

## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Date: 30 June 2011**

**Public Authority:** The Parliamentary and Health Service  
Ombudsman  
**Address:** Millbank Tower  
Millbank  
London SW1P 4QP

### **Summary**

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The complainant requested a large amount of information about the consideration of complaints he and his family had submitted to the Parliamentary and Health Service Ombudsman (the PHSO). The PHSO viewed some of the 'requests' as invalid, but provided some information..

The PHSO withheld information under section 40(1) (first party personal data), section 44(1) (statutory bar) and section 40(2) (third party personal data). It could not confirm or deny whether additional information was held by virtue of section 44(2) (statutory bar).

The Commissioner decided that there was no information that had been withheld under section 40(2) that was not also covered by section 44(1). He also found that the PHSO was correct that some 'requests' were not valid under the Act. However, he also decided that the PHSO was wrong about other requests that were valid. The PHSO then applied section 44(2) to the requests that were found to be valid.

The Commissioner considered the operation of section 44 to all the remaining information. He found that the PHSO applied section 44(1) appropriately to the information it confirmed it held. He also found that section 44(2) was appropriately applied to neither confirm nor deny whether information was held directly for each request and for the requests it had previously classed as invalid.

However, the Commissioner has noted a number of procedural breaches of the Act and that the PHSO breached sections 10(1) and 17(1). The Commissioner requires no remedial steps to be taken in this case.

## 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. The complainant and his family complained about the care and treatment his mother received from a named Trust in 2007.
3. They were unhappy how their complaints were dealt with and referred the matter to the PHSO. The PHSO refused to take his case forward. The complainant made a number of information requests to understand why it had come to this decision and what evidence it had considered.

## The Requests

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### *Requests that were thought to be valid*

4. Between 14 January and 17 February 2010, the complainant submitted a large number of requests for information to the PHSO. Thirty nine requests for information were recognised by the PHSO and referred to the Commissioner. The Commissioner has numbered them as requests **[1]** to **[39]** (see Appendix A.)
5. The PHSO issued its response to requests **[1]** to **[39]** on 14 April 2010. It explained that, taken together, it understood all of the requests amounted to a request for all the electronic and paper records it held in two complaint files. It disclosed the following.
  1. The information it regarded as the 'handling information' (redacting a small amount of personal data of its junior staff by virtue of section 40(2))<sup>1</sup> (under the FOIA).
  2. Copies of all the information the complainant sent to the PHSO about his complaint and records of the telephone calls between himself and PHSO staff (under the Data Protection Act 1998 ("the DPA")).

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<sup>1</sup> All of the sections of a statute that are cited in this Notice can be found in full in the Legal Annex attached to it.

3. Copies of the clinical advice provided in respect of his complaint (under the exception in section 15(1)(a) of the Health Service Commissioners Act 1993 ('HSCA 1993')).

It also confirmed a number of things about how his complaint was handled (and specifically confirmed or denied whether relevant recorded information was held for requests [29] and [39]).

6. However, it explained that it was unable to disclose any further information from the file under the Act. It confirmed that the information was either the complainant's own personal data (so was exempt by virtue of section 40(1) - first party personal data), was the personal data of his relatives (so was covered by section 40(2) - third party personal data) or was covered by a statutory bar which allowed section 44(1) (prohibitions on disclosure) to be applied. The statutory bar was at section 15 of the HSCA 1993.
7. On 22 and 23 April 2010 the complainant requested an internal review. The Commissioner can summarise his concerns as follows.
  1. He had separated his requests in order to ensure that he received confirmations and denials in relation to each of them.
  2. The statutory bar can be overridden and in the circumstances of this case should be.
  3. It is necessary for the full documentation to be released to enable the public to understand what evidence has been considered to come to a conclusion.
  4. It is necessary for the integrity of the PHSO's decision to be assured that all the information is provided to the public.
8. On 22 June 2010 the PHSO conducted its internal review. It addressed some of the complainant's points. In particular, it explained that it was not able to confirm or deny whether specific information was held in relation to his complaint file because the statutory bar meant it was not required to do so (section 44(2)) and that it believed it had exercised its discretion appropriately, disclosing the information that was material to its decision privately. The PHSO explained that it believed it had correctly withheld the disputed information.

*Request that was thought to be invalid*

9. The complainant also asked the Commissioner to consider a letter dated 23 January 2011 that the PHSO did not recognise as containing valid requests for information. The elements of this request are in Appendix B

of this Notice and have been numbered [40] to [49] by the Commissioner.

10. On 28 January 2010 the PHSO explained that it had received the letter dated 23 January 2010 but believed that it contained no valid requests for information. It explained that there was no obligation on it to analyse documents or create new information in response to requests. It also explained that it would consider all the requests at once, rather than consider each and every request individually as the complainant had requested. The complainant challenged this and the PHSO confirmed its position on 4 February 2010, explaining why it believed that some of the requests were not valid requests for information.

## The Investigation

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### Scope of the case

11. The complainant first contacted the Commissioner on 8 July 2010. He explained that he was not satisfied with how the PHSO had handled his requests for information and explained in detail why this was the case. The complainant then sent a number of items of further correspondence outlining his dissatisfaction with the operation of the statutory bar and with the time taken to process his request.
12. Section 7 of the DPA gives an individual the right to request copies of personal data held about them, referred to as the right of subject access. The Commissioner has conducted an assessment under section 42 of the DPA into the PHSO's compliance with the DPA which he sent to the complainant separately and which does not form part of this Decision Notice. .
13. On 31 May 2011 the complainant agreed that the scope of the Commissioner's case would be (for requests [1] to [39]):
  - whether the PHSO was right to say that it was not required to confirm or deny to the public whether it held information for his specific requests by virtue of section 44(2) (the statutory bar);
  - whether the PHSO was correct to say that the information he had requested should not be provided to the public by virtue of the exemptions found in sections 40(1) (first party personal data), section 40(2) (third party personal data) and section 44(1) (the statutory bar); and
  - any issues about the public authority's timeliness in dealing with his requests.

