

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 15 December 2010**

**Public Authority:** Dr N Deytrikh  
**Address:** The Weardale Practice  
Stanhope Health Centre  
Dales Street  
Stanhope  
County Durham  
DL13 2XD

### Summary

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The complainant requested a number of pieces of information. This request was made to the Practice. However, for the purposes of the Act the individual doctors at the Practice are considered to be public authorities, and therefore this Notice is addressed to one of the individual doctors concerned. Although a limited amount of information was provided to the complainant, most was not. During the Commissioner's investigation most of the outstanding information was disclosed. However a limited amount remained outstanding. In particular, the public authority relied upon section 40(2) to withhold the names of Practice staff referred to in the Health and Safety Policy Document. After investigating the case the Commissioner considers that this information should be disclosed. The Commissioner has also found that the public authority should confirm or deny whether it holds certain information. In addition, the Commissioner considers that the public authority failed to meet the requirements of sections 1, 10 and 17.

### 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.

## Background

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2. Although the request in this case was addressed to the Practice, the Commissioner should point out that medical practices are not, for the purposes of the Act, public authorities. Rather, each GP is a separate legal person and therefore each is a separate public authority. The Commissioner acknowledges that when an applicant makes a freedom of information request to a medical practice it is reasonable to expect that for convenience the practice will act as the single point of contact. However, ultimately each GP in a practice is a public authority in their own right and the duty under section 1 of the Act to confirm or deny whether information is held and then to provide the requested information to the applicant, subject to the application of any exemptions, is placed on each GP and not on any medical practice or partnership of doctors of which they may form a part.
3. However, for the sake of expediency, during the investigation of this case the Commissioner has dealt with the Practice directly, rather than individually with each of the doctors concerned. Therefore, throughout this Notice he has referred to 'the Practice' rather than to the individual named doctor.
4. A more detailed explanation of how GPs are covered by the Act is contained in the Legal Annex at the end of this Notice.

## The Request

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5. The complainant wrote to the Weardale Practice (the "Practice") on 25 March 2009 and requested the following information:
  - a. Certificates of third party insurance 2000 to date.
  - b. The Practice Health and Safety Policy Statement.
  - c. The Practice Health and Safety Policy document.
  - d. The Health and Safety training of the partners and the Practice Manager.
  - e. The Data Protection Policy of the Practice.
  - f. The Practice Contract with the Primary Care Trust.
  - g. Management of Health and Safety at Work Act Regulation 3(1)(b) Risk Assessments. Regulation 3(1)(b) Health and Safety at Work Act.

- h. Management of Health and Safety at Work Act Regulation 3(2)(b) Risk Assessments. Regulation 3(2) Health and Safety at Work Act.

For ease of reference these will be referred to as requests (a) to (h) throughout the rest of this Notice.

6. The Practice responded in a letter dated 3 April 2009. In this letter it stated that it was not a public authority for the purposes of the Act, and therefore it was not required to respond to this request. It referred the complainant to the local NHS Primary Care Trust.
7. The complainant wrote to the Practice on 5 April 2009 and queried this response.
8. Following a further exchange of communication, the complainant wrote to the Practice again on 6 October 2009 and asked it to carry out an internal review of its decision to refuse to respond to the above request.
9. The Practice wrote to the complainant on 2 November 2009 and informed him that the information he had requested would be available from 3 November in hard copy from the Practice.
10. The complainant wrote to the Practice again on 18 December 2009 and stated that,

*"I note your endeavours to ignore the issues raised in the letter dated 6 October 2009 and in previous correspondence and the time taken to respond. The wheels of Public Authority turn slowly no doubt..."*

*...it is noted that you have now initiated a publication scheme, however scant the information and difficult to access. The material [a family member] was forced to collect, in no way can be considered a discharge of duty as required by the Freedom of Information Act request on the 25<sup>th</sup> March 2009. You still have a duty to rectify the detriment."*

11. The Practice wrote to the complainant on 19 January 2010 and stated that,

*"The contract that we hold with NHS Co Durham PCT is considered by them to be commercially sensitive and not for disclosure."*

It did not refer to the other information that had been requested by the complainant.

