

Freedom of Information Act 2000 (Section 50)

Decision Notice

Dated 30 June 2006

Public Authority: East Sussex Hospitals NHS Trust

**Address: St Anne's House
729 The Ridge
St. Leonards-on-Sea
East Sussex
TN 37 7PT**

Summary Decision and Action Required

The Information Commissioner's (the "Commissioner") decision in this matter is that:

- **East Sussex Hospitals NHS Trust (the "Trust") has not dealt with the complainant's request in accordance with Part 1 of the Freedom of Information Act 2000 (the "Act") in that it has failed to comply with its obligations under section 10 and section 17.**
- **The Trust's response to all parts of the request was outside the 20 working day time limit, and that it is therefore in breach of section 10 (1) of the Act.**
- **The Trust's replies to the complainant did not include details of its internal complaints procedure, or of the complainant's right under section 50 of the Act to take her complaint to the Information Commissioner. It is therefore in breach of section 17 (7) of the Act.**
- **The Trust's letter of refusal of 25 April 2005 said that the Trust refused to disclose information as it would breach the Data Protection Act (the "DPA"), but failed to specify the exemption in question. It is therefore also in breach of section 17 (1) (b) of the Act.**
- **The Trust correctly applied s.40 of the Act to justify withholding the information requested by the complainant in points 1, 2 and 3 of section 2.2 of this Decision Notice. The Commissioner is satisfied that this information is personal data and that its disclosure would breach the first data protection principle.**

In view of the matters referred to above the Commissioner does not require any remedial steps to be taken by East Sussex Hospitals NHS Trust.

1. Freedom of Information Act 2000 (the 'Act') – Application for a Decision and the Duty of the Commissioner

1.1 The Commissioner has received an application for a decision whether the complainant's request for information made to the Public Authority has been dealt with in accordance with the requirements of Part I of the Act.

1.2 Where a complainant has made an application for a decision, unless:

- the complainant has failed to exhaust a local complaints procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or
- the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

1.3 The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority

2. The Complaint

2.1 On 3 March 2005 the complainant made the following request for information to the Trust in accordance with section 1 of the Act:

1. Please supply me with all information re all complaints made about Mr W, Consultant including those which have been ignored, suppressed, unrecorded, aided and abetted by the Chief Executive, including destroyed documents.
2. Please supply me with all information re all complaints made about Mr R, Consultant including receiving and accepting email(s) with a blatantly fraudulent diagnosis from an unqualified clerk.
3. Please supply me with all information re all complaints made about Dr S
4. Please supply me with all information re all complaints made about Ms S including criminal offences committed under the DPA, financial mismanagement, and relevant letters to and from the Audit Commission.
5. Please supply me with all information re all complaints made about Mrs W including criminal offences committed under the DPA.
6. Please supply me with the email written by Mrs W on 13 August 2002 at 08.57 hours and sent to Ms S and Ms K et al where she engaged in gross breaches of patient confidentiality and committed criminal offences under the DPA. (To include all manual data, all electronic records, all paper records

and documents and all memoranda of this telephone and other conversations).

7. Please supply me with all information re all complaints made about Ms M including making a fraudulent diagnosis, committing criminal offences under the DPA and electronically forwarding same to Ms K and Mr R et al on 12 November 2002 at 11.57 hours.
 8. Please supply me with all information re all complaints made about Ms D including criminal offences under the DPA.
 9. Please supply me with all information re all complaints made about Ms W including fraudulent entries in records, destroyed documents, missing documents, documents inserted and deleted and ongoing offences under the DPA.
 10. Please supply me with all information re all complaints made about Mr M including offences under the DPA.
 11. Please supply me with all information re all complaints made about Mr L.
 12. Please supply me with all information re how many GPs are being employed as Locum Consultants, Doctors – temporary or otherwise e.g. a GP being employed as a Temporary Consultant Dermatologist but the GP cannot even perform a simple biopsy that a properly qualified Doctor could perform in a couple of minutes.
- 2.2 The Trust responded to each part of the request over three letters dated 22 April 2005, 25 April 2005 and 7 June 2005. Points 4-12 have now been resolved and are not considered further in this Decision Notice. The Trust did however invoke s.40 (personal information) in relation to points 1, 2 and 3 of the complainant's request.
- 2.3 The Commissioner has decided in this case to investigate the complaint without an internal review having being carried out. This is because the Trust did not provide details of its complaints procedure to the complainant and because of the delay in the Commissioner beginning his investigation.

3. Relevant Statutory Obligations under the Act

Section 10(1) provides that –

“...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) provides that –

“A public authority which... is to any extent relying:

- on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or
- on a claim that information is exempt information

must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17 (7) provides that –

“A notice under subsection (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

Section 40(2) of the Act states that:

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and*
- (b) either the first or second condition below is satisfied.”*

Section 40 (3) states:

The first condition is:

(a) in a case where the information falls within any of the paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise 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).....”*

4. Review of the case

Scope of the Investigation

- 4.1 The Commissioner has focused his investigation on whether the Trust has dealt with the complainant's request for access to information falling within Points 1, 2 and 3 of 2.2 above in accordance with the requirements of the Act. In particular, the Commissioner has considered whether the Trust was justified in using the exemption at s.40 of the Act as its basis for withholding part of the requested information.
- 4.2 In addition, although not specifically part of the complaint to the Commissioner, he has also considered whether the Trust complied with s.10 and s.17 of the Act.