14. In addition, the complainant specifically asked the Commissioner to consider:
  - whether the PHSO complied with the Act in not issuing separate and differentiated responses to each request submitted as he had requested and the impact of this on timeliness; and
  - whether the PHSO was correct in saying that the whole of the request dated 23 January 2010 was invalid.
15. The complainant also confirmed on the same day that he did not challenge the application of the exemptions in the following three circumstances:
  - the application of section 40(1) to his own personal data as he understood this was covered by an absolute exemption;
  - the application of section 40(2) to information that related to [Relative 1 redacted] and [Relative 2 redacted]'s complaints as he understood why this exemption applied to this information; and
  - the application of section 40(2) to the names of the PHSO's staff redacted from the handling information, because his focus was on the other information that was considered in this complaint.
16. The Commissioner has also received submissions from the PHSO in a number of previous cases about how the statutory bar operates in cases where it has decided not to take a complaint forward. The Commissioner has considered these submissions where they are relevant to this case.
17. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. For clarity, the Commissioner cannot adjudicate on the PHSO's processes regarding how it handles complaints.

## **Chronology**

18. On 2 September 2010 the Commissioner wrote to the PHSO and the complainant to explain that he had received an eligible complaint. He explained that he would first conduct an assessment under the DPA, before considering the residue of any information under the Act. He asked the PHSO to explain its position in respect of the Act in detail.
19. On 8 October 2010 the Commissioner wrote to the PHSO and the complainant with the result of his assessment under the DPA.
20. On 11 November 2010 the PHSO outlined its position in detail and provided the Commissioner with a copy of the withheld information.

21. On 10 May 2011 the Commissioner wrote to the complainant to confirm the scope of his investigation and to gather any further arguments about why he refuted the PHSO's position.
22. The complainant called the Commissioner a number of times before confirming the scope of the case and offering further arguments on 31 May 2011. The Commissioner confirmed what was agreed by email and in a telephone call on 2 June 2011.
23. On 8 June 2011 the Commissioner wrote to the PHSO to ask some questions about its handling of the requests. He received a response on 10 June 2011.

## Analysis

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### Substantial procedural matters

*Were any of requests [40] to [49] valid requests for information under the Act?*

24. Section 8 defines what constitutes a 'request for information' under the Act. It provides three requirements that need to be satisfied for a request made under the Act to be valid:
  1. It must be in writing (8(1)(a));
  2. It must state the name of the applicant and an address for correspondence (8(1)(b)); and
  3. It must describe the (recorded) information that has been requested (8(1)(c)).
25. The PHSO did not consider that the letter of 23 January 2010 contained valid requests for information because they said it required analysis which was not a requirement of the Act. It explained that section 8(c) specifies that the request must 'describe the information requested' and that the letter failed to do so.
26. The complainant has argued that some of the requests contained within the letter dated 23 January 2010 were valid and has asked the Commissioner to come to a decision about this matter.
27. The Commissioner will therefore consider each of the three requirements of section 8 in turn. For the first requirement, it is important also to consider section 8(2) that explains that a request should be treated as being in writing where the text of the request is submitted by electronic

means, in legible form and capable of being used for subsequent reference. In this case the request satisfies the requirements of section 8(2) and can therefore be deemed to be in writing for the purposes of section 8(1)(a).

28. The second requirement is also met. The request contains the complainant's name, and his email address is sufficient to be an address within the meaning of section 8(1)(b).
29. The last requirement is most contentious. The Commissioner believes that the ten requests can be split into two categories:
  - The first category consists of 'where in the correspondence' questions (requests [40] to [43]); and
  - The second category consists of 'if the Ombudsman does not agree, please explain in detail why' questions (requests [44] to [49]).
30. In the Commissioner's view the first category of requests were wrongly said to be invalid requests for recorded information. They clearly describe the information that has been requested: the location in correspondence of set statements and therefore they amount to valid requests for information.
31. The Commissioner agrees with the PHSO that it would not be obliged to identify the part of the information, if it had disclosed the information to the complainant. However, this is not the situation in this case. The PHSO has explained that it wishes to apply section 44(2) to this information and neither confirm nor deny whether it holds it. The Commissioner will consider this matter in the analysis section below. It should be noted that the wrong declaration of requests as being invalid constituted a breach of section 1(1) of the Act.
32. However, in the Commissioner's view the second category of requests were correctly declared to be invalid. The second category of requests asks for the PHSO to consider a set of statements and offer its view about the merits of those statements. The Commissioner does not accept that these requests comply with section 8(1)(c) because they do not describe recorded information that could be held by the PHSO..

## Exemptions

33. As a preliminary matter, it is important to note that any disclosure under the Act amounts to a disclosure to the public at large and not just to the complainant. If the public authority is prepared to disclose the requested information to the complainant under the Act it should be prepared to disclose the same information to any other person who asks for it. The Tribunal in the case of *Guardian & Brooke v The Information*

*Commissioner & the BBC* (EA/2006/0011 and EA/2006/0013) (following *Hogan and Oxford City Council v The Information Commissioner* (EA/2005/0026 and EA/2005/0030)) confirmed "*Disclosure under FOIA is effectively an unlimited disclosure to the public as a whole, without conditions*" (paragraph 52).

34. It must also be noted that it is only necessary to show that one exemption can be applied appropriately to any piece of information for it to be correctly withheld.

#### **Section 44**

35. Section 44(1) provides an exemption from disclosure under the Act for information which is prohibited from disclosure under any law or enactment. It is an absolute exemption, so if the statutory bar applies then the information is exempt and no public interest test is necessary.
36. Section 44(2) explains that the duty to confirm or deny whether recorded information is held does not arise where even that confirmation or denial would be prohibited by the statutory bar.
37. As stated, the PHSO is relying on a mixture of the two and the Commissioner will divide his analysis the same way.