## The Investigation

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### Scope of the case

12. On 9 February 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
13. During the course of the Commissioner's investigation the complainant initially confirmed that he was only seeking to complain about the handling of requests (c), (d), (g) and (h). In addition to this, during the course of the investigation the complainant also asked the Commissioner to consider request (b). Subsequently, the Practice disclosed some of the requested information, or confirmed that it did not hold it. Following several telephone conversations with the complainant (see paragraphs 16 to 19, 22 and 29) the complainant agreed on 3 November 2010 that the outstanding issues on this case were as follows:
  - Whether the Practice should confirm or deny whether it held a copy of the Health and Safety Policy Statement (request (b)) – at the time of the request – that showed who signed the statement off and when. If it is held, whether a copy of the information showing this should be disclosed.
  - Whether the Practice should confirm or deny whether it held a copy of the Health and Safety Policy Document (request (c)) – at the time of the request – that showed who signed the document off and when. If it is held, whether a copy of the information showing this should be disclosed.
  - Whether the Practice was correct to withhold individual staff names from the information it had disclosed (during the course of the investigation) in relation to request (c), i.e. the Health and Safety Policy Document. This information was withheld under section 40.

Therefore, this Notice only addresses these three outstanding issues.

14. The Commissioner has also considered whether the Practice complied with the requirements of sections 10 and 17.

### Chronology

15. The Commissioner wrote to the complainant on 6 July 2010 and asked him to clarify his complaint. Specifically, he asked him to confirm which of his requests he believed had not been answered, or where he believed that the response he had received was inadequate.

16. The complainant contacted the Commissioner in a telephone call on 7 July 2010 to discuss the scope of his complaint. During this conversation he confirmed that his complaint was about requests (c), (d), (f), (g) and (h). In particular, in relation to requests (c), (d), (g) and (h) he said that the Practice had simply not addressed these requests. During this telephone conversation the Commissioner explained how the Act did not apply to medical practices, and how, instead, each GP is a separate public authority for the purposes of the Act.
17. At the same time as this case, the Commissioner was also investigating a different complaint by the complainant, against NHS County Durham (FS50299369). This other case dealt with, amongst other things, a request for a copy of the contract between NHS County Durham and the Practice – which has also been requested in this case at request (f). During the investigation of this other case the Commissioner spoke to the complainant on 4 August 2010 and informed him that NHS County Durham had agreed to disclose a copy of this contract (in a redacted form agreed with the complainant). The Commissioner stated that once this contract had been disclosed he would not go on to consider the Practice's response to this request in this case.
18. In a subsequent telephone conversation on 5 August 2010 the Commissioner spoke to the complainant again, and reiterated that once the contract had been disclosed by NHS County Durham he intended to focus his investigation on this case only on the outstanding elements of the requests to the Practice.
19. The Commissioner contacted the complainant by way of a telephone call on 25 August 2010 and noted that NHS County Durham had now disclosed the contract in question. He noted that following this, he intended the scope of this case to be the handling of requests (c), (d), (g) and (h). The complainant agreed to this.
20. The Commissioner wrote to the Practice on 31 August 2010. He noted that the Act did not apply to medical practices, and explained that each GP is a separate public authority for the purposes of the Act. However, for the sake of expediency he would address his correspondence to the Practice at that stage. He stated that the scope of the case would be to consider requests (c), (d), (g) and (h), and asked the Practice to confirm what information was held in relation to these requests, and to provide him with a copy of this information. He also asked the Practice to confirm its position in relation to the relevant information that it held; whether it was prepared to disclose this information to the complainant; and if not, why not.

