted objected to their names being disclosed and indeed 14 consented. Furthermore he has noted that many of the individuals names were already in the public domain and associated with this policy by the time of the request through the published documents referred to in paragraph 49 with no adverse affect.

104. Although he is not persuaded, on the basis of the DoH's arguments, that disclosure of this information would be likely to prejudice the rights, freedoms or legitimate interests of the named individuals, the Commissioner has gone on to consider whether, even if, such prejudice were to occur, that prejudice would be unwarranted. In reaching a view on this he has considered the following factors:

- again, the Commissioner has noted the seniority of many of the named individuals, who as experts in their field, had been called upon to help shape mental health policy
- those at more junior level were still acting as spokespersons for their organisations or in their capacity as expert advisors
- given this, it is reasonable to assume that these named individuals would expect some degree of accountability for the advice they gave or contribution they made, and
- the weight of the legitimate interests as listed at paragraph 96 above.

Given these factors, and noting the generic nature of the DoH's arguments, and the fact that it has not identified any particularly sensitive or controversial part of the information, the Commissioner is not persuaded that any prejudice that might reasonably occur would be unwarranted.

105. After considering the above factors the Commissioner believes that the disclosure of this information would not be in breach of the first principle of the DPA. Therefore he is of the view that section 40 does not provide an exemption from disclosure in relation to the withheld information as defined by the categories above.

Would disclosure of the names of the expert advisers be fair?

106. The Commissioner has considered the issue of fairness in relation to the expert advisor group separately, again by reference to the factors outlined in paragraph 73.

107. The Commissioner has noted that the Shift expert advisor group comprises of 14 people who were involved in Shift meetings on the basis that they either had direct experience of mental health issues as patients or as carers of individuals suffering from mental health problems. Their role was to provide advice to the Shift programme based on their personal experience of mental health. The minutes do not however identify in what capacity they are acting as expert advisors. Nor do the minutes in some cases even identify their attendance as being that of an expert advisor but simply list their attendance or refer to them in the minutes themselves.

108. The DoH has argued that some of the expert advisors have an understanding with Shift that their names will not be made public. It was unable to provide the Commissioner with any further detail regarding the nature of this understanding although it did acknowledge to the Commissioner that there were no records of assurances of confidentiality in the minuted records of Shift meetings. However it argued that there is a real concern that work colleagues, future employers, family, friends, etc. may use the information about their experience of mental health problems in a discriminatory way, e.g. to not offer employment. It added:

> *"We are very keen to encourage the commitment and involvement of mental health service users and to respect individual's wish for discretion. By accommodating this flexibility in people's situations we uphold our reputation of valuing service user involvement and respecting their wish for privacy. Respecting privacy also means that we are more likely to keep people involved and maintain continuity in advice and direction setting. This can be hard to achieve as volunteer engagement can fluctuate according to their state of health."*

109. It explained in its letter of 1 September 2008 that because of the stigma and discrimination that affects mental illness not all 14 of the expert advisor group wished initially to have a public profile. For others a public profile was not an issue at the time the meetings took place. However the DoH highlighted that it considered that there was a third sub group who do not hide their mental health problems when asked, but nor do they promote or publicise their involvement. In respect of the first group it stated that its concern was that their anonymity would be lost. For the last group it considered that they may be "pushed" into a level of public profile that then they may feel uncomfortable with. It also raised concerns about people wishing to "drop out of the spotlight" after they have received a certain level of "profile" and/or if their personal circumstances dictate a change of heart. The DoH accepted however that as time has gone on it is fair to say that for both expert advisors and junior officers from charities, everyone that has stayed involved has become more visible. The Commissioner has taken this to mean that some expert advisors are now participating in certain elements of the

work such as those involving public speaking or consultations more frequently and therefore presenting a more public facing image.

110. The Commissioner has considered the arguments provided by the DoH in relation to the disclosure of the names of the expert advisors very carefully. He recognises that there are potentially sensitive issues that need to be considered very seriously in relation to this group. He has therefore sought to understand the role of expert advisors in more detail to try to establish their likely expectations.

111. He understands that the policy of involving people with mental health problems and informal carers in advising and guiding the programme of work was a novel way of working at the time of the request.

As highlighted in paragraph 19, expert advisors were first appointed in 2005 on the basis that they would be expected to draw on their life experiences in both a personal and professional capacity to advise Shift. The job advert for the appointment of Shift expert advisors in 2005 stated that expert advisors would be expected to:

> ' …ensure that the needs and views of people with mental health problems and carers drive and inform the work of the programme."

The terms and conditions of appointment also states that:

> 'Shift aims to meaningfully involve people with mental health problems, and informal carers, in advising and guiding the programme of work. The processes for doing this are not well-trodden and may well develop over the duration of the project. This is a new and fairly unique initiative, it is important that both parties enter the agreement with this understanding.'

It was however still not certain at the time of the request how successful this would be or how the roles of those involved would develop. In order to keep people involved the process was not formalised but allowed people to turn down work as they chose and be flexible depending upon their personal issues or problems without their position in Shift being affected.

112. Taking these factors into account the Commissioner therefore considers it is reasonable to assume that those involved as expert advisors may have had a legitimate expectation at the time of their participation in meetings that their names would not be disclosed.

113. The Commissioner has however noted that some of the expert advisor group had not sought to hide their mental health issues as at the time of the request and had already endeavoured to raise awareness of mental health issues through their own experiences. However the Commissioner was also informed by Shift that due to the nature of the mental illness people can move positions in relation to their willingness to have a public profile depending on the state of their mental health at the time and will sometimes wish to take a low profile. The Commissioner was advised that due to the informality and flexibility of the programme these needs can be readily accommodated. It has also meant that that the group has been

able to remain close over the years and that keeping the group together is vital in order to maintain the right dynamics and ultimately maintain the effectiveness of the programme. The Commissioner was advised that there was a concern by Shift that disclosure of any of the names of the expert advisors as at the time of the request could have damaged the group, irrespective of whether some of the group had not sought to hide their state of health.

114. The Commissioner notes that expert advisors do feed into and shape policy through their involvement in the programme albeit at a fairly low level. They are also able as independent consultants to invoice for time spent on Shift programme work and can claim expenses. However the Commissioner has taken into account the fact that they participated in this programme as private individuals drawing on both their personal and professional experiences.

115. Having considered the facts of this case and the arguments presented by the DoH the Commissioner considers that arguments regarding fairness are finely balanced in this case. He recognises that expert advisors are feeding into policy and drawing on their professional experiences in providing advice to Shift and are paid for their time spent on the programme. However he has attached particular weight to the fact that at the time of the request the decision to involve expert advisors was very new and the nature of their role in the programme was still developing. He has also taken into account that their involvement required them to not only draw on their professional experiences but also on their personal experience as private individuals. Taking these factors into account he has concluded that disclosure of their names would be unfair and therefore a breach of the first data protection principle to disclose them. Accordingly, he has decided that the information should not be disclosed due to the exemption contained section 40(2) by virtue of section 40(3)(a)(i).

116. As the Commissioner considers that it would be unfair to disclose the requested information he has not gone on to consider whether any Schedule 2 or Schedule 3 condition can be met in respect to this category of disclosure.

117. However the Commissioner's decision is based purely on the merits of this case at the time of the request. He therefore points out that in future cases he may reach a different view.

Section 36

118. In its letter to the Commissioner dated 2 April 2008 the DoH informed the Commissioner that after considering the case further and taking into account the public interest considerations outlined earlier in this letter it believed that section 36 of the Act also applied to the withheld information.

119. In considering whether to accept the late application of this exemption the Commissioner has been mindful of the Information Tribunal's position on the late application of exemptions, as expressed in the DBERR case. In this hearing the Tribunal considered whether a new exemption can be claimed for the first time before the Commissioner. The Tribunal stated that:

"it was not the intention of Parliament that public authorities should be able to claim late and/or new exemptions without reasonable justification otherwise there is a risk that the complaint or appeal process could become cumbersome, uncertain and could lead public authorities to take a cavalier attitude towards their obligations."[3]

The Commissioner has adopted a discretionary approach to the late application of exemptions, based on a case by case basis and considering the particular circumstances of each case, which he believes is in line with the Tribunal's position on this issue.

120. When assessing the circumstances of the case and the late application of exemptions the Commissioner must carefully consider his obligations as a public authority under the Human Rights Act 1998 (the "HRA"), which prevent him acting incompatibly with rights protected by the HRA. It will therefore be difficult for the Commissioner to refuse to consider any exemptions that relate to rights under the convention (e.g. articles 6 and 8). This would include sections 38 and 40 and in some cases 30, 31 and 41.

121. Given the circumstances surrounding national security the Commissioner also believes that it would be difficult for him to refuse to consider sections 23 and 24 as late exemptions. The exemptions under sections 26 and 27 may also carry similar risks.

122. Factors which the Tribunal has accepted as being reasonable justifications for the application of exemptions before the Commissioner and/or the Tribunal for the first time include:

- where some of the disputed information is discovered for the first time during the Commissioner's investigation, and therefore the public authority has not considered whether it is exempt from disclosure;
- where the authority has correctly identified the harm likely to arise from disclosure however applies these facts and reasoning to the wrong exemption;
- where the public authority had previously failed to identify that a statutory bar prohibited disclosure of the requested information, and therefore ordering disclosure would put the public authority at risk of criminal prosecution; and
- where the refusal notice was issued at an early stage of the implementation of the Act when experience was limited, although this factor is likely to become far less relevant in the future.