#### **Category one – section 44(1)**

38. The PHSO has applied section 44(1) to the information in the complaint file that it has not disclosed (and did not believe that it amounted to the complainant's own or his family's personal data).
39. In its refusal notice dated 14 April 2010, the PHSO identified section 15 of the HSCA 1993 as the relevant statutory prohibition, which meant that it could not disclose the information to the public.
40. The Commissioner will first detail the relevant parts of the legislation before moving on to consider their operation in this case. The Commissioner has considered the withheld information when coming to a decision about whether the statutory bar can be applied appropriately or not.

#### ***The HSCA 1993***

41. Section 11(2) of the HSCA 1993 explains that the PHSO has a duty to conduct an investigation in private.
42. The Ombudsman has argued that the requirement for her investigations to be conducted in private would, or would be likely to be, undermined and jeopardised by the disclosure of the requested information to the



whole world. Such disclosure of the information withheld could conceivably inhibit, or discourage, individuals from bringing their concerns to the attention of the Ombudsman or having confidence in engaging with her office as freely and frankly as possible. The Commissioner acknowledges that the privacy of an investigation is an important factor when considering this statutory bar.

43. Section 15 of the HSCA 1993 states that:

*'(1) Information obtained by a Commissioner [the Ombudsman in this case] or his officers in the course of or for the purposes of an investigation shall not be disclosed...'*

44. The HSCA 1993 goes on to set out a number of exceptions to this provision. These are set out in full in the legal annex to this Notice.

45. The complainant has also pointed to a number of other sections of the HSCA 1993 that he argues are also relevant. They are also set out in the legal annex to this Notice and will be considered below.

### ***The application of the statutory bar to the information requested***

46. For it to be possible for the PHSO to disclose information under the Act it is necessary for the information to:

1. have been obtained other than *'... by the Ombudsman or his officers in the course of or for the purposes of an investigation'* under the HSCA 1993. If the information falls outside this provision then the statutory bar would not be appropriately applied;
2. fall within one of the exceptions found in section 15(1)(a) to (e) of the HSCA 1993; or
3. fall within another provision in the HSCA 1993 which compels its disclosure to the public.

47. The Commissioner will consider each possibility in turn:

**(1)** *Was the requested information 'obtained by the Commissioner or his officers in the course of or for the purposes of an investigation'?*

48. The first issue to be considered by the Commissioner is whether the information requested by the complainant can be said to have been obtained by the Ombudsman in the course of, or for the purpose of, an investigation under the HSCA 1993.

49. Section 3 of the HSCA 1993 sets out the matters subject to an 'investigation'. These matters include a complaint made to a

Commissioner (the Ombudsman as she has inherited the Commissioner's obligations) by or on behalf of a person that has sustained injustice or hardship through the failure in a service provided by a health care body, a failure of a body to provide a service, through maladministration or other miscellaneous complaints that aren't disallowed by that Act.

50. The Commissioner considers that the words '*obtained by the Commissioner or his officers in the course of or for the purposes of an investigation*' should be given their natural meaning. '*Obtained*' refers both to information which the Ombudsman proactively obtains as part of her investigations and information supplied by those wishing the Ombudsman to carry out an investigation.
51. The complainant has argued, as the PHSO decided against taking his complaint and his family's complaint forward, that the information supplied to it cannot be said to have been obtained in the course or for the purposes of an 'investigation'.
52. In a connected case, the PHSO has addressed these arguments by explaining that this argument advocated the incorrect approach. This was because it believed that even if it declines to investigate a complaint, it believes that section 15(1) still applies because "*obtained in the course of, or for the purposes of, an investigation*" also includes for the purposes of deciding whether there is going to be an investigation. The PHSO referred the Commissioner to the case of *R (Turpin) v Commissioner for Local Administration [2001] EWHC Admin 503* (paragraph 64).
53. The Commissioner is content that the PHSO's position is correct in that the process of deciding and reviewing whether there is going to be an investigation is caught by the statutory bar, providing it is generally held for the purposes of deciding whether there should be an investigation. He finds support in a recent First Tier Tribunal (Information Rights) decision in *Purser v the Information Commissioner and the Local Government Ombudsman [EA/2010/0188]*. The Tribunal was asked to consider the operation of a similarly worded statutory bar when that body had decided against taking an investigation forward. It stated at paragraph 20:

*'A necessary part of any investigation by a statutory body is determining whether a complaint falls within its powers and if so whether there are reasons, for example that the individual should pursue another route for redress, why the statutory body should not take up the issue. Even though a formal decision not to investigate was taken, there still needed to be, and was, an investigation to establish what steps were appropriate. In the*

*course of this investigation there was the generation of information and analysis derived from the material supplied and the legal framework of the Ombudsman. The Tribunal was satisfied that these actions and processes were "information obtained ...for the purposes of an investigation".'*

54. The Commissioner agrees with the PHSO. The information it has confirmed it holds, that it is withholding by virtue of section 44(1) (in relation to requests **[1]** to **[39]**) relates to the PHSO's handling of the complaints made by the family about the care received by [patient name redacted] from the Trust.
55. It is helpful to divide the withheld information into four sub-categories to explain his view on whether the information is held for the purpose the PHSO claims:
- (i) Information generated by the PHSO detailing its consideration of (the complainants') substantive complaints.
  - (ii) Information the PHSO obtained from the Trust.
  - (iii) Correspondence between the Trust and the PHSO in relation to the substance of those complaints; including records of relevant telephone calls.
  - (iv) Information that does fall within categories (i) to (iii) above, and which does not make reference to the subject matter of the complaint and/or information that was obtained in the course of or for the purposes of an investigation.
56. Firstly, the Commissioner has considered all the information in the complaints files and considers that the information that was disclosed to the complainant was all of the category (iv) information (apart from the names of staff that he has agreed not to pursue). The PHSO was correct that this information could not be withheld and was right to disclose it.
57. The information in respect of categories (ii) and (iii) were clearly 'obtained' by the Ombudsman for the purposes of her investigations. The information was gathered during the investigation to enable the PHSO to consider whether it would take the case forward. As this is so, the Commissioner finds that the category (ii) and (iii) information is held for the correct purposes for the statutory bar to apply.
58. Finally, the Commissioner has considered the category (i) information. He is satisfied that the analysis of the complainant's family's complaints relies entirely on the information gained from the relevant complainants and the other parties. The reason why the information was obtained was to conduct the investigation. The Commissioner is satisfied that it would

not be possible to redact the information that was obtained in the course or for the purpose of the investigation and provide the residue because it is permeates through all of the information held for this category.

