

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 17 April 2007

Public Authority: Royal Wolverhampton Hospitals NHS Trust
Address: Hollybush House
New Cross Hospital
Wolverhampton
West Midlands
WV10 0QP

Summary

The complainant sought disclosure of a report commissioned by the Royal Wolverhampton Hospitals NHS Trust regarding the standard of clinical practice of a particular surgeon. The public authority initially refused to disclose the report on the basis of the exemptions contained in sections 40 (personal information) and, subsequently, also sought to rely on section 41 (information obtained in confidence) of the Act. The Commissioner upheld the decision of the public authority to withhold the majority of the information in the report on the basis of sections 40 and 41. However, he determined that neither section 40 or 41 were applicable to a part of the report. He also found that the public authority had not complied with section 17(1)(a), as it failed to inform the complainant within 20 working days of receiving his request that it was relying on an exemption in Part II of the Act, nor section 17(1)(b) and (c), as it failed to state in its refusal notice that section 41 was applicable to the information requested nor explain why it 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 6 October 2005.** The complainant made a request to the Royal Wolverhampton NHS Hospital Trust ("the Trust") for a copy of a report ("the report") prepared by two surgeons, one acting on behalf of the Royal College of Surgeons and the other acting on behalf of the Society of Cardiothoracic

Surgeons, into the performance of a surgeon employed by the Trust in 2005. The complainant emailed a number of members of staff of the Trust during October 2005 repeating this request.

3. **On 2 February 2006.** The Trust issued a refusal notice which confirmed that it held the report but refused to disclose it on the basis that it contained the personal data of third parties, including patients and employees of the Trust. It believed the disclosure of this data would breach the data protection principles contained in the Data Protection Act 1998 and would also cause the data subjects identified in the report damage or distress. It stated that the report was therefore exempt from disclosure under section 40(2) (personal information) of the Act.
4. **On 4 March 2006.** The complainant requested the Trust carry out an internal review of its decision.
5. **On 16 March 2006.** The Trust informed the complainant that the internal review had upheld the initial decision which had been taken.

The Investigation

Scope of the case

6. **On 20 February 2006.** The complainant initially wrote to the Commissioner to complain about the Trust's refusal to provide him with a copy of the report. The Commissioner suggested that it would be appropriate for him to seek an internal review from the Trust of its decision before the Commissioner considered the complaint.
7. **On 20 March 2006.** The complainant wrote again to the Commissioner following the completion of the internal review. He asked the Commissioner to investigate the decision of the Trust not to disclose a copy of the report.

Chronology

8. **On 1 December 2006.** The Commissioner wrote to the Trust asking it to provide him with a copy of the report and with any further submissions it wished to make in support of its decision.
9. **On 15 January 2007.** The Trust's solicitors wrote to the Commissioner enclosing a copy of the report and providing further submissions regarding the withholding of the report. They argued that the report contained a considerable amount of personal information relating to the Trust's patients, its employees and the surgeon whose performance was reviewed. They believed that the release of this information would be a breach of section 40(2).
10. The Trust's solicitors also argued that the report was exempt from disclosure under section 41 (information subject to a duty of confidence) as it had been provided to the Trust in confidence by the two surgeons on behalf of the Royal

College of Surgeons and the Society of Cardiothoracic Surgeons. The report was headed in bold on its front page "Private and Confidential". The Trust had contacted both of the surgeons who had informed it that they believed the report had been provided to the Trust in confidence and that they did not wish it to be made public.

11. **On 23 January 2007.** The Commissioner wrote to the Trust's solicitors seeking more information as to why it believed a duty of confidentiality existed in relation to the report and asking for any supporting documents which might exist, such as any agreement entered into by the Trust and the Royal College of Surgeons and the Society of Cardiothoracic Surgeons, prior to preparation of the report.
12. **On 6 March 2007.** The Trust's solicitors provided the Commissioner with a copy of a letter from the Royal College of Surgeons expressing concern that the disclosure of the report would set a precedent which would be detrimental to the processes involved in preparing similar reports in future and affect the willingness of surgeons to act as reviewers.
13. The Commissioner was also provided with a copy of a deed of indemnity signed by the Trust, the Royal College of Surgeons, the Society of Cardiothoracic Surgeons and the two surgeons who prepared the report.
14. In addition, the Trust's solicitors drew the Commissioner's attention to one of his earlier Decision Notices from August 2006 in relation to Newcastle upon Tyne Hospitals NHS Trust (FS50086131). They pointed out that, in his earlier decision, the Commissioner had upheld the application of section 41 to a report prepared by a panel of experts representing the Royal College of Surgeons into the standard of clinical practice by a doctor employed by the Newcastle upon Tyne Trust. The solicitors argued that the two cases were very similar and that many of the arguments in favour of the withholding of the report in the earlier case were equally applicable to the current one.
15. **On 26 March 2007.** The Commissioner wrote to the Trust's solicitors querying the application of section 41 to certain parts of the report. He pointed out that the report included figures and tables, on pages 6-10, which provided data on the survival rates of patients treated by individual heart surgeons. The Commissioner noted that this appeared to be information provided by the Trust, and not a third party, and therefore was not information to which section 41 could apply. In addition, it appeared to be information which had for some time been routinely placed in the public domain.
16. The Commissioner also noted that, on pages 10-13, the report contained details of patients of the Trust, their medical conditions and the treatment that they had received which had been provided by the Trust to the reviewers. Once again this did not appear to be information to which section 41 could apply. However, the Commissioner noted that this was likely to be information which would be exempt from disclosure under section 40(2) of the Act (personal information).
17. **On 29 March 2007.** The Trust's solicitors wrote to the Commissioner and acknowledged that the information on pages 6-10 of the report might be in the

