

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 August 2007

Public Authority: University Hospital of North Staffordshire NHS Trust
Address: Trust Headquarters
Royal Infirmary
Prince's Road
Hartshill
Stoke-on-Trent
ST4 7LN

Summary

The complainant sought disclosure of an internal report prepared by the University Hospital of North Staffordshire NHS Trust following complaints that she made about a ward on which she had worked. The public authority initially refused to disclose the report under section 36 (prejudice to the effective conduct of public affairs). Subsequently, having disclosed the report with certain information redacted, it sought to rely on sections 40 (personal information) and 42 (legal professional privilege) of the Act in relation to the information that was withheld. The Commissioner upheld the decision of the public authority to withhold the majority of the information in the report on the basis of section 40. However, he determined that neither section 40 nor 42 were applicable to certain parts of the report. He also found that the public authority had not complied with section 17(1)(b) and (c) as it failed to state in its refusal notice that section 40 and 42 were applicable to the information requested and failed to explain why they applied.

The Commissioner's Role

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

The Request

2. On 27 February 2005, the complainant requested a copy of an internal report ("the report") from the University Hospital of North Staffordshire NHS Trust ("the

Trust”) which had been commissioned following allegations made by the complainant, a former employee of the Trust. These allegations related to a specific ward of a particular hospital in which the complainant had worked. They included suggestions that there had been a lack of proper supervision and management of medical staff and that the levels of resources available were inadequate.

3. On 22 March 2005, the Trust wrote to the complainant refusing her request on the basis that the information was exempt from disclosure under section 36 of the Act. It argued that disclosure would be prejudicial to the conduct of public affairs as it would inhibit the free and frank provision of advice or exchange of views and that it was not in the public interest to release the report.
4. On 12 April 2005, the complainant requested an internal review of the Trust's decision.
5. On 28 April 2005, the Trust wrote to the complainant with the result of the internal review which confirmed its earlier decision.
6. On 25 July 2005, after further correspondence with the complainant, the Trust again confirmed its decision not to release the report for the reasons stated previously.
7. On 26 October 2005, following further correspondence with the complainant, the Trust wrote to the complainant informing her that it had carried out a further review of its original decision and had decided to release a redacted version of the report. The Trust informed the complainant that the redactions were necessary to protect the rights of individuals under the Data Protection Act 1998.
8. On 30 November 2005, the Trust wrote to the complainant to provide further explanation as to why it had withheld certain information in the report. It stated that it believed that as staff, who provided information for the purpose of the production of the report, believed that information was given in confidence and would not be disclosed, the Trust owed these staff a duty of confidence. It therefore considered “...that to disclose this information would infringe the Data Protection Act 1998 rights of staff as disclosure could be deemed unfair, unlawful or prejudicial to any future frank exchange of views”.

The Investigation

Scope of the case

9. On 22 July 2005, the complainant wrote to the Commissioner to complain about the Trust's refusal to provide her with a copy of the report.
10. On 24 July 2006, the complainant confirmed to the Commissioner that she wished to complain about the fact that, whilst the Trust had provided her with a

copy of the report, it had redacted certain information. She believed that she was entitled to receive an unredacted copy of the report.

Chronology

11. There were a number of communications between the Commissioner and the Trust, those of most significance are identified below.
12. On 27 November 2006, the Commissioner wrote to the Trust requesting a copy of the report and an explanation as to which exemptions were applicable to the information which had been withheld.
13. On 21 December 2006, the Trust provided the Commissioner with a copy of the report and explained that redactions had been made to the report to protect the rights of certain named or identifiable individuals under the Data Protection Act.
14. On 5 January 2007, the Commissioner contacted the Trust to point out that in some places there had been inconsistency in the redaction of the report. In some places in the report information had been redacted which had then been disclosed in other parts of the report. He therefore sought clarification as to which information the Trust was claiming was exempt.
15. On 16 February 2007, the Trust wrote to the Commissioner and clarified which pieces of information it believed were exempt. It also explained which exemptions it believed were applicable to each piece of information. The Trust stated that the report contained personal data relating to the complainant and to third parties, as well as information belonging to the Trust. It advised that the parts of the report relating to the complainant had been disclosed to her as part of a subject access request under the Data Protection Act. General information regarding the Trust and the hospital, which was the subject of the report, had been disclosed under the Freedom of Information Act. However it had withheld some personal data relating to people other than the complainant under section 40 of the Act.
16. The Trust argued that it had not disclosed some information as it constituted requests for legal advice or was specific legal advice obtained by the Trust and was therefore exempt under section 42. In its view the public interest did not favour disclosure of this information.
17. Finally, the Trust identified some information which had been redacted from the copy of the report sent to the complainant which it now believed should have been disclosed.
18. On 14 May 2007, the Commissioner contacted the Trust for clarification concerning the likely expectations of staff, who provided information for the purposes of the report, as to how that information would be treated by the Trust.
19. On 5 June 2007, the Trust wrote to the Commissioner to inform him that the people who were interviewed as part of the investigation were informed that the information that they provided would be treated as confidential and that it would only be disclosed to those within the Trust who had to determine whether the