59. The Commissioner has also considered the Information Tribunal's decision in *Commission for Local Administration in England v The Information Commissioner* [EA/2007/0087], which was an appeal against the Commissioner's decision FS50112347. This case concerned the statutory prohibition contained in section 32(2) of the Local Government Act 1974, which is similar to the section 15 statutory bar of the HSCA 1993. From this decision, the Commissioner believes that it is important to note the following:
1. There is a distinction between information that concerns the content of the complaint and information that relates to the process that was undertaken in investigating it – the first is definitely caught by the statutory bar while the second is unlikely to be (paragraph 10).
  2. There is also a distinction between information that has been obtained from a third party and internally generated information – the first is definitely caught by the statutory bar while the second is unlikely to be (paragraph 11).
60. The Commissioner has considered the comments outlined above and notes that had it been possible to separate the purely internally generated information from the information obtained during the investigation, then the purely internally generated information should have been disclosed. However, as noted above, he does not consider that the information can be separated in this way (following his earlier decision in FS50140862 which was upheld by the Tribunal in *Mr Colin Parker v the Information Commissioner and the Parliamentary and Health Service Ombudsman* [EA/2007/0046]). He is satisfied therefore that this information was '*obtained by the Commissioner or his officers in the course of or for the purposes of an investigation*'.
61. The Commissioner is therefore satisfied that the information in the first three categories is the sort of information that the statutory bar covers.
62. This does not mean that the statutory bar necessarily applies. This is because there are exceptions to the statutory bar found in section 15(1)(a) to (e) of the HSCA 1993. The complainant has also asked the Commissioner to consider other arguments.
- (2)** *Do any of the exceptions found in section 15(1)(a) to (e) of the HSCA 1993 apply in this case?*

63. The Commissioner can discount sections 15(1)(b) to (d) because in this case the PHSO is not releasing the information in these limited circumstances to achieve these purposes. These three sections are only relevant where a body that is charged with investigating those offences requests the information from the PHSO and this would amount to a public disclosure of the information.
64. Section 15(1)(a) allows the PHSO to disclose information where it wishes to do so for both the purposes of the PHSO's investigation and any report made in respect of it.
65. The PHSO explained that it had disclosed some information to the complainant under section 15(1)(a) that related to how it came to its decision in relation to his family's complaint. It explained that this disclosure to the relevant parties is all the information it needs to disclose for the purposes of its investigation and to report its conclusions. The Commissioner recognises that section 15(1)(a) gives the PHSO discretion to disclose information obtained in the course of or for the purposes of an investigation where it believes it would be beneficial for the purposes of that investigation.
66. The complainant has also argued that the Ombudsman should not be allowed to 'cherry pick' the information that it released to him. This is a misunderstanding of the fact that the discretion about what to disclose remains at all times with the PHSO. The Upper Tier Tribunal has recently confirmed that the Commissioner does not have the power to consider how a public authority uses its discretion in its recent decision *OFCOM v Morrissey and the Information Commissioner* [2011] UKUT 116 (AAC). This decision is binding on the Commissioner. The Tribunal confirmed that the correct channel to challenge use of discretion was the administrative court.
67. Section 15(1)(e) also requires further consideration. It is important to note that section 15(1)(e) has been restricted by section 15(1)(1B) which explains that disclosure can only be made to:  
  
*'any persons to whom he thinks it should be disclosed in the interests of the health and safety of patients'.*
68. The complainant has argued that the assessment of the case by the PHSO constitutes a threat to the health and safety of patients itself and therefore in his view all the information needs to be released to the public.
69. The Commissioner cannot accept this argument. While he has noted that the complainant's allegations about his mother's care are serious and if proven, may mean that the PHSO would be entitled under section 15(1)(e) to contact relevant individuals to protect the health and safety

of patients, the discretion to make this disclosure lies with the PHSO itself. The Commissioner cannot overturn the PHSO's use of its discretion for the reasons outlined above.

70. As all the information falls within the statutory bar and none of the exceptions apply, the Commissioner has looked at the complainant's other arguments that the information should be disclosed.
- (3)** *Does the information fall within another provision in the HSCA 1993 which compels its disclosure to the public?*
71. The complainant has offered a variety of further arguments about why the statutory bar should not be regarded as being applied correctly in this case, including his view that section 13 of the HSCA 1993 overrides the prohibition in section 15 of HSCA 1993. Section 13 of HSCA 1993 relates to the investigation conducted by the Ombudsman. It is entitled 'obstruction and contempt'.
72. Section 13 of the HSCA 1993 allows the Ombudsman to take court action when a party acts in a manner that is obstructive or is guilty of an act or omission which if done in court would constitute contempt of court. The court can acquire information that it needs to make a judgment about this.
73. The complainant alleged that the way the Trust behaved in handling his complaint meant that it was 'without doubt' that if it happened before a Court or Ombudsman investigation it would be classed as perjury, obstruction and contempt. The complainant argued that section 13 of the HSCA 1993 should therefore allow the disclosure of all the information to him.
74. The Commissioner considers that this argument is misguided. Section 13 of HSCA 1993 allows the Ombudsman to take court action against a party. It provides no obligation to disclose information to the public and does nothing to change the application of the statutory bar.
75. The complainant also argued that the statutory bar should not be used to:
1. *cover up the dangerous Health and Safety issues in regard to the PHSO and the Trust;*
  2. *prevent justice;*
  3. *aid cover-ups of highly contentious deaths; and*
  4. *aid obstruction.*