public domain. They indicated that they were aware that there had been a move towards releasing this type of data related to individual surgeons on a national basis.

18. With regard to the patients' details, contained in pages 10-13 of the report, they accepted that this information did not appear to be covered by section 41 but argued that it was exempt from disclosure under section 40(2). They believed that the information was the personal data of the patients concerned and to release it would breach the first data protection principle as it would cause them damage and/or distress.
19. The Commissioner subsequently ascertained that information regarding individual heart surgeons' survival rates, similar to that contained in the report, had been in the public domain since 2006.

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)(a) – Time for compliance with request

21. Section 17(1)(a) requires that a public authority which is seeking to rely on an exemption in Part II of the Act must inform a person in writing of that fact within 20 working days of the receipt of a request. The complainant made his request on 6 October 2005 but the public authority did not send a refusal notice until 2 February 2006. The public authority therefore breached section 17(1)(a).

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

22. Section 17(1)(b) and (c) of the Act requires 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 section 41, nor explain why it applied, and, therefore, breached section 17(1)(b) and (c).

Exemptions

Section 41 – Information provided in confidence

23. Section 41(1) provides that information is exemption from disclosure if:-

- (a) it was obtained by the public authority from another person and

- (b) the disclosure of the information to the public by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

24. In order to determine whether section 41(1) applied to the report, the Commissioner took into account the guidance on the application of the section provided by the Information Tribunal in *Derry City Council v The Information Commissioner EA/2006/0014* at paragraph 30. The issues he considered were:-

- (a) was the information contained in the report obtained by the Trust from a third party?; and if so
- (b) would the disclosure of the report constitute an actionable breach of confidence, that is
 - (i) did the report have the necessary quality of confidence to justify the imposition of a contractual or equitable obligation of confidence?; if so
 - (ii) was the report communicated in circumstances that created such an obligation?; and, if so
 - (iii) would disclosure of the report be a breach of that obligation?;and, if this part of the test was satisfied;
- (c) would the Trust nevertheless have had a defence to a claim for breach of confidence based on the public interest in disclosure of the information?

(a) Was the information contained in the report obtained by the Trust from a third party?

25. The report was commissioned by the Trust from the Royal College of Surgeons and the Society of Cardiothoracic Surgeons and was prepared by a surgeon from each of these bodies. However, in order to prepare the report the reviewers were provided with data by the Trust regarding the survival rates of patients of individual surgeons. They were also provided with information with regard to some of the Trust's patients. Some of this information was included in the report. The Commissioner considers that this information could not be exempt under section 41 as it was not obtained by the Trust from a third party. However, he went on to consider whether this information was exempt from disclosure under section 40(2) (see paragraphs 43-47). In relation to the remainder of the information contained in the report, the Commissioner is satisfied this constituted information which was obtained by the Trust from a third party as it is an assessment of the performance of a surgeon by the two reviewers.

(b) Would the disclosure of the report constitute an actionable breach of confidence?

(i) Does the report have the necessary quality of confidence to justify the imposition of an obligation of confidence?

26. The Commissioner considers that a detailed report assessing the performance of a surgeon can be said to contain information which is of a sensitive nature. It does not contain information which could be regarded as trivial. In addition, the information provided by the reviewers was not information which was readily available or in the public domain except for some general biographical information about the surgeon. This biographical information was contained on page 3 (the first sentence of the third paragraph and first three sentences of the fourth paragraph) and page 4 (the first paragraph) of the report. The Commissioner is satisfied that the remainder of the information had the necessary quality of confidence to justify the imposition of an obligation of confidence.

(ii) Was the report communicated in circumstances that created such an obligation?

27. The Commissioner has been provided with a copy of deed of indemnity signed by the Trust, the Royal College of Surgeons, the Society of Cardiothoracic Surgeons and the two reviewers, prior to the preparation of the report, which refers to its confidential nature. He has also seen a copy of the report which is clearly headed "Private and Confidential" in bold on the front page.