Trust needed to take further action. It also provided the Commissioner with a copy of the disciplinary policy it had in place at the time of the investigation, as further evidence that such information would have been regarded as confidential.

Analysis

20. The full text of the sections of the Act which are referred to can be found in the Legal Annex at the end of this notice, however the relevant points are summarised below. The procedural matters are considered initially and then matters relating to the application of the exemptions.

Procedural matters

Section 17(1)(b) and (c) – Refusal notice

21. Section 17(1)(b) and (c) of the Act require that, where a public authority is relying on a claim that an exemption in Part II of the Act is applicable to the information requested, it should state in its refusal notice which exemptions are applicable and explain why the exemption applies. In this case, the public authority failed to state in the refusal notice that it was relying on sections 40(2) and 42, and failed to explain why they applied, and, therefore, breached section 17(1)(b) and (c).

Exemptions

Section 40 – Personal information

22. Under section 40(1) information is exempt from disclosure under the Act if it constitutes personal data about the person making the request. If it is not personal data about the requester, it would be exempt from disclosure under section 40(2) if its disclosure would breach any of the data protection principles.

23. The report discussed matters which directly related to the complainant but also considered in great detail matters affecting other staff in the hospital. A considerable amount of the report related to events which occurred after the complainant had left the Trust's employment.

24. The information in the report which the Commissioner regards as coming within the Act fell into the following categories:-

- i. comments on the performance of named members of staff, other than the complainant, by their colleagues and the author of the report;
- ii. the names of members of staff who were reluctant or unwilling to provide information during the investigation;
- iii. the names of members of staff from whom further information was sought, following the completion of initial staff questionnaires;

- iv. an allegation concerning an individual who was not an employee of the Trust;
25. The Commissioner is satisfied that all of the above information is personal data about persons other than the complainant and that it was therefore appropriate to consider whether it should be withheld under section 40(2).
 26. Having determined that this information constituted personal data about the parties concerned, the Commissioner considered whether the disclosure of the information would have contravened any of the data protection principles, particularly, whether it would have been a breach of the first data protection principle, that processing should be fair and lawful.
 27. In relation to the employees who provided information for the purposes of the investigation, the Trust stated that these staff believed that this information would be treated as confidential and would only be used for the investigation. They believed that the information was given to the Trust on the understanding that it would not be disclosed to third parties, other than those investigating the allegations, the author of the report and those in the Trust who were required to read the report and undertake actions based on its content. Those who contributed information were, therefore, of the view that it would only be used in the investigation and the creation of the report.
 28. The Trust has also provided the Commissioner with a copy of the disciplinary policy which was in force at the time the investigation was carried out. This states that, as one of its guiding principles, "Confidentiality will be maintained at all stages of the procedure". The Trust believed that, as the investigation related to allegations which could have given rise to disciplinary proceedings against members of staff, if it had felt that this was warranted, staff would have been aware of the commitment of the Trust, in its disciplinary procedure, to treat information obtained in these sorts of circumstances as confidential. This would have reinforced the perception of staff that any information provided to the investigators would be treated as confidential.
 29. The Trust considered that disclosure of the information would have caused unwarranted damage or distress to the employees concerned by causing details of their shortcomings, failures at work and other personal information to be made public. This would have affected their personal lives, current employment and future employment prospects. It therefore did not believe it would be fair or lawful to disclose this information.
 30. The Commissioner accepts that where members of staff are interviewed by their employer as part of an investigation into serious allegations, there is likely to be an expectation that the information they provide will generally be treated with a degree of confidence. In this case, the Trust indicated to the people who were interviewed that the information they provided would be treated as confidential and would only be seen by the people who needed to have sight of it to determine what action should be taken by the Trust.