76. The Commissioner can only judge whether the statutory bar has been applied correctly in accordance with the law that was set by Parliament. It is not appropriate or possible for him to judge whether the complaints listed in paragraph 75 are founded in fact as they have no impact on the application of the statutory bar.
77. The complainant argued that he could not see how the disclosure of the information to the family would prejudice the PHSO's statutory functions. The Commissioner notes that this is not the test. The test is whether disclosure to the public would be caught by the statutory bar. The complainant also argued that he was unable to make an informed challenge to the PHSO's decision without the evidence that it had considered. This argument is also not relevant to the Commissioner's consideration of the statutory bar.
78. The complainant also argued that there should be equality of arms between himself and the Trust. He should be able to know what the other side received from the PHSO to be sure that its verdict was sound. He said that this would accord with his idea of natural justice. This argument also has no impact on the application of the statutory bar.
79. He also noted that inaccurate evidence could be submitted to the PHSO and there would be no way for the interested parties to let the PHSO know. This is also an argument that has no impact on the application of the statutory bar.
80. In conclusion, the Commissioner has found that the PHSO was entitled to rely on section 44(1) in respect of the all the information that fell within categories (i), (ii) and (iii) as outlined above.
81. By virtue of section 2(3) of FOIA, the exemption in section 44(1) is absolute. The only issue the Commissioner can consider is whether disclosure of the withheld information was prohibited by or under the statutory bar. There is no public interest component.
82. As he is satisfied that the statutory bar applies and the PHSO was entitled to withhold the information from the public, the Commissioner upholds its position.
83. The complainant also asked the Commissioner to consider the operation of section 40(2) to any information found outside the elements he agreed to withdraw, which the PHSO did not apply section 44(1) appropriately to. For the avoidance of doubt, the Commissioner can confirm that there is no information of this description. Section 44(1) was applied appropriately to all the information and so the Commissioner has not been required to consider section 40(2). This is because only one exemption needs to be appropriately applied for the information to be correctly withheld.

## Category two – section 44(2)

84. Section 44(2) works in the same way as section 44(1) with the only exception being that the PHSO is not required to confirm or deny whether it holds specific recorded information when do so would reveal information that falls under the statutory bar itself.
85. The PHSO has confirmed that it has applied section 44(2) in relation to the information that it will not confirm or deny having to the public. This information consists of the following:
  1. Specific individual responses to requests [1] to [39] because to answer each of them individually would expose information that was covered by the statutory bar. Instead it took a general approach to ensure that the complainant received as much information as possible to which he was entitled that fell outside the statutory bar.
  2. Not specifically answering requests [40] to [43] that it originally declared to be invalid.

## Category one

86. The complainant maintained that the grouping together of requests meant that he was unable to follow what information has been disclosed for each request and this went directly against his instructions.
87. The PHSO explained that it believed that this was the only legitimate approach it could take because otherwise the fragmentation of the requests would cause it to reveal information that was appropriately covered by the statutory bar. Instead it believed that it should answer all the requests about the complaint file together and consider all the complaint file while doing so. This solution would mean that no information was missed, while maintaining the integrity of the withheld information.
88. The Commissioner is satisfied that revealing whether specific relevant recorded information was held to the public in the complainant's family's complaint files would reveal information *'obtained by the Commissioner or his officers in the course of or for the purposes of an investigation'* for the same reasons outlined above concerning the operation of section 44(1). He believes that to confirm or deny individually whether or not information was held for requests [1] to [39] would reveal whether information of a set description was held by it and all the information that has been requested concerns the PHSO's investigation into the complainant's and his family's complaints.



89. He is also satisfied that there are no exceptions that apply in this case for the same reasons as are outlined in paragraphs 63 to 80 above.
90. It follows that he finds that the PHSO appropriately applied section 44(2) which excluded it from the obligation to confirm or deny to the public whether or not it held specific information for requests **[1]** to **[39]**.

#### *Category two*

91. The four requests in category two ask for the PHSO to point out where in the complaint correspondence statements were made.
92. In the Commissioner's view this makes the request clearly about the information the PHSO may hold that it obtained in the course of or for the purposes of its investigation.
93. In the Commissioner's view it is therefore appropriate not to confirm or deny to the public whether it held relevant recorded information for these statements because it is excluded from the obligation to do so by virtue of section 44(2).
94. It follows that the Commissioner accepts the application of section 44(2) to both categories above.

### **Procedural Requirements**

#### *Section 10(1)*

95. Section 10(1) requires that a public authority complies with its obligations as set out in section 1(1) within 20 working days (except for limited exceptions that are not relevant to this case).
96. Section 1(1)(a) requires that a public authority confirms or denies that it holds information and section 1(1)(b) requires that non-exempt information is provided.
97. The PHSO failed to confirm it held information or provide disclosable information in 20 working days and thus breached section 10(1) in relation to its handling of all of the requests that it believed were valid (requests **[1]** to **[39]**).
98. The PHSO also declared some valid requests invalid (**[40]** to **[43]**) and breached section 10(1) in relation to those requests, because it did not comply with its obligations under section 1(1) within 20 working days.
99. The complainant has specifically mentioned that he felt that he was prejudiced in terms of the time taken by the PHSO 'bunching' up the requests **[1]** to **[39]** and answering them with one response. The

Commissioner wants to make it clear that in his view each request imposes its own obligation on the PHSO. Therefore, his view is that if the PHSO does group the requests, then to be in compliance with section 10(1), it would need to answer all of the requests within 20 working days of receiving the first one.