The Commissioner's Investigation

- 4.3 The Trust responded to the complainant's request over three letters dated 22 and 25 April 2005 and 7 June 2005. This was outside the 20 working days provided for in the Act.
- 4.4 In its letter of 25 April 2005, the Trust stated that it could not supply the information requested falling within items 1, 2 and 3 of 2.2 above. It argued that to do so would be a breach of the DPA and that the information in question is therefore exempt from disclosure under the Freedom of Information Act.
- 4.5 The complainant has not gone through the Trust's internal review procedure. The Trust failed to include details of its internal complaints procedure in any of its letters to the complainant, or to include details of the complainant's right under s.50 to take her complaint to the Information Commissioner.
- 4.6 Personal data of which a third party is the data subject is exempt under s.40 of the Act where disclosure would contravene any of the principles of the DPA. This is an absolute exemption which means there is no requirement to consider the public interest. The Commissioner has therefore only needed to consider whether the information is personal data and if so whether its disclosure would breach any of the data protection principles.
- 4.7 When the Trust refused the complainant's request on 25 April 2005, it did not specify that it was withholding the information requested on the basis of s.40 of the Act. However the Commissioner wrote to the Trust on 22 September 2005 and stated his assumption that the Trust wished to rely on s.40 as its basis for withholding the information. The Trust replied to that letter on 23 September 2005. The Trust addressed various queries regarding the complainant's request. However, in that letter the Trust did not specifically address its use of the s.40 exemption. Correspondence then followed, in which the Commissioner attempted to verify what information falling within the complainant's request the Trust held, and to address various other aspects of its handling of the complainant's request.
- 4.8 The Commissioner wrote to the Trust on the 24 January 2006 enquiring about its decision to use s.40 as its basis for withholding information. In particular he asked

for a more detailed explanation as to why the Trust invoked s.40 and asked which principle of the DPA would be breached.

- 4.9 The Trust replied on 7 February 2006. It explained that the request related to other patients' concerns about their treatment at Eastbourne District General Hospital. The requested information also contained personal information about the complainant herself. Personal data of which the complainant is the data subject is absolutely exempt from disclosure by virtue of s.40 (1) of the Act. In a telephone call of 16 May 2006, the Trust assured the Commissioner that the complainant had been provided with a copy of all the personal data that she is entitled to under the DPA.
- 4.10 With regard to the personal data of which the third party is the subject, this is exempt where disclosure of that data would contravene any of the Principles of the DPA. This is an absolute exemption which means there is no requirement to consider the public interest.
- 4.11 The Commissioner is satisfied that the information requested by the complainant constitutes personal data, some of it sensitive personal data, about various patients who made the complaints against the practitioners named in the Complainant's request. The First Data Protection Principle ("the First Principle") requires that personal data is processed fairly and lawfully and only where one of the conditions listed in Schedule 2 (or, in the case of sensitive personal data, one of the conditions in Schedule 3) of the DPA is satisfied.
- 4.12 The Commissioner is of the view that disclosure of information about other patients would be unfair and therefore contravene the First Data Protection Principle. The reasons for this are set out below.
- 4.13 The Trust has stated that the patients in question have not consented to their personal data being disclosed and that consent would be unlikely to be obtained. The patients provided this information in order for the Trust to investigate their complaints; there is no reason to believe that they would have given consent to the release of this information to third parties. There is no obligation for the Trust to seek those patients' consent for the release of the information in light of the complainant's request, especially considering the nature of the information likely to be contained in such a complaint. The information has been provided to the Trust by patients wishing to complain about their healthcare treatment. The Trust has a duty to consider these complaints with the ultimate aim of ensuring that patients are given adequate treatment. It is important that patients are able to make complaints about their doctors without fear that such information will be disclosed to third parties.
- 4.14 In the Commissioner's opinion, anonymising this part of the requested information by removing the names of other patients would render the residual information meaningless. Given the intimate and personal nature of health service complaints, even if the information were to be anonymised, there would remain a risk of patients who complained about their treatment being identified. The disclosure of

material containing unsubstantiated and possibly malicious personal information about practitioners could also constitute a breach of the Data Protection Principles. However, given the strength of other arguments against the release of this part of the requested information, the Commissioner has not looked into this issue further.

5. The Commissioner's Decision

- 5.1 For the reasons stated above, the Commissioner's decision in this matter is that the Trust has not dealt with the complainant's request in accordance with the following requirements of Part 1 of the Act:

Procedural Matters

Section 10 (1) – in that it failed to provide a refusal notice to the complainant within 20 working days following the date of receipt of the complaint.

Section 17 (1) – in that it failed to specify the exemption it was relying on to justify withholding the information. It did not therefore issue a valid refusal notice in accordance with the Act.

Section 17 (7) – in that it failed to provide particulars of its internal complaints procedure, or of the complainant's right under section 50 of the Act to take her complaint to the Information Commissioner.

- 5.2 The Commissioner notes that the Trust did not issue a valid refusal notice. In such circumstances he would normally require that the Public Authority do so. However, in this case no useful purpose would now be served by the Trust serving a proper Refusal Notice.

The Section 40 Exemption

- 5.3 The Commissioner has decided that the Trust was justified in withholding the information requested by the complainant in items 1, 2 and 3 at 2.2 above on the basis of the exemption at s.40 of the Act. In this respect, the Trust has complied with its obligations under s.1 (1) of the Act.

6. Action Required

In view of these matters the Commissioner hereby gives notice that in exercise of his powers under section 50 of the Act he does not require any remedial steps to be taken by the Trust.



7. Right of Appeal

7.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

7.2 Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

Dated the 30 day of June 2006

Signed:

Phil Boyd
Assistant Commissioner

Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF