

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 27 September 2007**

**Public Authority:** Sheffield Teaching Hospitals NHS Foundation Trust  
**Address:** Northern General Hospital  
Herries Road  
Sheffield  
South Yorkshire  
S5 7AU

### Summary

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The complainant requested a copy of an internal Audit Report into allegations of financial irregularities made against the former Director of Research Governance of Sheffield Teaching Hospitals NHS Foundation Trust (the "Trust"), together with any background material regarding these allegations. This request was made under the Freedom of Information Act 2000 (the "Act"). The Trust refused to provide this information and initially cited the exemptions at section 30 and section 41 of the Act. During the course of the case the complainant confirmed to the Commissioner that he now only sought access to the Audit Report. The Trust subsequently informed the Commissioner that it was now relying upon section 40 and section 31 of the Act to withhold the information in question. After considering the Report in detail, the Commissioner concluded that it contained the personal data, as defined in the Data Protection Act 1998 (the "DPA"), of both the former Director of Research Governance and of staff members who had given evidence to the writers of the Report, or who were involved in the events surrounding the allegations. After considering the case the Commissioner decided that in relation to the personal data of the former Director, the release of this information would not be in breach of the DPA. He also concluded that if the Report was released in a partially redacted format with the personal data of staff members, other than that of the former Director, anonymised, the release of this information would not be a breach of the DPA. Therefore he concluded that if the Report was anonymised in this fashion section 40(2) would not be engaged. The Commissioner also decided that section 31 did not prevent disclosure of this information. Finally the Commissioner decided that the public authority was in breach of section 17, as it failed to state in its refusal notice the exemptions it later sought to rely upon. Consequently, the complaint was partially upheld.

## The Commissioner's Role

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

## The Request

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2. The complainant has advised that on 3 January 2006 the following information was requested from the Trust in accordance with section 1 of the Act:  
  
"Please provide me with all documentary material, including correspondence and witness submissions, as well as official NHS trust reports, regarding allegations of financial irregularities made against Richard Eastell, who was until last month research and development director at the [Sheffield Teaching Hospitals NHS Foundation Trust]."
3. On 16 January 2006 the Trust confirmed that it held a confidential internal Audit Report in relation to this matter, but refused to disclose it, citing section 41 of the Act. For ease of reference this withheld document will be referred to as the 'Audit Report' throughout this Notice. The Trust explained that the Audit Report had been produced by a "third party organisation" and had been passed to the Trust in confidence. The Trust went on to state that it believed that if it disclosed the Audit Report to the complainant this would be an actionable breach of that confidence.
4. The complainant requested a review of this decision in an email dated 3 February 2006. He asked the Trust to provide him with the identity of the third party who had produced the Audit Report and to whom it owed a duty of confidence.
5. The Trust responded on 25 April 2006, upholding the decision to withhold the Audit Report. It again cited section 41, and also stated that as the Audit Report "was supportive of a disciplinary process" it believed that section 30 also applied. It did not make any reference to a public interest test. The Trust also refused to answer the additional questions asked by the complainant in his email of 3 February 2006, stating that this information was also exempt under section 41.

## The Investigation

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### Scope of the case

6. On 28 April 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the refusal was appropriate.

7. During the course of the investigation the Trust informed the Commissioner that after receiving the initial request from the complainant it had had discussions with him, in line with section 16 of the Act (the duty to advise and assist), during which the complainant had intimated that he only sought access to the Audit Report.
8. As a result of this information the Commissioner contacted the complainant and asked him whether he only sought access to the Audit Report. In an email dated 26 April 2007 the complainant confirmed to the Commissioner that this was so.
9. Therefore the Commissioner has focused his investigation on the Audit Report.

### Chronology

10. The Commissioner wrote to the Trust on 9 May 2006 to notify it that he had received a complaint and to request a copy of the withheld information.
11. The Trust provided the Commissioner with a copy of the Audit Report on 10 May 2006.
12. The Commissioner wrote again on 8 March 2007 requesting further information in regard to the withheld information and the exemptions cited by the Trust. In particular he asked the Trust to explain why it believed that section 41 applied to the information concerned. He informed the Trust that after an initial look at the case he had formed an initial view that it was unlikely that section 30 applied, and drew its attention to the areas of overlap between sections 30 and 31. He asked whether, after considering this, the Trust now sought to rely upon section 31 instead, and if so, to explain its reasoning why it thought this exemption applied. If it continued to rely upon section 30, he asked for the Trust's reasoning behind the use of section 30. He also asked the Trust whether it wished to consider the application of section 40 to the information in question.
13. The Commissioner's actions here were in line with the reasoning of the Information Tribunal, in *Dr Bowbrick V The Information Commissioner and Nottingham City Council*, which stated,  
  
"The Commissioner, however, would be entitled to look for an appropriate exemption in some exceptional cases. This could happen where a public authority claims a particular exemption and the Commissioner considers that the authority has mis-identified the correct exemption. For example, there is a close relationship between the exemptions in s.30 (investigations) and s.31 (law enforcement). The information can only be within s.31 if it is outside s.30 and sometimes there is an issue as to where the particular information falls...If the Commissioner considered that there was a s.40 issue in relation to the data protection rights of a party, but the public authority...did not claim the exemption, it would be entirely appropriate for the Commissioner to consider this data protection issue..."<sup>1</sup>

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<sup>1</sup> Information Tribunal EA/2005/0006, page 15-16.

14. The full text of section 30 and section 41 can be found in the Legal Annex at the end of this Notice.
15. The Trust provided a substantive response in a letter dated 2 April 2007. In this letter it stated that it now believed that section 41 had been claimed erroneously. The Trust went on to provide its reasoning behind the application of section 30, and stated that it considered section 30(2)(b) to be applicable, by way of section 30(2)(a)(iii), as it believed that the investigation was conducted for the purpose listed at section 31(2)(b) and (d). However, it did not refer to the public interest test in relation to these exemptions.
16. In this letter the Trust also considered the application of section 40 to the information in question, and confirmed that it now believed that the section 40(2) applied to the Audit Report. However, it did not specify which of the conditions listed in section 40(3) or section 40(4) it believed was satisfied.
17. The Trust also informed the Commissioner that after receipt of the initial request the complainant had intimated to the Trust that he only sought access to the Audit Report. After a letter was sent regarding this, the complainant confirmed to the Commissioner that he now only sought access to the Audit Report (see paragraph 7 and 8 above)
18. The Commissioner wrote to the Trust again on 2 May 2007. In this letter he asked the Trust to clarify whether it still sought to rely upon section 30 and section 41. He also asked it to confirm whether it now sought to rely upon section 31, and if so, to provide information about its application of the public interest test. In regard to its application of section 40(2) he asked the Trust to clarify which of the conditions it believed was applicable. Finally, he asked it for details as to the terms under which the Audit Report was written, especially whether there had been any assurances of confidentiality given to the individuals who had given evidence for the report.
19. The Trust responded to this letter by way of an email, dated 29 May 2007. It informed the Commissioner that it was no longer relying upon section 30 and section 41, and it was now relying upon section 31 and section 40 to withhold the information in question. In respect of section 40 it informed the Commissioner that it believed that this applied as the disclosure of this information would be in breach of the principles of the DPA in relation to the staff who acted as witnesses for the Report. It also provided information as to its consideration of the public interest test in respect of section 31. Finally the Trust informed the Commissioner that the staff who had acted as witnesses for the Audit Report had been given written assurances of confidentiality.
20. Following an email from the Commissioner on 6 June 2007, the Trust informed the Commissioner by letter dated 18 June 2007 that it was unable to provide copies of these written assurances of confidentiality, as they had been issued by the third party responsible for the writing of the Audit Report.

## Findings of fact

21. The Trust held an internal disciplinary hearing into the allegations against Professor Eastell in December 2005. However, the Professor resigned his post before the hearing concluded and consequently it did not make a final judgement in relation to the allegations.
22. At the time the Audit Report was written Professor Eastell was the Director of Research Governance at the Trust.

## Analysis

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### Procedural matters

23. Section 1(1) of the Act states that any person making a request for information to a public authority is entitled:
  - to be informed in writing by the public authority whether it holds information of the description specified in the request, and
  - if that is the case, to have that information communicated to him.
24. Section 17(1) states that a public authority who is relying on an exemption(s) in order to withhold information must give the applicant a notice which:
  - (a) states that fact,
  - (b) specifies the exemption in question, and
  - (c) states (if it would not otherwise be apparent) why the exemption applies.
25. As the Trust did not claim in its refusal notice issued on 16 January 2006 the exemptions it later sought to rely upon, it was in breach of section 17(1).
26. The full text of section 17 can be found in the Legal Annex at the end of this Notice.

### Exemptions

27. During the course of the request and the subsequent investigation by the Commissioner, the Trust relied upon a number of exemptions under the Act in order to withhold the information in question. These were sections 30, 31, 40, and 41. However, during the investigation the Trust informed the Commissioner that it was now relying only upon sections 31 and 40 to withhold the information in question. Therefore the Commissioner has only considered the application of these two exemptions.