### *Section 17(1)*

100. Section 17(1) requires that a valid refusal notice is issued within the time for statutory compliance. The PHSO failed to issue a refusal notice in time and therefore breached section 17(1).

## **The Decision**

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

- *it applied section 44(1) appropriately to the information it confirmed that it held that fell into categories (i), (ii) and (iii) of withheld information and was entitled to withhold it;*
- *it could appropriately rely on section 44(2) to not confirm or deny whether it held relevant information for the specific requests that it believed were valid (requests [1] to [39]); and*
- *it could appropriately rely on section 44(2) to not confirm or deny whether it held relevant recorded information for the requests that it wrongly originally believed to be invalid (requests [40] to [43]).*

102. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- *it breached sections 10(1) for complying with section 1(1)(a) and section 1(1)(b) late; and*
- *it breached section 17(1) because it failed to issue its refusal notice in 20 working days*

## **Steps Required**

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103. The Commissioner requires no steps to be taken.

## Right of Appeal

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104. 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: 0300 1234504

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)

105. 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.

106. 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 30<sup>th</sup> day of June 2011**

**Signed .....**

**Faye Spencer  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## **Appendix A – a copy of original requests for information recognised by the PHSO**

### *Request one dated 14 January 2010*

- [1]** A full copy of the medical record used in the assessment of our case;
- [2]** A full copy of all memos, letters, emails and documentation used by any professional advisers/assessors (clinical) in the assessment of our case;
- [3]** A full copy of all memos, letters, emails and documentation used by any non professional advisers/assessors (clinical) in the assessment of our case.
- [4]** A full copy of all memos, letters, emails and documentation used by any professional advisers/assessors (nursing) in the assessment of our case;
- [5]** A full copy of all memos, letters, emails and documentation used by any non professional advisers/assessors (nursing) in the assessment of our case.
- [6]** A full copy of all memos, letters, emails and documentation sent between Wrightington Wigan and Leigh NHS FT ('WW&L NHS FT') and the Ombudsman in regards to this case, at all stages, not just the assessment stage. Please include all [complainant's surname redacted] family documentation which we sent to the Ombudsman that was subsequently forwarded to WW&L NHS FT.
- [7]** A full list of all people/advisers/assessors that were/are involved in our case from initial Ombudsman contact. Please state if any of these people/advisers/assessors have had any contact prior to our case, with former/current staff from WW&L NHS FT.
- [8]** A full copy of all memos, letters, emails and documentation sent between ICAS/Ombudsman/ WW&L NHS FT at all Ombudsman stages to our case.
- [9]** A full copy of all memos, letters, emails and documentation used in the assessment of our case and all assessors/advisers/staff names.
- [10]** Please supply all information, personal or otherwise that the Ombudsman holds in regards to [the complainant], [relative 1 redacted] and [relative 2 redacted].

### *Request two dated 15 January 2010*

- [11]** We request all documents under the DPA, Access to Health Records Act on your assessment papers regarding our case – so essentially we want all the documents relating to our mum.

*Request three dated 17 January 2010*

Please provide all dates and times for all mentioned telephone calls below:

**[12]** All telephone conversation transcripts between [complainant redacted] and the Ombudsman/Ombudsman staff (please provide names), please also provide the total number of mentioned conversations, and also who initiated the call.

**[13]** All telephone conversation transcripts between [relative 1 redacted] and the Ombudsman/Ombudsman staff (please provide names), please also provide the total number of mentioned conversations, and also who initiated the call.

**[14]** All telephone conversation transcripts between [named Individual A redacted] and the Ombudsman/Ombudsman staff (please provide names) in regards to our case, please also provide the total number of mentioned conversations, and also who initiated the call.

**[15]** All telephone conversation transcripts between ICAS staff and the Ombudsman/Ombudsman staff (please provide names) in regards to our case, please also provide the total number of mentioned conversations, and also who initiated the call.

**[16]** All telephone conversation transcripts between [named Individual B redacted] (Wrightington Wigan and Leigh NHS FT) and the Ombudsman/Ombudsman staff (please provide names) in regards to our case, please also provide the total number of mentioned conversations, and also who initiated the call.

**[17]** All telephone conversation transcripts between Wrightington Wigan and Leigh NHS FT staff (please provide names) and the Ombudsman/Ombudsman staff (please provide names) in regards to our case, please also provide the total number of mentioned conversations, and also who initiated the call.

**[18]** All telephone conversation transcripts between [Individual C redacted] and the Coroner/Coroner staff (please provide names) in regards to our case, please provide the total number of mentioned conversations, and also who initiated the call.

**[19]** All telephone conversation transcripts between [Individual D redacted] and the Coroner/Coroner staff (please provide names) in regards to our case, please provide the total number of mentioned conversations, and also who initiated the call.

**[20]** All telephone conversation transcripts between the Ombudsman/Ombudsman staff (please provide names) and the Coroner/Coroner staff (please provide names) in regards to our case, please provide the total number of mentioned conversations, and also who initiated the call.

**[21]** All telephone conversation transcripts between [Individual D redacted] and 'all' other external (external to the Ombudsman) people/organisations/bodies (please provide names) in regards to our case, please provide the total number of mentioned conversations, and also who initiated the call.

**[22]** All telephone conversation transcripts between the Ombudsman/Ombudsman staff (please provide names) and 'all' other external (external to the Ombudsman) people/organisations/bodies (please provide names) in regards to our case, please provide the total number of mentioned conversations, and also who initiated the call.

**[23]** Basically, we want all telephone conversation transcripts between the Ombudsman/ Ombudsman staff (please provide names) and 'all' other external (external to the Ombudsman) people/organisations/bodies (please provide names) in regards to our case, please provide the total number of mentioned conversations, and also who initiated the call.

*Request four dated 18 January 2010*

**[24]** In a previous FOI/DPA request to you/The Ombudsman we requested all medical records you hold in regards to [Patient redacted], can you please make sure you include all the medical records, in particular we need all Xrays/scans taken from 14/10/2007 up until 2/11/2007, not just the reports by the scans/Xrays or copies of these.