31. The Commissioner also accepts that the statement contained in the Trust's disciplinary policy in place at the time adds weight to the argument that the staff who were interviewed would have had an expectation that the information they provided would not be disclosed to the public at large. This expectation would also have extended to the assessment of individuals' performance by the author of the report, written upon the completion of the investigation.
32. The Commissioner acknowledges that the disclosure of critical comment on the performance of individual members of staff contained within the report would have been likely to cause them considerable distress. It might also have resulted in damage to their employment prospects. He would not normally expect such detailed assessments of employees' performance to enter the public domain. He is satisfied that disclosure of this information would have been unfair to the people whose performance was discussed in the report and that the information was exempt from disclosure under section 40(2).
33. In relation to the names of members of staff who were reluctant or unwilling to provide information during the investigation, the Commissioner believes that disclosure could have lead to undue inferences being drawn about the individuals concerned. He has, therefore, concluded that disclosure would have been unfair and that the exemption in section 40(2) was engaged.
34. With regard to the names of members of staff from whom further information was sought, following the completion of the staff questionnaires, the Commissioner is not convinced that disclosure of this information was likely to have been unfair to the individuals concerned. The names of the people who were sent questionnaires was disclosed by the Trust and the fact that further information or clarification was sought from certain individuals was not likely to cause any undue inferences to be drawn concerning those particular individuals in the context of the report and what was contained within it. He, therefore, believes that it was not unfair to disclose this information and that it was not exempt from disclosure under section 40(2).
35. The Trust withheld the name and the details of an allegation against a person not employed by the Trust. The Commissioner believes that it would have been unfair to release details of the allegation and the name of the person concerned as they would not have had an opportunity to comment on the allegation and contest the accuracy of it. He is therefore satisfied that this information is exempt under section 40(2).

Section 42 – Legal professional privilege

36. The Trust argued that some information was exempt from disclosure under section 42 of the Act as it either provided details of legal advice requested by the Trust or legal advice that was provided to the Trust. The Commissioner is satisfied that the advice sought and given related to the complainant and, therefore, constituted her personal data. Consequently, he believes that it was exempt under section 40(1) and should have been considered for disclosure under the complainant's access rights under the Data Protection Act 1998 ("the DPA"), rather the Freedom of Information Act.

37. Attached to this Decision Notice is a schedule (Appendix A) which indicates which information the Commissioner believes the Trust was entitled to withhold and which information should have been disclosed.

The Decision

38. 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:

- section 40(2) as it correctly applied the exemption, as identified in Appendix A, to most of the personal data of third parties.

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

- section 17(1)(b) and (c), as it failed to state in its refusal notice that sections 40(2) and 42 were applicable to some of the information requested and explain why the exemptions applied;
- section 40(2), as it incorrectly applied the exemption, as identified in Appendix A, to the names of members of staff from whom further information was sought during the investigation;
- section 42, as it incorrectly applied the exemption, as identified in Appendix A, to details of requests for legal advice, and legal advice given, in relation to the complainant.

Steps Required

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

- To disclose to the complainant the names of members of staff from whom further information was sought during the investigation by the Trust.

41. The Commissioner does not require the public authority to take any steps in relation to the breach of section 17(1)(b) and (c) as the complainant has been informed of its reliance on sections 40(2) and 42.

42. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Other matters

43. The Trust withheld information contained in the report which is not detailed in Appendix A to this decision. The Commissioner believes that this information relates to the complainant and should have been considered for disclosure under her access rights under the Data Protection Act, rather than under the Freedom of Information Act. He will therefore carry out an assessment under section 42 of the Data Protection Act to determine whether the information in question should be disclosed to the complainant. However, this assessment will be dealt with separately and will not form part of this Decision Notice, as the Commissioner does not believe that it would be appropriate to record the results of an assessment under the Data Protection Act within a Decision Notice under section 50 of the Freedom of Information Act.

Failure to comply

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

Right of Appeal

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

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

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

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

Dated the 30th day of August 2007

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

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

Personal information

Section 40(1) provides that –

“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.”

Section 40(2) provides 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 the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

Legal Professional Privilege

Section 42(1) provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

Appendix A

Schedule detailing the Commissioner's decision in relation to the application of exemptions to the requested report

Page	Paragraph	Description of information withheld	Exemption claimed by Trust	Commissioner's decision
The Main Report				
3	5	Comment on the performance of a named member of staff. Not the complainant.	Section 40(2)	Exempt – section 40(2)
5	3, 6 and 7	Comments on the extent to which named members of staff provided information for the investigation.	Section 40(2)	Exempt – section 40(2)
5	4 and 5	Names of members of staff from whom further information was sought, following the completion of initial staff questionnaires.	Section 40(2)	Not exempt
9 10	6 1	Comments by a named member of staff about her performance. Not the complainant.	Section 40(2)	Exempt – section 40(2)
14	2	Comments by a named member of staff on the performance of another named member of staff. None relate to the complainant.	Section 40(2)	Exempt – section 40(2)
14	5	Name of a member of staff whose performance is commented on by another member of staff. Not the complainant.	Section 40(2)	Exempt – section 40(2)