28. Following the request for a copy of the report, the Trust sought the view of the two authors who both indicated that they understood it to be a confidential report to the Trust and did not wish it to be disclosed.

29. In light of the above, the Commissioner is satisfied that the Royal College of Surgeons, the Society of Cardiothoracic Surgeons and the two reviewers would have reasonably expected the Trust, as the recipient of the report, to keep it confidential. He is therefore satisfied that it was communicated in circumstances that created an obligation of confidence.

(iii) Would disclosure of the report be breach of that obligation?

30. The Commissioner is satisfied that the disclosure of the report by the Trust would have been a breach of the obligation of confidence owed to the Royal College of Surgeons, the Society of Cardiothoracic Surgeons and the two reviewers.

(c) Would the Trust have had a defence to a claim for breach of confidence based on the public interest in disclosure of the information?

31. Section 41 is an absolute exemption and therefore there is no public interest test to be applied under the Act. However, under the common law, a duty of confidentiality can be overridden if there is an overriding public interest in the disclosure of the information concerned. Under the Act, the public interest test assumes that information should be disclosed unless the public interest in

maintaining the exemption exceeds the public interest in disclosure. Under the law of confidence, the public interest test assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence. Under the law of confidence the burden of proof is therefore the reverse of that under the Act.

32. In *Derry City Council v The Information Commissioner (EA/2006/0014)*, it was argued before the Information Tribunal that an exceptional case has to be made for the disclosure of information which was subject to a duty of confidentiality. However, the Tribunal's view was that no exceptional case has to be made to override the duty of confidence that would otherwise exist. All that is required is a balancing of the public interest in putting the information into the public domain and the public interest in maintaining the confidence. Disclosure would be lawful where the public interest in disclosure outweighed the public interest in maintaining the duty of confidence.

Public interest arguments in favour of maintaining the duty of confidence

33. There is a strong argument that disclosure of the report could prejudice the future ability of the Trust, and other Trusts, to call upon clinical expertise to assess the competence of medical practitioners and provide manageable solutions to problems which may exist. The Trust has provided the Commissioner with a copy of a letter from the Royal College of Surgeons which raised concerns that, if this report were to be disclosed, it would create a precedent which would be detrimental to the processes involved in preparing this type of report and to the willingness of reviewers to participate in this type of activity in future.
34. The Commissioner notes that similar concerns were raised by the Newcastle upon Tyne Hospitals NHS Trust (FS50086131) in a very similar case in which it stated that it believed disclosure would create severe and insurmountable difficulties in engaging independent experts to provide free and frank advice in future. In addition, the panel of experts who prepared the report for the Newcastle upon Tyne Trust wrote to it stating that they would not have agreed to participate in the preparation of the report if they had believed that it would be put in the public domain. The members of the panel went to say that they believed that it would be impossible to find members for similar panels in future if the report was made public.
35. The Royal College of Surgeons also indicated in its letter to the Trust that the report was intended to be part of a rapid response review mechanism to assist hospitals in determining whether any unsafe or unsatisfactory surgical practice had taken place. There is clearly a public interest in such reports being completed in an expeditious manner so that any problems may be addressed quickly. If the parties involved in the report believed that it might be put into the public domain this could result in the process taking longer to complete and thus impact on the speed with which any remedial action could be taken.
36. The disclosure of the report could also adversely affect the willingness of a doctor, whose performance was being examined, to cooperate with the reviewers.

Similarly it could also affect the willingness of other staff to express free and frank views to the reviewers.

37. The Commissioner acknowledges that any adverse effect on the ability of the Royal Wolverhampton NHS Trust, and other NHS Trusts, to readily call upon the best possible expertise to advise on matters having a direct bearing upon the safety and wellbeing of patients in its care would clearly not be in the public interest.

Public interest arguments in favour of the disclosure of the information

38. The Commissioner believes that there is a general public interest in disclosing information which allows individuals to gain a greater understanding of decisions taken by public authorities which may affect their lives and, in some cases, assist individuals in challenging those decisions. Disclosure of the report would provide information to those who believed that they, or their relatives, may have been adversely affected by the standards of the surgeon concerned falling below the appropriate professional levels. It also may assist them in deciding whether to take further action against the surgeon and Trust.
39. Disclosure of the report would promote accountability and transparency by allowing the public to form a view as to how rigorously the Trust investigated concerns raised about the surgeon. In addition, it would help the public to determine whether the Trust had received appropriate advice to rectify any problems which existed.
40. However, in relation to these arguments, the Commissioner notes that there are already formal mechanisms available for public concerns about a doctor's professional standards to be raised. Such concerns may be raised with bodies such as the Healthcare Commission and the General Medical Council, who can carry out their own investigations and take further action, where appropriate.
41. After carefully considering the public interest arguments, the Commissioner has formed the view that, in this case, the public interest in disclosure did not outweigh the public interest in maintaining the duty of confidence. He has given particular weight to the adverse effect that disclosure of the report might have had on the ability of this Trust, and other NHS Trusts, to obtain similar reports in future and the impact this might have had their ability to deal expeditiously with any problems related to patient care.
42. He is satisfied that the disclosure of the information would have constituted an actionable breach of confidence and that, therefore, the exemption in section 41 has been correctly applied to the information in the report which was not provided by the Trust.

