

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 2 August 2011

Public Authority: Wrightington, Wigan and Leigh NHS Foundation Trust
(‘the Trust’)

Address: Royal Albert Edward Infirmary
Wigan Lane
Wigan
WN1 2NN

Summary

The complainant requested, under the Freedom of Information Act 2000, twelve items of information that related to how his complaint and other complaints of his family were handled by the Trust.

The Trust provided some information, explained that it did not hold other information and withheld other information by virtue of sections 12 [the costs limit], 21 [information reasonably accessible to the applicant], 40(1) [first party personal data], 40(2) [third party personal data] and 44(1) [a statutory bar prohibits its disclosure]. The Trust was relying on the statutory bar found in section 15 of the Health Service Commissioners Act 1995 that prohibited information obtained by the Parliamentary and Health Service Ombudsman for the purposes of her investigations.

The complainant requested an internal review and referred the case to the Commissioner. He explained that he was not content that he had received all the appropriate information in relation to the information that had been disclosed and that he believed that the exemptions had been applied inappropriately. He agreed that the Commissioner need not consider the operation of section 40(1) and to a limited extent section 40(2) during the course of his investigation.

Further information was disclosed and the Commissioner has found that the Trust has applied sections 21(1), 40(2) and 44(1) appropriately to the information that it continues to withhold. He has also found a number of procedural breaches, but requires no remedial steps to be taken in this case.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The complainant and his family complained about the care and treatment received by his mother from the Trust in 2007. The case went through the Trust's complaint procedure and the complainant remains dissatisfied with the care that was received.
3. The complainant referred this case to the Parliamentary and Health Service Ombudsman (PHSO) who declined to investigate his complaint. The Commissioner understands that he wants to understand the evidence that was considered by the PHSO in coming to that decision.

The Requests

4. The complainant requested twelve items in two separate requests for information. The Commissioner will number the items consistently, but will separate out how the requests were answered:

Request one

5. On 23 May 2010 the complainant requested the following four items of information (WW&L NHS FT is the complainant's acronym of the Trust's name):

[1] *Copies of all medical records forwarded to the Ombudsman in regard to our family complaint regarding the death of [Individual A Redacted].*

[2] *Copies of all documentation forwarded to the Ombudsman in regard to our family complaint regarding the death of [Individual A Redacted].*

[3] *All information the trust holds in regard to [the complainant]. The reason for this request is that I am now privy to a document forwarded by the trust to [Individual D redacted] at Christie's Manchester by [Individual E redacted] of WW&L NHS FT. Part content in regard to the above mentioned document concerning [the*

complainant] is nonfactual, and other parts in regard to [the complainant] contain statements taken out of context. Tactics of this nature need to be highlighted to the Information Commissioner for consideration. I already have evidence (above mentioned document) in regard to misrepresentation of myself, but require all documentation/data the trust holds in regard to [the complainant].

[4] *The above information described in point 3. above in regard to [Individual B redacted] and [Individual C redacted].*

6. On 1 July 2010 the Trust issued its response. It addressed the questions in the order that they were stated and said:

[1] All relevant recorded information had been provided by the Trust to the complainant already. Nothing additional or different was provided to the PHSO. The Trust later explained to the Commissioner that it was relying upon section 21(1) [information reasonably accessible to the applicant] for this request.

[2] It said that the Trust was not able to answer this question, because a statutory bar applied [section 44(1)]¹. It explained that section 15 of the Health Service Commissioners Act 1993 prevented it from disclosing this information because it prohibited the Trust from disclosing the information that was obtained for the purposes of the Ombudsman's investigation. It confirmed that it believed that this statutory bar also covered pre-investigation enquiries and covered both the PHSO and the body that was being investigated.

[3] It explained that it was unable to provide this information because it would take approximately 30 hours to identify and collate the information. It explained that it believed that the costs limit [section 12(1)] applied because its £750 estimate was over the limit of £450. It explained that it would not therefore process this request under the Act.

[4] It explained that it was not able to provide the information for other complainants because it would be a breach of the Data Protection Act. It explained that it was therefore relying on section 40(2) [third party personal data] and would not provide this information.

7. On 22 July 2010 the complainant requested an internal review. He explained that he was dissatisfied that information had been withheld.

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

8. On 25 August 2010 the Trust communicated the results of its internal review. It explained that it had thoroughly considered the situation for a second time and had decided to completely uphold its original decision. It also provided the Commissioner's details.