123. In considering the late application of section 36 in this case the Commissioner has been mindful of the factors listed above.

124. In particular he has noted that although the refusal notice was issued in November 2005, i.e. in the first year of the implementation of the Act the DoH did not conduct its internal review until April 2007. This being the case the

[3] EA/2007/0072, para 42.

Commissioner considers that by the time the DoH conducted its internal review its experience in handling FOI complaints would have increased substantially and therefore it had the opportunity of considering the application of section 36 at this stage but failed to do so.

125. After considering the circumstances of this case the Commissioner believes that it does not raise any issues under the HRA. Furthermore, in relation to the above bullet points, after considering the information provided by the DoH the Commissioner does not believe that the late application of section 36 in this case falls under any of the above criteria.

In addition to this the Commissioner has noted that:

- The DoH did not previously refer to disclosure being likely to inhibit the free and frank provision of advice or prejudice the effective conduct of public affairs in its correspondence with the complainant in this case
- In its previous communications with the Commissioner during the investigation of this case the DoH first raised the possibility of applying another exemption in October 2007 but subsequently confirmed it was not going to do so in November 07. It was not until April 2008 that it changed its mind again and formally then invoked section 36
- When asked by the Commissioner for an explanation as to the late application of this exemption its response was essentially that it became more aware of the potential prejudices as it learned more about the way the Board had conducted its business and the potential impact on collaborative and partnership approaches and only then it felt that it was appropriate to apply section 36

126. In light of these considerations and in all the circumstances of this case the Commissioner does not believe that it is appropriate for him to take this exemption into account when reaching a view on this case.

The Decision

127. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with section 1(1)(b) of the Act, in that it inappropriately relied upon section 40(2) of the Act in respect of some of the information. In failing to comply with the requirements of section 1(1)(b) within twenty working days it also breached the time for compliance set out at section 10 of the Act.

128. The DoH did however correctly rely on section 40(2) to withhold the names of the expert advisors.

129. The DoH also acted in breach of section 17(1) (b) and (c) in that it did not fully quote to the complainant the exemptions it was seeking to rely upon, and that it sought to rely on an exemption not cited in its refusal notice. It also failed to meet the requirements of section 17(1) in that it did not inform the complainant of all the

exemptions it was seeking to rely upon within the time for compliance with section 1(1).Furthermore the DoH also breached section 17 (1) in failing to issue its refusal notice within twenty working days.

Steps Required

130. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

The requested information should be disclosed to the complainant, in an unredacted format, except for the names of those individuals who fall within the expert advisor category as identified by the DOH in its letter to the Commissioner dated 27 November 2008 which should remain redacted. This step should be carried out within 35 calendar days of the date of this Notice.

Other matters

131. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

132. In making these observations, the Commissioner accepts that the request in question was submitted in the first year of the Act's implementation. As a consequence the advice contained here repeats that provided in more recent cases, and in his practice recommendation of the 31 March 2008.

133. Throughout his investigation, the Commissioner experienced prolonged delays in obtaining responses to his enquiries. Whilst the Commissioner accepts that the length and frequency of the delays reduced during the latter half of his investigation, he would welcome further progress in this regard.

134. It appears to the Commissioner that substantive consultation with some of the third parties named in the minutes of the meetings, and specifically, the process of seeking consent for their names to be released, took place during the course of his investigation, rather than in response to the initial request. As a matter of good practice, such consultation should be carried out as soon as is practicably possible, and within the time for compliance specified by section 10 (1) of the Act.

135. Reliance on section 36 (2) (b) and 36 (2) (c) requires an authority to demonstrate that, in the reasonable opinion of a qualified person, the exemption applies. For the purposes of information held by government departments, the qualified person is the relevant Minister of the Crown. The Commissioner understands that the Department sought the Minister's opinion and this was subsequently communicated on 18 March 2008, 648 working days after the request for information was submitted and 580 working days from the date of the Department's refusal. Whilst late reliance on an exemption does not necessarily

negate its applicability, the Commissioner is disappointed that the Department sought to rely on an additional exemption at such a late stage of proceedings.

Failure to comply

136. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court

Right of Appeal

137. 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.
Website: 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 25th day of June 2009

Signed ……..

David Smith
Deputy Commissioner

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

Legal Annex

Section 17(1) provides that -
"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."

Section 17(2) states –

"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 t 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."

Section 17(3) provides that -

"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."

Section 17(4) provides that -

"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.

Section 17(5) provides that –

"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."

Section 17(6) provides that –

"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."

Section 17(7) provides that –

"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 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.