*Request five dated 27 January 2010*

**[25]** Can you please identify all correspondence sent by me to the Ombudsman since your letter dated 13 January 2010. This includes emails sent to [Individual C redacted], Ann Abraham and to email address [complaintsaboutphso@ombudsman.org.uk](mailto:complaintsaboutphso@ombudsman.org.uk)

*Request six dated 17 February 2010*

**[26]** Can you please forward to me the PHSO's full audit trail of your decision making process in regards to our case, please make sure all decisions are contained within the requested audit trail.

**[27]** Please forward a full copy of all assessment forms used in regards to our case.

**[28]** Please send a full copy of all Visualfiles used in regard to our case.

**[29]** Please state whether our case went to the assessment panel, if so, please provide all recommendations, and supporting analysis that accompanied the recommendations.

**[30]** Please forward the electronic record that evidences what happened during our case assessment.

**[31]** Please provide all documentation that the PHSO has relied upon in reaching their decision (or which influenced their decision) that is held on hard copy files.

**[32]** Please provide all documentation that the PHSO has relied upon in reaching their decision (or which influenced their decision) that is not held on hard copy files.

**[33]** Please provide the information that states whether our case was 'risk assessed' or not.

**[34]** Please state if any conflicts of interest were identified in regards to our case, please state these conflicts if any.

**[35]** Please state whether any other similar cases or related cases [sic \*were] considered when assessing our case, if possible please state these cases if any.

**[36]** Please state whether our case was recorded as having the local resolution state completed satisfactorily in regards to the Ombudsman accepting our case.

**[37]** If the information provide in point **[36]** above is no, then please provide the reasons why the local resolution stage was not completed satisfactorily in the eyes of the PHSO.

**[38]** Please state whether our case was confirmed as completing the complaint procedure or was discretion used and thus the complaint was records as 'not reasonable to persue [sic] the complaints procedure'.

**[39]** Please state whether a covering letter was sent with the PHSO decision letter to our local MP, if not, please provide the reasons why no correspondence was sent to our local MP, who is involved in our case.

## **Appendix B – a copy of further ‘requests for information’ not recognised as valid requests for information by the PHSO**

*Request dated 23 January 2010*

**[40]** You state in point 2 ‘you complain that a scan taken on 26 October 2007 showed that [Patient redacted] had lymphoma, and that the doctors treating her new[sic] this but did not act on it and concealed it from the family.’ 1. Now the above statement beggars belief, as not once in any correspondence have we stated anything of the sorts [sic]. We are assuming that the scan you mention above is the CT scan performed on [date redacted]. Not once have we ever stated that this scan showed lymphoma/cancer, the only person we have quoted in regards to this scan is [Individual F redacted] – [Individual F redacted] stated in trust meeting with us dated 24<sup>th</sup> November 2008 that the scan looked like a patient with cancer, it was [Individual F redacted] who stated this not us the family – we as a family have only ever quoted [Individual F redacted]’s comments about the scan – if your assessor [Individual C redacted] had taken the time to view the documentation forwarded to you, then this fact would have been realised by [gender redacted]. So can you please state where in our correspondence we have stated the above?

**[41]** Please also explain where in our correspondence we state the above [sic] ‘and that doctors treating her new [sic] this but did not act on it and concealed it from your family.’... we have clearly not stated anything of the sorts in regards to the CT scan.

**[42]** If [Individual C redacted] in her letter dated 13 January 2010 is getting confused between the Leucoerythroblastic blood discovery and the CT scan, then [Individual C redacted]’s assessment of our documented allegations is also flawed. If this is the case please state where in our correspondence we state thus in regards to the Leucoerythroblastic blood picture:

**[43]** Please state where we state in our correspondence that the Leucoerythroblastic blood picture ‘showed that [Patient redacted] has lymphoma’ as the only person to state that the Leucoerythroblastic blood picture pointed strongly at Lymphoma/Cancer was [Individual G redacted], not once has our family ever stated that Leucoerythroblastic blood picture showed Lymphoma/Cancer. We as a family have only ever quoted what [Individual G redacted]/ the Trust stated in regards to the Leucoerythroblastic blood picture discovery, that being that they strongly suspected that [Patient redacted] had Lymphoma/Cancer.

....

**[44]** [Detailed set of alleged facts under point 6]... If the Ombudsman does not agree with the family points made in point 6 please state why not in great detail.



**[45]** Please also state in regards to point 20 of your letter dated 13 January 2010 were [sic] it states in the medical records or other documentation that nurses made a referral to the medical team, due to the MEWS score becoming high, this is a fabrication of the truth, we as a family had been asking all that day for the medical team, and the medical records clearly state that, so please produce the entries in the medical records that back up your false statement.

**[46]** [Set of statements under point 8]... If the Ombudsman does not agree with the family points made in point 8 please state why not in great detail.

**[47]** [Set of statements under point 10]... If the Ombudsman does not agree with the family points made in point 10 please state why not in great detail.

**[48]** [Set of statements under point 11]... If the Ombudsman can state to the contrary please do so in full detail [sic].

**[49]** [Set of statements under point 12]... If the Ombudsman feels that our family statements in this point 12 are not a true/honest reflection of the facts, then please kindly in as much detail as possible explain why not.

## **Legal Annex**

### **Freedom of Information Act 2000**

#### **Section 1(1) – General right of access to information held by public authorities**

- (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.”

#### **Section 10(1) – Time for compliance with the request**

- (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.”

#### **Section 17(1) – Refusal of request**

- (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.”

#### **Section 40 – Personal information**

- (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 [1998 c. 29.] 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 [1998 c. 29.] 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 [1998 c. 29.] 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 [1998 c. 29.] 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 [1998 c. 29.] 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 [1998 c. 29.] 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 [1998 c. 29.] Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
- “data subject” has the same meaning as in section 1(1) of that Act;
- “personal data” has the same meaning as in section 1(1) of that Act.