Request two

9. On 24 May 2010 the complainant also requested the following eight items of information:

'The documentation required is in regard to the death of [Individual A redacted] at your Trust.

[5] *Copies of all medical records forwarded to the Ombudsman in regards to our family complaint regarding the death of [Individual A redacted].*

[6] *Copies of all documentation forwarded to the Ombudsman in regards to our family complaint relating the death of [Individual A redacted].*

[7] *Copies of the Medical Investigation Reports by your Trust during the internal investigation of the death of [Individual A redacted].*

[8] *Copies of any additional information held by the Trust, but not forwarded on to the Ombudsman in relation to the death of [Individual A redacted].*

[9] *Copies of All communications forwarded to the Ombudsman relating to the death of [Individual A redacted].*

[10] *Copies of emails, letters, written notes, reports, minuted telephone conversations, electronic attachments utilised by the Trust in response to the Ombudsman's investigation into the death of [Individual A redacted].*

[11] *A copy of the WW&L NHS FT 'Quality & Safety Strategy' document - provided to the Ombudsman's Office if applicable.*

[12] *Provide open access to all documentation/information held by the Trust with regards to the complaint into the death of [Individual A redacted] - as per the 'Open & Transparent' Policy of WW&L NHS FT attempting [sic] to be adopted by Mr Andrew Foster CBE.'*

10. On 1 July 2010 the Trust issued its response. It addressed the questions in the order that they were stated and said:

[5] and [6] It regarded these requests as having already been addressed in answering the previous request.

[7] It explained that it could not answer this question because the information was exempt by virtue of section 44(1). It explained that the reasons this was so were the same as for **[2]** above.

[8] It explained that all information relating to this case was sent to the Ombudsman.

[9] and [10] It explained that it could not answer these questions because the information was exempt by virtue of section 44(1).

[11] It explained that this policy was currently under review and would not be provided to the complainant.

[12] It provided a redacted set of documentation. It confirmed that it had redacted information with third party organisations and some third party personal data by virtue of section 40(2). It had also redacted some information that fell outside the scope of his request (providing the residue that fell inside his request).

11. On 22 July 2010 the complainant requested an internal review. He explained that he was dissatisfied that information had been withheld. On 23 July 2010 the complainant followed up this request by explaining that he disagreed that all the relevant information had been provided for item **[12]**.
12. On 25 August 2010 the Trust communicated the results of its internal review. It explained that it had thoroughly considered the situation for a second time and upheld its position in relation to all the items, except item **[7]**. It explained that it did not believe that the statutory bar could apply to this request. However, it confirmed that it held no relevant recorded information in relation to it. It also confirmed that it continued to maintain that all the relevant information held for item **[12]** had been provided. It then provided the Commissioner's details.

The Investigation

Scope of the case

13. On 14 September 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The Commissioner has considered whether the Trust's position was appropriate in this case. He has also considered all the evidence provided by the complainant across a number of cases that he has

considered where relevant to his determination of the issues that this case raises.

14. 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 also considered these submissions where they are relevant to this case. This includes some submissions that were received about the same withheld information in **FS50347380**².
15. Section 7 of the Data Protection Act 1998 ('DPA') gives an individual the right to request copies of personal data held about them – this is referred to as the right of Subject Access. The Commissioner is conducting an assessment under section 42 of the DPA into the Trust's compliance with the DPA. This does not form part of this Decision Notice. This is because an assessment under section 42 of the DPA is a separate legal process from the consideration under section 50 of the Act. The complainant will receive the result of this assessment in due course. This case has been complicated by the Trust's failure to process the request as a subject access request immediately and this matter will be discussed in more detail in the Other Matters section of this Notice.
16. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this Notice:
 - The Trust disclosed all the relevant recorded information it held for request **[11]** on 3 June 2011 and this information is no longer in the scope of this investigation; and
 - The Trust disclosed some of the information relevant to request **[12]** that it was withholding by virtue of section 40(2) on 7 July 2011 and this will also not be considered further by the Commissioner.
17. The complainant also agreed that the Commissioner did not need to consider elements **[3]**, **[4]**, **[5]**, **[6]** and **[7]** further on 7 June 2011. The reason he did not need to consider **[5]** and **[6]** further because they were duplicates of **[1]** and **[2]**. The Commissioner is also not considering request **[8]** because it was not referred to him and the same information was covered by request **[12]**.
18. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. In particular, the Commissioner can make no judgment about the standard

² http://www.ico.gov.uk/~media/documents/decisionnotices/2011/fs_50347380.ashx

of care the complainant's mother received. All the Commissioner can consider is whether relevant recorded information is held and if so, whether it can be provided.