21. The Commissioner spoke to the Practice on 3 September 2010 and discussed this case further. In relation to requests (g) and (h) it confirmed that it held numerous risk assessments, and raised the issue of the resource implications of providing all of these. The Commissioner agreed that he would contact the complainant and would ask him to clarify whether he was seeking access to all the risk assessments held by the Practice, or whether he was interested in particular ones.
22. The Commissioner rang the complainant on 21 September 2010 to discuss this matter further. He informed the complainant that the Practice had confirmed that it held numerous risk assessments, and asked him whether he was seeking access to all of these, or whether he was seeking access to ones about a specific topic or topics. The complainant agreed that he was seeking access to risk assessments in relation to:
  - the safe prescribing of medicines to the public, and
  - the issuing of medical certification (continuing/closing certificates).
23. The Commissioner rang the Practice on the same day, and informed it that in relation to requests (g) and (h) the complainant was seeking access to risk assessments in regard to the above topics. The Practice confirmed that it held some of the information requested in requests (c), (d), (g) and (h), but that it did not hold all the information that had been requested. It also stated that it had sent the Commissioner some information that it held in relation to requests (c) and (d). It was agreed that the Commissioner would write to the Practice to confirm what it had said that it held. It was also agreed that the Practice would consider what information it was prepared to disclose to the complainant. The Commissioner emailed the Practice on the same day to confirm this conversation.
24. The Commissioner received a letter from the Practice on 23 September 2010 (dated 15 September). In this letter it provided him with some of the information that was relevant to the requests. It also raised concerns about the release of personal information contained in these documents.
25. The Commissioner wrote to the Practice on 6 October 2010. In relation to the information that it held that fell under requests (c), (d), (g) and (h), he asked it to confirm whether it was prepared to disclose some, or all, of this information / or to confirm that it did not hold any relevant information. If it believed that some (or all) of the information should continue to be withheld, he asked it to provide further

submissions to support this (including identifying an exemption). He asked for a response by no later than 20 October 2010.

26. The Practice wrote to the Commissioner on 19 October 2010. It again raised concerns about the release of personal information contained in the information that it held that fell within the requests. It also made reference to section 40 of the Act – although it did not provide substantive arguments to support its use of this exemption. It also stated that it was prepared to let the complainant know what information that it held in relation to requests (g) and (h) – as refined by the complainant (see paragraph 22 above).
27. The Commissioner wrote to the Practice on 21 October 2010. He asked it to now disclose the information it was prepared to disclose to the complainant, and to notify him when this had been done. He would then contact the complainant and establish what issues remained outstanding on this case.
28. The Practice wrote to the complainant on 1 November 2010, and provided the information he had requested at request (d). In relation to request (c), it provided a copy of information that fell under this request, although it removed the names of individual members of staff who were named in the document. In relation to requests (g) and (h) it confirmed that it did not hold any risk assessments in relation to the topics that had been set out by the complainant (see paragraph 22 above). The Practice contacted the Commissioner on the same day and notified him that this had been done.
29. The Commissioner rang the complainant on 3 November 2010, and asked him whether this disclosure satisfied his requests. The complainant stated that it did not. In particular he complained about three things, namely:
  - The removal of individual staff names from the information it had disclosed in relation to request (c).
  - The fact that the information that it had disclosed in relation to request (c) did not show who had signed the policy off and when. He stated that he wanted a copy of the information that showed who had done this and when, or confirmation that it was not held.
  - He also noted that the Practice had earlier provided him with a copy of the Health and Safety Policy Statement (request (b)). However, he now complained that this information did not show who had signed the statement off and when. He stated that he wanted a copy of the information that showed who had done this and when, or confirmation that it was not held.



It was agreed that these were now the outstanding issues on this case, and the Commissioner stated that his investigation would only focus on these issues.