## **Section 44 – Prohibitions on disclosure**

(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court."

## **Health Service Commissioners Act 1993**

**Section 3** provides that:

### *Matters subject to investigation*

#### 3. General remit of Commissioners

(1) On a complaint duly made to a Commissioner by or on behalf of a person that he has sustained injustice or hardship in consequence of—

- (a) a failure in a service provided by a health service body,
- (b) a failure of such a body to provide a service which it was a function of the body to provide, or
- (c) maladministration connected with any other action taken by or on behalf of such a body,

the Commissioner may, subject to the provisions of this Act, investigate the alleged failure or other action.

(1YA) In the case of the Assembly the Health Service Commissioner for Wales may only conduct an investigation in respect of—

- (a) a failure in a service provided by the Assembly in the exercise of a function of the Assembly relating to the National Health Service (an "Assembly health service function"),
- (b) a failure of the Assembly to provide a service the provision of which is an Assembly health service function, or
- (c) maladministration connected with any other action taken by or on behalf of the Assembly in the exercise of an Assembly health service function.

(1ZA) Any failure or maladministration mentioned in subsection (1) may arise from action of—

- (a) the health service body,

(b) a person employed by that body,

(c) a person acting on behalf of that body, or

(d) a person to whom that body has delegated any functions.

(1A) Where a family health service provider has undertaken to provide any family health services and a complaint is duly made to a Commissioner by or on behalf of a person that he has sustained injustice or hardship in consequence of—

(a) action taken by the family health service provider in connection with the services,

(b) action taken in connection with the services by a person employed by the family health service provider in respect of the services,

(c) action taken in connection with the services by a person acting on behalf of the family health service provider in respect of the services, or

(d) action taken in connection with the services by a person to whom the family health service provider has delegated any functions in respect of the services,

the Commissioner may, subject to the provisions of this Act, investigate the alleged action.

(1C) Where an independent provider has made an arrangement with a health service body or a family health service provider to provide a service (of whatever kind) and a complaint is duly made to a Commissioner by or on behalf of a person that he has sustained injustice or hardship in consequence of—

(a) a failure in the service provided by the independent provider,

(b) a failure of the independent provider to provide the service, or

(c) maladministration connected with any other action taken in relation to the service,

the Commissioner may, subject to the provisions of this Act, investigate the alleged failure or other action.

(1D) Any failure or maladministration mentioned in subsection (1C) may arise from action of—

(a) the independent provider,

(b) a person employed by the provider,

(c) a person acting on behalf of the provider, or

(d) a person to whom the provider has delegated any functions.

(2) In determining whether to initiate, continue or discontinue an investigation under this Act, a Commissioner shall act in accordance with his own discretion.

(3) Any question whether a complaint is duly made to a Commissioner shall be determined by him.

(4) Nothing in this Act authorises or requires a Commissioner to question the merits of a decision taken without maladministration by a health service body in the exercise of a discretion vested in that body.

(5) Nothing in this Act authorises or requires a Commissioner to question the merits of a decision taken without maladministration by—

(a) a family health service provider,

(b) a person employed by a family health service provider,

(c) a person acting on behalf of a family health service provider, or

(d) a person to whom a family health service provider has delegated any functions.

(6) Nothing in this Act authorises or requires a Commissioner to question the merits of a decision taken without maladministration by—

(a) an independent provider,

(b) a person employed by an independent provider,

(c) a person acting on behalf of an independent provider, or

(d) a person to whom an independent provider has delegated any functions.

(7) Subsections (4) to (6) do not apply to the merits of a decision to the extent that it was taken in consequence of the exercise of clinical judgment.

Section **11(2)** provides that:

‘(2) An investigation shall be conducted in private.’

Section **13** provides that:

‘(1) A Commissioner may certify an offence to the Court where—

(a) a person without lawful excuse obstructs him or any of his officers in the performance of his functions, or

(b) a person is guilty of any act or omission in relation to an investigation which, if that investigation were a proceeding in the Court, would constitute contempt of court.

(2) Where an offence is so certified the Court may inquire into the matter and after hearing—

(a) any witnesses who may be produced against or on behalf of the person charged with the offence, and

(b) any statement that may be offered in defence,

the Court may deal with the person charged with the offence in any manner in which it could deal with him if he had committed the like offence in relation to the Court.

(3) Nothing in this section shall be construed as applying to the taking of any such action as is mentioned in section 11(5).'

Section **15** provides that:

'(1) Information obtained by a Commissioner or his officers in the course of or for the purposes of an investigation shall not be disclosed except—

(a) for the purposes of the investigation and any report to be made in respect of it,

(b) for the purposes of any proceedings for—

(i) an offence under the Official Secrets Acts 1911 to 1989 alleged to have been committed in respect of information obtained by virtue of this Act by a Commissioner or any of his officers, or

(ii) an offence of perjury alleged to have been committed in the course of the investigation,

(c) for the purposes of an inquiry with a view to the taking of such proceedings as are mentioned in paragraph (b),

(d) for the purposes of any proceedings under section 13 (offences of obstruction and contempt) or

(e) where the information is to the effect that any person is likely to constitute a threat to the health or safety of patients as permitted by subsection (1B).

(1A) Subsection (1B) applies where, in the course of an investigation, a Commissioner or any of his officers obtains information which—

(a) does not fall to be disclosed for the purposes of the investigation or any report to be made in respect of it, and

(b) is to the effect that a person is likely to constitute a threat to the health or safety of patients.

(1B) In a case within subsection (1)(e) the Commissioner may disclose the information to any persons to whom he thinks it should be disclosed in the interests of the health and safety of patients; and a person to whom disclosure may be made may, for instance, be a body which regulates the profession to which the person mentioned in subsection (1A)(b) belongs or his employer or any person with whom he has made arrangements to provide services.'