Chronology

19. On 26 October 2010 the Commissioner wrote to the complainant and the Trust to explain that he had received an eligible complaint. He explained that it covered both the complainant's rights under the Data DPA and the Act. He confirmed that he would make an assessment under the DPA first and asked the Trust to provide a copy of the relevant information to enable him to make this assessment.
20. On 24 November 2010 the Trust contacted the Commissioner to understand what it was required to do. The Commissioner wrote on the same day to explain what he required at this stage.
21. On 18 February 2011 the Commissioner wrote to the Trust to explain further what it was required to now do.
22. On 18 May 2011 the Commissioner also wrote to the Trust to ask it to clarify its position in relation to request [1] and reconsider its position in relation to request [11]. On 3 June 2011 the Trust provided its clarification and disclosed the information for request [11] to the complainant.
23. On 6 June 2011 the Commissioner wrote to the complainant to clarify the nature of the complaint. He received a response on 7 June 2011.
24. On 8 June 2011, the Commissioner wrote to the Trust to make detailed enquiries about its position. He received a response on 1 July 2011.
25. On 1 July 2011 the Commissioner also asked the Trust to disclose the information it had agreed was not exempt and the Commissioner received written confirmation that this was done on 7 July 2011.

Analysis

Substantive Procedural Matters

Is further relevant recorded information held?

26. The Trust explained that it held no further relevant recorded information for request [12] and that it was appropriate to redact some information from copies of the documents that it provided that contained some information that was relevant that request because it fell outside the scope of the request.

27. The complainant argued that there was further recorded information that was not provided and/or the information that was redacted was done so inappropriately.
28. Section 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 recorded information of the description specified in the request and (b) if that is the case to have that information communicated to him. It follows that it is necessary for information to be held in recorded form by the Trust at the date of the request for it to be subject to the Act. The date of the requests in this case is 24 May 2010.
29. The Commissioner's analysis will focus on whether there was any further relevant recorded information held within the scope of request **[12]**.
30. The standard of proof that the Commissioner uses to determine whether relevant recorded information is held was confirmed by the Tribunal in *Linda Bromley & Others v Information Commissioner and Environment Agency* [EA/2006/0072] ('Bromley'). It said that the test for establishing whether information was held by a public authority was not one of certainty, but rather the balance of probabilities.
31. He has also been assisted by the Tribunal's explanation of the application of the 'balance of probabilities' test in *Bromley*. It explained that to determine whether information is held requires a consideration of a number of factors including the quality of the public authority's final analysis of the request, the scope of the search it made on the basis of that analysis and the rigour and efficiency with which the search was then conducted. It also requires considering, where appropriate, any other reasons offered by the public authority to explain why further recorded information is not held.

The Commissioner has considered the arguments of both sides and considered the factors specified in *Bromley*.

32. Request **[12]** asks for *all documentation/information held by the Trust with regards to the complaint into the death of [Individual A redacted]*.
33. The Commissioner has identified two separate limbs of the complaint that need to be considered individually in this part of case:
 - (i) That the information redacted as not being relevant to the request was indeed relevant to the request ('limb one'); and
 - (ii) That there is further information relevant to the complaint that the Trust has not located ('limb two').

34. Firstly, it should be noted that the Trust has redacted some information by virtue of section 40(2) [third party personal data] and the operation of this exemption will be considered separately at paragraph 57 below.

Limb one

35. The Trust withheld four pieces of information on the basis that while it was contained within communications where some information was relevant to the request, it was not itself within the scope of that request.
36. The Commissioner has considered these four pieces of information and can confirm that he accepts that this information does not concern the complaint about the death of 'individual A redacted'. As this is so, he finds that the Trust was right that it fell outside the scope of the request.