30. The Commissioner contacted the Practice by email on the same day, and set out the remaining areas of dispute. He asked the Practice to confirm whether it held information that related to requests (b) and (c) that showed who had signed the documents off and when. If so, he also asked the Practice to confirm whether it was prepared to disclose this information. If not, he asked the Practice to set out why not. He also asked it to provide any further submissions it wished to make to support its redaction of the names of individual members of staff from the information it had disclosed to the complainant. He asked for a response by no later than 18 November 2010.
31. The Practice responded in an email dated 12 November 2010. In relation to the information that it held that related to requests (b) and (c), and whether it held information that showed who had signed the documents off and when, it confirmed that it had no objections to confirming or denying whether it held any of this information and (if it were held) to supply it to the complainant. It did not, however, provide any further substantive submissions to support its redaction of the names of individual members of staff from the Health and Safety Policy Document (request (c)).

## Analysis

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### Substantive Procedural Matters

#### Section 1 – the duty to confirm or deny

32. Section 1(1) provides that –

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

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

The duty set out in section 1(1)(a) is referred to as ‘the duty to confirm or deny’. The duty placed on a public authority under section 1(1) is subject to the provisions of section 1(2). This states that section 1(1)



- has effect subject to the provisions of section 1(2) and sections 2, 9, 12 and 14.
33. The full text of section 1 can be found in the Legal Annex at the end of this Notice.
  34. As noted at paragraph 13 above, two of the outstanding issues in this case are:
    - Whether the Practice should confirm or deny whether, at the time of the request, it held a copy of the Health and Safety Policy Statement that showed who signed the statement off and when. If it is held, whether a copy of the information showing this should be disclosed. This relates directly to the information that was requested at request (b).
    - Whether the Practice should confirm or deny whether, at the time of the request, it held a copy of the Health and Safety Policy Document that showed who signed the document off and when. If it is held, whether a copy of the information showing this should be disclosed. This relates directly to the information that was requested at request (c).
  35. In this case, and as noted at paragraph 31 above, the Practice has agreed to confirm or deny whether it held any of this information and (if so) to supply it to the complainant.
  36. Bearing this in mind, the Commissioner considers that the Practice should comply with the requirements of section 1 of the Act in relation to this information. Specifically it should confirm or deny whether (at the time of the request) it held a copy of the Health and Safety Policy Statement, and the Health and Safety Policy Document, that showed who signed the statement / document off and when. If the information is held, the Practice should provide the complainant with a copy of this information, unless it believes that the provisions of section 1(2), or sections 2, 9, 12 or 14 apply.

## **Exemptions**

### **Section 40**

37. The Practice has relied upon section 40 to withhold the names of individual members of staff from the Health and Safety Policy Document (request (c)).
38. Section 40 relates to personal data – as defined in the Data Protection Act 1998 (the “DPA”).

39. 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 sections 40(3) or 40(4) is satisfied.
40. Although the Practice has not specified which part of section 40 it seeks to rely upon, the Commissioner notes that it has, in its correspondence with him, referred to the data protection principles. Bearing this in mind, the Commissioner believes that the Practice is relying upon the condition listed in section 40(3)(a)(i) to withhold the names of individual members of staff referred to in the Health and Safety Policy Document.
41. The condition listed at section 40(3)(a)(i) applies where the disclosure of the information to any member of the public would contravene any of the data protection principles.
42. In order to establish whether this exemption has been correctly applied the Commissioner has first considered whether this information constitutes the personal data of a third party or parties.
43. Section 1 of the DPA defines personal data as data which relate to a living individual, who can be identified:
  - from that data, or
  - from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
44. Having considered the withheld information, the Commissioner notes that the Health and Safety Policy Document is not significantly about the members of staff whose names are recorded in the Document. However, he also notes that staff members are identifiable from their names, and that the Document does relate to their roles, duties and responsibilities in relation to aspects of health and safety in the Practice's premises.
45. Bearing this in mind, the Commissioner is satisfied that the names of staff listed in the Health and Safety Policy Document are the personal data of those individuals.
46. The Commissioner has gone on to consider whether the disclosure of this information would be in breach of the data protection principles.
47. The Practice has not stated which of the data protection principles it believes would be breached by the disclosure of this information.

48. In the absence of any specific arguments by the Practice, the Commissioner believes that the most appropriate principle to consider is the first principle of the DPA.

49. The first principle states that,

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

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

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

50. The Commissioner has first considered whether the disclosure of this information would be unfair.

Would it be unfair to disclose the information?

51. As noted above, the Practice has not provided any specific arguments as to how the disclosure of this information would be in breach of the data protection principles. However, the Commissioner notes that it has argued that,

*“This Practice is based in a small rural area and we feel it would be detrimental to partners and staff for [the complainant] to have knowledge of specific [staff] responsibilities.”*

The Commissioner has considered this statement when reaching a view on whether disclosure of this information would be unfair.

52. During the course of the investigation the Commissioner asked the Practice to provide further submissions as to why the disclosure of the information in question would be in breach of the data protection principles.

53. In particular, in its email to the Practice dated 6 October 2010 the Commissioner noted that given the nature of the Health and Safety Document, and that it was likely to be widely known in the local community that the individuals named in the Document were employees of the Practice, it was his initial view that the disclosure of this information would not be in breach of the data protection principles. Given this, he asked the Practice to provide further arguments to support its position. In response, the Practice argued that,

*"The fact that we are a small community and the names of those employed at the Practice are widely known should not preclude a principal [sic] of data protection."*

54. However, other than this, the Practice has not provided any substantive arguments to support its belief that the disclosure of this information would be in breach of the data protection principles.
55. In reaching a view on these arguments the Commissioner has considered them in relation to the information in question, and the document it is contained in.
56. As noted above, the information in question consists of the names of some of the Practice's employees, recording their roles, duties and/or responsibilities in the Practice's Health and Safety Policy Document.
57. In relation to this information the Commissioner considers that it is of a high level and factual nature. The information does not contain any comments about the individuals in question – and merely records their roles and duties in relation to aspects of health and safety in the Practice's premises. Whilst the Commissioner notes the Practice's comments that the disclosure of this information would be detrimental to the individuals concerned, he also notes that it has not provided any further substantive arguments as to how the disclosure of this information would cause this detriment. In addition to this, given the nature of the document, which records the roles, duties and/or responsibilities of members of staff in relation to Health and Safety at the Practice the Commissioner considers that it would be within the reasonable expectations of the individuals concerned that the details of their responsibilities in this area would be made available. Bearing in mind the high level and factual nature of this information, the Commissioner does not consider that the disclosure of this information would cause any unnecessary interference with the rights, freedoms and legitimate interests of these individuals. He also believes that there is a legitimate interest in increasing the public's understanding of which members of staff are responsible for the health and safety issues in the Practice's premises. Therefore he believes that the disclosure of this information would be fair.

Would it be unlawful to disclose the information?

58. The Commissioner has gone on to consider whether the disclosure of this information would be lawful. In this case, the Commissioner is not aware of any duty of confidence or statutory bar protecting this information. Therefore he is satisfied that the disclosure would be lawful.

Schedule 2 conditions

59. In relation to the information which he has concluded would be fair to disclose, the Commissioner has gone on to consider whether any of the conditions in schedule 2 of the DPA can be met.
60. The Commissioner considers that the most applicable condition in this case is condition 6 which gives a condition for processing personal 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.
61. In order to consider whether this condition is met the Commissioner believes that disclosure must satisfy a three part test:
- 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.
62. The Commissioner considers there is a legitimate interest in public authorities being as open and transparent as possible. In addition to this, he also concludes that there is a legitimate interest in increasing the public's understanding of which members of staff are responsible for the health and safety issues in the Practice's premises. The Commissioner considers that the disclosure of the identity of the staff who are responsible for these issues is necessary to increase this public understanding.
63. Having already established that the processing is fair, the Commissioner is also satisfied that the release of the withheld information would not cause any unnecessary interference with the rights, freedoms and legitimate interests of the individuals in question. In reaching this view the Commissioner has again been mindful of the nature of the requested information, and the lack of detailed submissions provided by the Practice.
64. Therefore the Commissioner is of the view that the disclosure of the withheld information would not breach the first principle of the DPA. As such, he is not persuaded that section 40(2) in conjunction 40(3)(a)(i) applies to this information.

65. The exemption listed at section 40(2) and section 40(3)(a)(i) is an absolute exemption, and therefore is not subject to a public interest test.
66. The full text of section 40 can be found in the Legal Annex attached to the end of this Notice.

### **Procedural Requirements**

67. Section 1(1) states that:

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

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

*(b) if that is the case, to have that information communicated to him."*

68. Section 10(1) states that:

*"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."*

69. By failing to confirm or deny what information it held in relation to requests (b) and (c) within 20 working days of receipt of the request, the Commissioner considers that this constitutes a breach of section 1(1)(a). Furthermore, during the course of the investigation the Practice disclosed some of this information to the complainant. However, as this information was not disclosed within 20 working days of the request the Commissioner considers that this is in breach of sections 1(1)(b).
70. In addition to this, as the Commissioner has decided that the information withheld under section 40(2) is not exempt from disclosure, he considers that this information should have been provided to the complainant in line with the duty at section 1(1)(b). The Practice's failure to do so therefore constitutes a breach of section 1(1)(b).
71. By failing to comply with sections 1(1)(a) and (b) within 20 working days, the Commissioner also considers that the Practice failed to comply with the requirements of section 10(1).
72. The Commissioner has also considered whether the Practice has complied with its obligations under section 17(1).

73. Section 17(1) requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal 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.
74. During the investigation of the case the Practice informed the Commissioner that it was relying upon section 40 to withhold some of the requested information. However, the Practice had not previously informed the complainant of this. By failing to do so, the Commissioner considers that the Practice did not comply with the requirements of section 17(1)(a), (b) and (c).
75. The full texts of sections 1, 10 and 17 can be found in the Legal Annex at the end of this Notice.

## **The Decision**

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76. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act in that:
- It did not deal with the request in accordance with section 1(1)(a) in that it did not confirm or deny whether it held the requested information.
  - It did not deal with the request for information in accordance with section 1(1)(b) insofar as it inappropriately relied upon section 40(2) to withhold some of the information requested at request (c).
  - By failing to comply with sections 1(1)(a) and (b) within 20 working days, the Commissioner also considers that the public authority failed to comply with the requirements of section 10(1).
  - The public authority also failed to meet the requirements of section 17(1)(a), (b) and (c) in that it failed to inform the complainant it was seeking to rely upon section 40(2) to withhold some of the requested information.



## Steps Required

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77. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- The public authority should confirm or deny whether (at the time of the request) it held a copy of the Health and Safety Policy Statement, and the Health and Safety Policy Document, that showed who signed the statement / document off and when. If the information is held, the public authority should provide the complainant with a copy of this information.
  - In relation to the information that is held that falls under request (c), the public authority should disclose a copy of this document as it was held at the time of the request, showing the names of staff recorded in that document.
78. The public authority must take the steps required by this Notice within 35 calendar days of the date of this Notice.

## Failure to comply

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79. 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.

## Other matters

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

### **Awareness and Training**

81. Paragraph 15 of the section 45 Code of Practice (the "Code") states:

*"All communications in writing to a public authority, including those transmitted by electronic means, may contain or amount to requests for information within the meaning of the Act, and so must be dealt with in accordance with the provisions of the Act. While in many cases such requests will be dealt with in the course of normal business, it is essential that public authorities dealing with correspondence, or which otherwise may be required to provide information, have in place procedures for taking*

*decisions at appropriate levels, and ensure that sufficient staff are familiar with the requirements of the Act and the Codes of Practice issued under its provisions. Staff dealing with correspondence should also take account of any relevant guidance on good practice issued by the Commissioner..."*

82. Whilst the introduction does not form part of the Code itself, the Commissioner echoes its recommendations and expects that the public authority will ensure that, in its future handling of requests, it meets the requirements of the Act.