Section 40(2) – personal information

43. Having determined that some of the information that was contained within the report was exempt from disclosure under section 41, the Commissioner went to consider whether the remainder of the information, which was not exempt under

section 41 as it was not provided to the Trust by a third party, was exempt from disclosure under section 40(2).

44. The Commissioner is satisfied that the surgeon's biographical information relating to his employment, contained on page 3 (the first sentence of the third paragraph and first three sentences of the fourth paragraph) and page 4 (the first paragraph) of the report, constitutes the surgeon's personal data. The information, contained in pages 5 (commencing at section 6) -10 of the report, detailing the survival rates of patients for individual surgeons employed by the Trust, also constitutes those surgeons' personal data. Finally he is satisfied that the information contained in pages 10-13 of the report, with regard to individual patients, is the patients' personal data. The report identifies the patients by initials and provides details such as to their age, their symptoms and treatment, the surgeon who operated on them, the type of operation they underwent and the date of any operations that took place.
45. Having determined that this information constituted the personal data of 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 be a breach of the first data protection principle, that processing shall be fair and lawful.
46. Whilst the biographical information of the surgeon was his personal data, the Commissioner does not believe the release of this information would have breached any of the data principles as it is information which would have been in the public domain at the time of the request.
47. With regard to the information concerning individual surgeons' patients' survival rates, the Commissioner is aware that this type of information has for some time been routinely made available to the public. In these circumstances, he does not believe it would have been unfair or unlawful for this information to have been released to the complainant and, therefore, it would not have been a breach of section 40(2) to do so. The only exception to this is the opinions expressed on these figures by the reviewers at pages 6 (the first paragraph), 7 (the final sentence) and 10 (the first sentence). The Commissioner is satisfied that this is confidential information that is exempt from disclosure under section 41 as explained in paragraphs 23-42 above.
48. With regard to the information concerning individual patients, the Commissioner believes that this information would have been held by the Trust on the basis of a shared understanding, with the patients, of confidentiality. Any disclosure to the public of such sensitive information, relating to individuals' private lives, could have caused unnecessary and unjustified distress or damage. The Commissioner is therefore satisfied that disclosure of this information would have been unfair and, therefore, agrees with the Trust that it is exempt from disclosure under section 40(2).

The Decision

49. 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 41 as it correctly applied the exemption to most of the information contained in the report which was not obtained from the Trust;
- section 40(2) as it correctly applied the exemption to the information related to patients contained on pages 10-13 of the report.

50. 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)(a) as it failed to inform the complainant in writing within 20 working days of receiving his request that it was seeking to rely on an exemption in Part II of the Act;
- section 17(1)(b) and (c) as it failed to state in its refusal notice that section 41 was applicable to the information requested and explain why the exemption applied;
- section 41 as it incorrectly applied the exemption to the surgeon's general biographical information, contained on page 3 and page 4, of the report, most of the information contained on pages 5-10 of the report, related to individual surgeons' patients' survival rates, and to the information related to patients contained on pages 10-13 of the report;
- Section 40(2) as it incorrectly applied the exemption to the information contained on pages 5-10 of the report, related to individual surgeons' patients' survival rates.

Steps Required

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

- To disclose to the complainant the surgeon's biographical information, contained on page 3 (the first sentence of the third paragraph and first three sentences of the fourth paragraph) and page 4 (the first paragraph) of the report and the information related to individual surgeons' patients' survival rates which are contained on pages 5-10 of the report, with the exception of pages 6 (the first paragraph), 7 (the final sentence) and 10 (the first sentence).

52. The Commissioner does not require the public authority to take any steps in relation to the breach of section 17(1)(a),(b) and (c) as the complainant was subsequently informed that it was seeking to rely on an exemption in Part II of the Act and of its reliance on section 41.

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

Right of Appeal

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

- i. Information Tribunal
- ii. Arnhem House Support Centre
- iii. PO Box 6987
- iv. Leicester
- v. LE1 6ZX

- vi. Tel: 0845 600 0877
- vii. Fax: 0116 249 4253
- viii. 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 17th day of April 2007

Signed

**Steve Wood
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).”

Section 40(5) provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”

Section 40(6) provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

Section 40(7) provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

Information provided in confidence

Section 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Section 41(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”