Limb two

37. This requires the Commissioner to be satisfied on the balance of probabilities that all the communications held by the Trust with regards to the complaint into the death of [Individual A redacted] have been found by the Trust and considered by it.
38. The Commissioner firstly asked the Trust to provide him with a copy of the complaint file, a copy of the information it regards to be the complainant's own personal data and the correspondence that had passed between the Trust and the complainants up until 24 May 2010 (the date of the request).
39. He has read through the files carefully and is content that the files read as being complete. It follows the pro forma that outlines what is normally contained in complaints files at the Trust and there are no obvious omissions or gaps in the correspondence that have not been explained within the file. The only information that the complainant has not received is the information that is being withheld by virtue of a number of exemptions that will be considered in detail below.
40. The Commissioner was required to approach the Trust to understand how it holds complaint files and how it was sure that all the information that was relevant to the request had been located.
41. The Trust explained that the department responsible for handling complaints was its Patient Relations Department. It uses the DATIX Risk Management system to record complaints and then creates an electronic folder with a bespoke reference number on the Trust's computer network. This electronic file ensures that the information is secure and backed up.

42. The Department also creates a paper complaint file which is stored in a secure location. Any information that is relevant to the complaint is printed and put in the file. The Trust explained the stages a typical complaint goes through and the information that would typically be generated.
43. The Trust explained that the responsible staff searched the two locations noted above and undertook additional searches in the email inbox of the staff member who was responsible for overseeing the complaint. It chose this person's email box because they would have been copied into all relevant communications.
44. The Trust explained that it was legally obliged to keep the all the complaint documentation in accordance with the NHS Complaints Regulations 2004 and NHS Records Management Code of Conduct. It also explained that it would be required to disclose the information in potential court action and therefore it always acted to ensure that the file offered a complete record of what had been considered.
45. The Commissioner is satisfied that the right locations have been searched and all the information held in those locations has been identified. He is satisfied that on the balance of probabilities there is no further relevant recorded information held by the Trust.

The operation of the exemptions

46. A number of exemptions have been applied by the Trust to relevant recorded information. Only one exemption must be applied correctly for each piece of information for it to be correctly withheld. The Commissioner will consider the operation of these exemptions in turn:

Section 21(1)

47. Section 21(1) can be applied when all the relevant recorded information is reasonably accessible to the applicant. It is an absolute exemption and so has no public interest component.
48. The Trust has informed the Commissioner that it meant to apply section 21(1) to request [1] (and the duplicate request [5]). The Commissioner is obliged to consider exemptions that are raised during the course of his investigation. This is the result of the Upper Tribunal (Information Rights)' decision in the linked cases *DEFRA v Information Commissioner and Simon Birkett* [2011] UKUT 39 (AAC) and *Information Commissioner v Home Office* [2011] UKUT 17 (AAC).
49. The Trust has explained that it forwarded the whole medical file to the PHSO and that the complainant had already received the same file. It kept a copy of the file that it had provided to the PHSO. It explained

that the appropriate access regime for deceased person's medical records was the Access to Health Records Act 1990 ("AHRA") through which the complainant had received the records.

50. Although the Act is designed to be applicant blind, in order for a public authority to consider whether section 21 applies it has to take into account the individual circumstances of the applicant, and whether the information requested is reasonably accessible to that applicant.
51. In determining whether information is reasonably accessible to the applicant, the Trust should take into account any legal access schemes or rights which are available to that applicant. In this instance the public authority has taken into account, and cited, the AHRA.
52. Section 3(f) of the AHRA provides that an application for access to a health record, or to any part of a health record may be made by a deceased patient's personal representative and any person who may have a claim arising out of the patient's death. The AHRA requires the Trust to disclose documents in certain situations.
53. The Commissioner has considered the accessibility of the information requested by the complainant through the two access regimes of the AHRA and the Act. The AHRA only allows disclosure to certain categories of persons as defined in section 3(1). The complainant is the Personal Representative of the deceased as per the AHRA and the information must be considered to be reasonably accessible to him.
54. The Trust has provided the complainant with a copy of the medical records under AHRA. The Commissioner understands that the complainant may be dissatisfied with the sufficiency of the medical records. The Commissioner is content that the Trust has provided the complainant with a copy of the same medical records that it forwarded to the Ombudsman.
55. In these circumstances the Commissioner considers that disclosure of this information is exempt under section 21 of the Act. This is because it is reasonably accessible to the complainant because it has been provided under the AHRA.

Section 40(2)

56. As noted above, section 40(2) had been applied to a number of redactions in the information that was provided as a result of request [12].
57. Section 40(2) applies where information constitutes third party personal data and its disclosure to the public would contravene one or more data protection principles.