### **Application of exemptions during complaint**

83. As detailed in the decision of the Information Tribunal in *Bowbrick v Information Commissioner & Nottingham City Council*<sup>1</sup> [2006] the fact that an exemption is introduced after the initial refusal does not in itself disentitle an authority from relying upon it. However, as detailed in 'The Decision' section of this Notice, the Commissioner would inevitably find that the authority had breached the requirements of section 17 by failing to inform the applicant of the exemption it sought to rely on within the appropriate timescale. In effect, the authority would be providing part of its refusal notice too late.
84. Furthermore, the application of an alternative or additional exemption at a late stage may suggest the initial refusal or internal review (or possibly both) was not afforded appropriate consideration.
85. In light of this the Commissioner expects the public authority to take steps to minimise the likelihood of additional exemptions being applied during the course of future investigations.

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<sup>1</sup> Available at [http://www.informationtribunal.gov.uk/Documents/decisions/Dr%20P%20Bowbrick%20v%20Information%20Commissioner%20and%20Nottingham%20City%20Council%20\(28%20September%202007\)v7307.pdf](http://www.informationtribunal.gov.uk/Documents/decisions/Dr%20P%20Bowbrick%20v%20Information%20Commissioner%20and%20Nottingham%20City%20Council%20(28%20September%202007)v7307.pdf)

## Right of Appeal

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86. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

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)

87. 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.

88. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 15<sup>th</sup> day of December 2010**

**Signed .....**

**Pamela Clements  
Group Manager, Complaints Resolution**

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

## Legal Annex

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### Section 1

- (1) Any person making a request for information to a public authority is entitled –
  - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
  - (b) if that is the case, to have that information communicated to him.
- (2) Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
- (3) Where a public authority –
  - (a) reasonably requires further information in order to identify and locate the information requested, and
  - (b) has informed the applicant of that requirement,the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.
- (4) The information –
  - (a) in respect of which the applicant is to be informed under subsection (1)(a), or
  - (b) which is to be communicated under subsection (1)(b),is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.
- (5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).
- (6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

## Section 10

- (1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
- (2) Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.
- (3) If, and to the extent that –
  - (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
  - (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.
- (4) The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.
- (5) Regulations under subsection (4) may –
  - (a) prescribe different days in relation to different cases, and
  - (b) confer a discretion on the Commissioner.
- (6) In this section –

“the date of receipt” means –

  - (a) the day on which the public authority receives the request for information, or
  - (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

## Section 17

- (1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -
- (a) states that fact,
  - (b) specifies the exemption in question, and
  - (c) states (if that would not otherwise be apparent) why the exemption applies.
- (2) Where—
- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—
    - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
    - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
  - (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,
- the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.
- (3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
  - (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- (4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.
- (5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
- (6) Subsection (5) does not apply where –
- (a) the public authority is relying on a claim that section 14 applies,
  - (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
  - (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7) A notice under section (1), (3) or (5) must –
- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
  - (b) contain particulars of the right conferred by section 50.

## **Section 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) 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).

(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.

### **Status of GPs under the Act**

Schedule 1 of the Act outlines which bodies are covered by the Act. Part III of Schedule 1 relates to organisations and individuals in the National Health Service. Paragraphs 44 and 45 of Part III deal with the coverage of GPs:

*"44. Any person providing general medical services, general dental services, general ophthalmic services or pharmaceutical services under Part II of the National Health Service Act 1977, in respect of information relating to the provision of those services*

*45. Any person providing personal medical services or personal dental services under arrangements made under section 28C of the National Health Service Act 1977, in respect of information relating to the provision of those services."*

The Commissioner is satisfied that a GP is a separate legal person who falls within either or both of the classes above. Therefore each GP is a separate public authority for the purposes of the Act whether they operate in a medical practice with other GPs or not.

However, the Commissioner recognises that information held by GPs will only be covered to the extent that where that information relates to the 'provision' of general or personal medical services. Therefore, some information held by GPs will not fall under the Act.