15	3,4 and part of 5	Comments by named members of staff on, and discussion of, the performance of other named members of staff. None relate to the complainant.	Section 40(2)	Exempt – section 40(2)
16	6 and part of 2,4 and 5	Comments by named members of staff on, and discussion of, the performance of other named members of staff. None relate to the complainant.	Section 40(2)	Exempt – section 40(2)
17	1 and part of 2,3 and 5	Comments by named members of staff on, and discussion of, the performance of other named members of staff. None relate to the complainant.	Section 40(2)	Exempt – section 40(2)
18	2, 4 and part of 5	Comments by named members of staff on, and discussion of, the performance of other named members of staff. None relate to the complainant.	Section 40(2)	Exempt – section 40(2)
19	Part of 3	Legal advice related to the complainant.	Section 42	Exempt - section 40(1)
19	5	Comments by named members of staff on, and discussion of, the performance of another named member of staff. None relate to the complainant.	Section 40(2)	Exempt – section 40(2)
20	Part of 1	Comment related to the performance of a named member of staff. Not the complainant.	Section 40(2)	Exempt – section 40(2)
20	Part of 2	Comment on the performance of a named member of staff. Not the complainant.	Section 40(2)	Exempt – section 40(2)

20	3	Legal advice related to the complainant.	Section 42	Exempt - section 40(1)
21	Part of 3	Legal advice related to the complainant.	Section 42	Exempt - section 40(1)
23	6 and part of 7	Comments by named members of staff on, and discussion of, the performance of other named members of staff. None relate to the complainant.	Section 40(2)	Exempt – section 40(2)
24	1-3	Comments by named members of staff on, and discussion of, the performance of other named members of staff. None relate to the complainant.	Section 40(2)	Exempt – section 40(2)
25	3 and part of 2,4,5 and 6	Comments by named members of staff on, and discussion of, the performance of other named members of staff. None relate to the complainant.	Section 40(2)	Exempt – section 40(2)
26	Part of 2	Name of a member of staff whose performance is commented on. Not the complainant.	Section 40(2)	Exempt – section 40(2)
27	Part of 3	Comment on the performance of a named member of staff. Not the complainant.	Section 40(2)	Exempt – section 40(2)
29	Part of 1 and 3	Comments by a named member of staff on, and discussion of, the performance of other named members of staff. None relate to the complainant.	Section 40(2)	Exempt – section 40(2)
30	Part of 2 and 3	Comments by a named member of staff on, and discussion of, the performance of other named members of	Section 40(2)	Exempt – section 40(2)

		staff. None relate to the complainant.		
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Appendix 4 of Report

14	1	Name of member of staff making a complaint and name of member of staff being complained about. Not related to the complainant.	Section 40(2)	Exempt – section 40(2)
14	6 and 7	Comments related to the performance of a named member of staff. Not the complainant.	Section 40(2)	Exempt – section 40(2)
15	1	Comments on the performance of a named member of staff. Not the complainant.	Section 40(2)	Exempt – section 40(2)
15	4	Comments on the performance of a named member of staff by another named member of staff. Not the complainant.	Section 40(2)	Exempt – section 40(2)
16	4	Comments on the performance of a named member of staff. Not the complainant.	Section 40(2)	Exempt – section 40(2)
16	5	Comments on the performance of a named member of staff by another named member of staff. Not the complainant.	Section 40(2)	Exempt – section 40(2)
17 - 24	Various	Comments by named members of staff on, and discussion of, the performance of other named members of staff. None relate to the complainant.	Section 40(2)	Exempt – section 40(2)

24	2	Allegation against a named individual who was not a member of staff.	Section 40(2)	Exempt – section 40(2)
25 - 28	Various	Comments by named members of staff on, and discussion of, the performance of other named members of staff. None relate to the complainant.	Section 40(2)	Exempt – section 40(2)
28	9	Legal advice related to the complainant.	Section 42	Exempt – section 40(1)
29	2	Legal advice related to the complainant.	Section 42	Exempt – section 40(1)
30 - 32	Various	Comments on the performance of named members of staff. Not the complainant.	Section 40(2)	Exempt – section 40(2)
32	7	Request for legal advice related to the complainant.	Section 42	Exempt - section 40(1)
43	9	Name of member of staff who allegations had been made against. Not the complainant.	Section 40(2)	Exempt – section 40(2)