58. Originally, the Trust explained to the Commissioner that it was withholding eight categories of information.
59. However, on reflection it chose to release five of these categories and continue to withhold only three. The Commissioner will only consider the remaining three categories under section 40(2).
60. They constitute:
1. A staff member's personal email address ('category one');
 2. Details about a staff member's study leave ('category two'); and
 3. Information about a concurrent complaint ('category three').
61. Section 40(2) of the Act provides an exemption for information that constitutes the personal data of third parties where its disclosure would contravene one or more of the data protection principles found in the DPA.
62. In analysing the application of section 40(2), the Commissioner has considered:
- (a) whether the information in question was personal data; and*
 - (b) whether disclosure of the personal data under the Act would contravene the first data protection principle.*
63. Section 40(2) operates as an absolute exemption and has no public interest component. Therefore no public interest test is required.

Is the information personal data?

64. Personal data is defined in section 1 of DPA as data 'which relate to a living individual who can be identified—
- (a) from those data, or*
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*
- and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.'*

65. The Commissioner will consider each category in turn.

66. For category one, the Commissioner is satisfied that an individual can be identified by their personal email address. The email address contains components of that person's name and can be used to contact that individual.
67. For category two, the Commissioner is satisfied that information about when a specified individual took study leave is also their personal data.
68. For category three, the Commissioner is satisfied that details of a concurrent complaint amount to the personal data of the person that is being complained about. It will enable a living individual to be identified and so amounts to their personal data.
69. It follows that all the information being withheld amounts to third party personal data.

Would disclosure contravene the first data protection principle?

70. The first data protection principle has three main components. These are as follows:
 - The requirement to process all personal data fairly;
 - The requirement to process all personal data lawfully; and
 - The requirement to satisfy at least one DPA Schedule 2 condition for processing of all personal data.
71. All three requirements must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first principle.

Would disclosure be fair?

72. The complainant contends that it is appropriate and fair for the information to be disclosed to the public. He has explained that it is important that the Trust is as accountable as possible in light of the circumstances of this case.
73. For category one, the Trust explained that its policy was not to provide its staff personal email addresses to the public. It confirmed that, while the workplace email addresses are available when it is appropriate, but that there was no expectation that an individual's personal private email address would be disclosed. The Trust also explained that the individual has expressed their concern about their private email address being disclosed to the public. It explained that the nature of their role in the complaints department means that not every customer will be cordial and that it is necessary for there to be a private space between work

duties and an individual member of staff's private life. The Commissioner has considered the circumstances that led the complainant to use their private email address for work purposes and the arguments made by the Trust. He does not believe that there is any legitimate public interest in knowing a staff member's private email address and that any legitimate interest is outweighed by it not being in accordance with their expectations and being likely to cause them damage and/or distress. Overall, he has been satisfied that the disclosure of this private personal email address would be unfair to the data subject and therefore supports the Trust's application of section 40(2) to it.

74. For category two, the Trust explained that its policy was not to disclose to the public when a specified individual was on study leave. In the circumstances of this case, that individual was undertaking additional duties during that study leave to ensure that the business needs of the Trust were met. It explained that in the circumstances of this case, the disclosure of when an individual was on study leave would not be fair to them.
75. When deciding whether the disclosure of the information is fair, the important factors that require consideration are:
 - What are the reasonable expectations of the individual in relation to the handling of their personal data?
 - Whether disclosure would cause any unnecessary or unjustified damage or distress to the individual; and
 - The legitimate interests of the public in knowing the withheld information and understanding who was responsible for handling the complaint.
76. The Commissioner is satisfied that the individual's expectations would be that information about their study leave on an exact day would not be disclosed without their consent. This is because he is satisfied that there is a general expectation that aspects of an individual's personal development would not be open to public disclosure, unless there is good reason for its disclosure.
77. The Commissioner has considered the reasonableness of the expectations. He has considered the seniority of the individual, whether the role is public facing and whether it involves the spending of public money. The individual in this case is not senior, operates in a semi-public facing role, but has no power over the spending of public money. The Commissioner is satisfied that in the circumstances their expectations are reasonable that information about study leave is private. The individual's personal data should not be compromised

because they are working beyond the hours that are expected (as they were working on a day where it was agreed that they could take study leave).

78. The Commissioner is satisfied from the input of the individual themselves that the disclosure of this information would cause them some distress. This also leads the Commissioner towards the conclusion that disclosure would not be fair.
79. When considering the legitimate interests of the public, the Commissioner notes that the key principle behind the Act is that there is transparency and accountability. However, this does not mean that there should be full accountability when that would cause damage to third party individuals. He believes that it is appropriate to make some distinction in relation to seniority. This is because the more senior a member of staff is the more likely it is that they will be responsible for making influential policy decisions and/or decisions related to the expenditure of significant amounts of public funds.
80. The Commissioner obtained from the Trust the name, position and salary band of this individual. He also obtained confirmation that the individual would not provide their consent in this case. The Commissioner's view is that the individual is not very senior and that there is no compelling legitimate interests of the public in providing details of their study leave. He has also considered whether there is a legitimate public interest in knowing when and why an individual was absent from work. While he is satisfied that an interest does exist, he does not believe that this interest outweighs the expectation of privacy to this information. He has also considered the information in its context and has determined that there was no case specific reason about why knowing about this absence was crucial. It was not a situation when the name of the decision-maker(s) was obscured by absence.
81. In conclusion, the Commissioner considers that the disclosure of the category two information to the public would be unfair to the data subject. He is satisfied that it would be unfair because it would be against their reasonable expectations, that it could cause unjustified distress to them and the individual is insufficiently senior to be held publicly accountable for any decision.
82. Category three concerns information about a concurrent complaint. The Commissioner cannot provide more detail than that without undermining the integrity of the withheld information.
83. In relation to this category, in order to determine whether it would be fair to process the personal data the Commissioner considered the following factors:

- the way that the Trust considers complaints and what the data subject's expectations would be in the event of it receiving a complaint;
 - the likely expectations of the data subject regarding the disclosure of the information;
 - the effect disclosure could have on the data subject, for example, could the disclosure cause unnecessary or unjustified distress or damage to them; and
 - the legitimate interests of the public in knowing the withheld information.
84. In coming to this decision, the Commissioner has reviewed the Trust's complaint handling functions. It has the power to investigate complaints that are made about it and come to a considered verdict. The complainant may then take the complaint further for example to the General Medical Council (GMC) or the Parliamentary and Health Service Ombudsman. The important thing regarding the expectation of all employees is that complaints will be dealt with confidentially and handled appropriately by the Trust. Information about them would only be published when a complaint is upheld and disclosure is appropriate.
85. Further, allegations regarding an individual's professional performance may also be unfounded and/or malicious. Were such details publicly available, this may harm the member of staff, even if it were subsequently found that there was no case to answer.
86. In considering fairness, the Commissioner takes the view that a prime consideration must be the consequences of processing the data for the interests of the data subject.
87. At the date of request, the Commissioner is satisfied that the data subject in question would have had no expectation that this information would be made public in this case.
88. The Commissioner is satisfied that disclosure of this type of information would breach the DPA in that it would be contrary to the first data protection principle. It would be unfair to provide this information about a concurrent complaint, except if a complaint had been sufficiently serious to mean that it had gone before a public body that issues judgments. There was a reasonable expectation that the existence and details of complaints might be provided to the relevant disciplinary bodies, but there is nothing to suggest that the individual would expect that their personal data would be communicated to the general public without their consent. Such a communication would be likely to cause

unnecessary distress to the individual. The type of information requested is that which ordinarily remains confidential.

89. On the other hand, the Commissioner does note that there is a greater level of legitimate public interest in knowing details of complaints that have been made. This is because it would provide accountability about the experiences received by individuals and ensure that patterns become apparent potentially before there is serious harm done.
90. Balancing the weight of arguments, the Commissioner has been satisfied that the integrity of the complaints process, the reasonable expectations of the data subject and the potential for unnecessary distress mean that the disclosure of the category three information would also be unfair.
91. As he has found the disclosure unfair, he does not need to consider the lawfulness of the disclosure or compliance with the conditions found in schedule 2 of the DPA. He also does not need to consider any of the other Data Protection Principles.
92. He finds that section 40(2) has been applied appropriately to all three categories of information and that the information should not be disclosed to the public.

Section 44(1)

93. Section 44(1) has been applied to the relevant recorded information held for requests **[2]**, **[9]** and **[10]**.
94. 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.
95. In its refusal notice dated 1 July 2010, the Trust identified section 15 of the Health Service Commissioners Act 1993 as the relevant statutory prohibition, which meant the relevant recorded information could not be released. It explained that while this statutory bar is usually applied by the PHSO, it also works to prohibit it from disclosing information about what the PHSO considered in coming to its conclusion in this case.
96. The Commissioner will first detail the relevant parts of the legislation before moving on to consider its 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 Health Service Commissioners Act 1993

97. Section 11(2) of the Health Service Commissioners Act explains that the PHSO has a duty to conduct an investigation in private.

98. The PHSO has argued in other cases 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 PHSO 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 consideration when considering this statutory bar.

99. Section 15 of the Health Service Commissioners Act then discusses what information cannot be released by the PHSO (and by those bodies who are being investigated by it – in this case the Trust):

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

100. The Health Service Commissioners Act 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.

101. For it to be possible for the Trust to disclose information under the Act it is necessary for the information either:

1. Not to have been '*obtained by the Commissioner or his officers in the course of or for the purposes of an investigation*' under the Health Service Commissioners Act 1993. If the information falls outside this provision then the statutory bar would not be appropriately applied; or
2. For it to fall within one of the exceptions found in section 15(1)(a) to (e) of the Health Service Commissioners Act 1993.

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

102. The first issue to be considered by the Commissioner, therefore, is whether the information requested by the complainant and withheld by the Trust under section 44 of the Act, can be said to have been obtained by the PHSO in the course of, or for the purpose of, an investigation under the Health Service Commissioners Act 1993.

103. Section 3 of the Health Service Commissioners Act 1993 sets out the matters subject to 'investigation'. These matters include a complaint made to the PHSO by or on behalf of a person that he 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 are not disallowed by that Act.
104. 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.
105. The complainant has argued, as the PHSO decided against taking his complaint forward, that the information supplied to it cannot be said to be obtained in the course or for the purposes of an 'investigation'.
106. In a connected case, the PHSO has addressed these arguments by explaining that this was not the correct approach to take. It has explained 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* (where Collins J stated this was so in paragraph 64)³.
107. The Commissioner has considered the situation and is content that the PHSO's position is correct in that the process in 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

³ <http://www.richardbuxton.co.uk/v3.0/node/103>

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".'

108. The Commissioner has considered the three requests for information. He notes that all three requests ask for information provided by the Trust to the PHSO. They also focus on what was the subject matter of the complaint that his family referred to the PHSO.
109. The Commissioner has considered the withheld information and is satisfied that all of the information was released by the Trust to the PHSO in light of the PHSO's investigation of the complainant's family's complaint and was used when deciding whether to investigate it.
110. It follows that he accepts that all the information withheld under section 44(1) was 'obtained by the Commissioner or his officers for the purpose of an investigation'.
- (2)** Do any of the exceptions found in section 15(1)(a) to (e) of the Health Service Commissioners Act 1993 apply in this case?
111. The above analysis 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 Health Service Commissioners Act 1993.
112. The discretion about whether or not to disclose this information is vested with the PHSO. The Upper Tier Tribunal confirmed that the Commissioner does not have the power to challenge how another regulator uses its discretion in its recent decision *OFCOM v Morrissey and the Information Commissioner* [2011] UKUT 116 (AAC)⁴. This decision is binding on the Commissioner. The Tribunal confirmed that the correct channel to challenge use of discretion was the administrative court. The Commissioner therefore concludes that because the PHSO has not exercised its discretion to allow disclosure of the requested information the statutory bar to disclosure continues to apply.
113. The Commissioner must therefore find that the Trust was entitled to rely on section 44(1) for requests **[2]**, **[9]** and **[10]**.

⁴[http://www.informationtribunal.gov.uk/DBFiles/Decision/i365/Morrissey%20v%20IC%20%20Ofcom%20\(EA-2009-0067\)%20-%20Decision%2011-01-10%20\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i365/Morrissey%20v%20IC%20%20Ofcom%20(EA-2009-0067)%20-%20Decision%2011-01-10%20(w).pdf)

114. 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.
115. As he is satisfied that the statutory bar applies, the Trust was entitled to withhold the information from the public and the Commissioner upholds its position.
116. For the sake of completeness, the Commissioner would normally expect the PHSO to be consulted by the Trust before applying its statutory bar. This has not happened in this case. However, the Commissioner has considered the operation of the statutory bar to the same withheld information in **FS50347380**⁵ and therefore has no doubt that the PHSO would have applied its exemption to the information that has been considered under section 44(1).

Procedural issues

Section 10(1)

117. 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'.

118. 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. The Trust failed to comply with these requirements within 20 working days and so breached section 10(1).

Section 17(1)(b)

119. Section 17(1)(b) imposes an obligation on a public authority to specify the exemption that it is relying on in its refusal notice. The Trust failed to specify that it was relying on section 21(1) and therefore breached section 17(1)(b).

Section 17(1)

120. Section 17(1) explains that a complete and accurate refusal notice should be issued in 20 working days when information is being refused. The Trust failed to issue its refusal notice in 20 working days and therefore also breached section 17(1).

⁵ http://www.ico.gov.uk/~media/documents/decisionnotices/2011/fs_50347380.ashx

The Decision

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

- It located all the relevant recorded information that it held in relation to request [12];
- It applied section 21(1) appropriately to all of the information that it withheld under that exemption;
- It applied section 44(1) appropriately to all of the information that it withheld under that exemption; and
- It applied section 40(2) appropriately to the information considered above that it withheld under that exemption.

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

- It breached section 10(1) because it failed to confirm or deny that information was held within 20 working days and failed to provide some non-exempt information within 20 working days ;
- It breached section 17(1) because it failed to issue an appropriate refusal notice in 20 working days; and
- It breached section 17(1)(b) because it failed to specify an exemption that it would later rely on in this case.

Steps Required

123. The Commissioner requires no steps to be taken.

Other matters

124. Although the below comments are not part of this Decision Notice the Commissioner wishes to highlight the following matters of concern to improve compliance in the future. As noted above, section 7 of the DPA gives an individual the right to request copies of personal data held about them – this is referred to as a right of Subject Access. As some of the information being sought was in fact the complainant's personal data those requests should have been dealt with as a subject access request

rather than a request under the Act. The Commissioner encourages public authorities to consider requests under the correct regime in the first instance. In the Commissioner's opinion responsibility for applying exemptions and determining whether a request should be considered under the Act or the DPA rests with the Trust and not the requestor. He therefore advises the Trust to ensure that it deals with requests under the correct access regime in the future.

Right of Appeal

125. 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.

Website: www.informationtribunal.gov.uk

126. 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.

127. 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 2nd day of August 2011

Signed

**Lisa Adshead
Group Manager**

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

Legal Annex

Freedom of Information Act 2000

Section 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.

(2) Subsection (1) has 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.

Section 10(1) - Time for Compliance

(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 21 - Information accessible to applicant by other means

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)—

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

(3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

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(1)- 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.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

Data Protection Act 1998

Section 1 - Basic interpretative provisions

(1) In this Act, unless the context otherwise requires—

- “data” means information which—

(a)

is being processed by means of equipment operating automatically in response to instructions given for that purpose,

(b)

is recorded with the intention that it should be processed by means of such equipment,

(c)

is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or

(d)

does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

- “data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;
- “data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;
- “data subject” means an individual who is the subject of personal data;
- “personal data” means data which relate to a living individual who can be identified—

(a)

from those data, or

(b)

from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

- “processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—

(a)

organisation, adaptation or alteration of the information or data,

(b)

retrieval, consultation or use of the information or data,

(c)

disclosure of the information or data by transmission, dissemination or otherwise making available, or

(d)

alignment, combination, blocking, erasure or destruction of the information or data;

- “relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

(2) In this Act, unless the context otherwise requires—

(a) “obtaining” or “recording”, in relation to personal data, includes obtaining or recording the information to be contained in the data, and

(b) “using” or “disclosing”, in relation to personal data, includes using or disclosing the information contained in the data.

(3) In determining for the purposes of this Act whether any information is recorded with the intention—

(a) that it should be processed by means of equipment operating automatically in response to instructions given for that purpose, or

(b) that it should form part of a relevant filing system,

it is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.

(4) Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.

12 (3) Schedule 2 (which applies to all personal data) and Schedule 3 (which applies only to sensitive personal data) set out conditions applying for the purposes of the first principle; and Schedule 4 sets out cases in which the eighth principle does not apply.

(4) Subject to section 27(1), it shall be the duty of a data controller to comply with the data protection principles in relation to all personal data with respect to which he is the data controller.

Schedule 1 – the Data Protection Principles

1. "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."

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 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.'