#### **Section 40(2)**

28. Section 40(2) gives an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied.
29. One of the conditions, listed in section 40(3)(a)(i), is where the disclosure of the information to any member of the public would contravene any of the data protection principles. It is this condition that the Trust is relying upon to withhold the Audit Report.
30. In considering the applicability of section 40(2) to the Audit Report the Commissioner has first considered whether the withheld information constituted the personal data of any individuals.
31. Section 1 of the DPA defines personal data as data which relate to a living individual who can be identified:
  - from those data, or
  - from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
32. The Trust has stated that it believes that this exemption applies as the Audit Report contains the personal data of staff members who contributed to the Audit Report and provided evidence to the authors of the Report. The Trust has also stated that it believes that the disclosure of this personal data would be in breach of the first, second, and sixth principles of the DPA.
33. In its correspondence with the Commissioner the Trust did not state that it believed that the Audit Report contained the personal data of Professor Eastell. Nonetheless, given the nature of the Audit Report and the purposes for which it was commissioned, the Commissioner has initially considered whether the Report does contain the personal data of Professor Eastell.
34. The Audit Report was commissioned following allegations made against Professor Eastell, which led to internal disciplinary proceedings. The Report formed part of those proceedings and focused on the events surrounding the allegations and Professor Eastell's actions in relation to those events.
35. Taking this into consideration the Commissioner has formed the view that the Audit Report is the personal data of Professor Eastell.
36. Because of the nature of the allegations the Commissioner has gone on to consider whether the information in the Audit Report was the sensitive personal data of the Professor. After careful consideration of the contents of the Audit Report, the Commissioner is satisfied that it is not sensitive personal data.
37. Sensitive personal data is defined in section 2 of the DPA. The full text of this section can be found in the Legal Annex at the end of this Notice.
38. The Commissioner has gone on to consider whether the release of the Audit Report would be a breach of the data protection principles, in regard to Professor Eastell's personal data. In making these considerations the Commissioner has

primarily considered whether the disclosure of this information would breach the first principle of the DPA.

39. The first principle of the DPA requires that personal data is:
- processed fairly and lawfully, and
  - that at least one of the conditions in schedule 2 is met.
40. In considering whether disclosure of Professor Eastell's personal data would contravene the requirements of the first data protection principle, the Commissioner has taken a number of factors into consideration, namely:
- The employment context which gave rise to the information being recorded
  - Professor Eastell's seniority as an employee of the Trust
  - The nature of the allegations made against Professor Eastell and the contents of the Audit Report.
  - Was Professor Eastell given any express promise of confidentiality?
  - What information is already in the public domain?
  - Professor Eastell's resignation prior to the conclusion of the disciplinary action.
41. In his guidance on the section 40 exemption the Commissioner has stated that the seniority of the individual should be taken into account when personal data about that person is being requested under the Act, "It may also be relevant to think about the seniority of staff: the more senior a person is the less likely it will be that to disclose information about him or her acting in an official capacity would be unfair,"<sup>2</sup> and in previous decision notices the Commissioner has stated that he considers that occupants of senior posts are more likely to be exposed to greater levels of scrutiny and accountability.<sup>3</sup> At the time that the Audit Report was written Professor Eastell was the Director of Research Governance at the Trust.
42. The Commissioner's guidance on the section 40 exemption differentiates between information which relates to an individual's private life and their public life, stating,
- "...information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned.
- While it is right to take into account any damage or distress that may be caused to a third party by the disclosure of personal information, the focus should be on the damage or distress to an individual acting in a personal or private capacity. The exemption should not be used, for instance, as a means of sparing officials embarrassment over poor administrative decisions."<sup>4</sup>

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<sup>2</sup> Freedom of Information Awareness Guidance 1 – Personal Information, page 5.

<sup>3</sup> See Decision Notices FS50062124 (Corby Borough Council), and FS50081576 (The Department of Culture, Arts and Leisure).

<sup>4</sup> Freedom of Information Awareness Guidance 1 – Personal Information, page 4.



43. The Information Tribunal in *The Corporate Officer of the House of Commons V The Information Commissioner* has agreed with this approach, stating, “We accept the approach of the Commissioner’s Guidance which recognises that in determining fair processing regard can be had as to whether the personal data relates to the private or public life of the data subject to whom it relates.”<sup>5</sup>
44. After careful consideration of the information contained in the Audit Report and the nature of the allegations made against Professor Eastell, the Commissioner is satisfied that this information relates to the Professor’s public life.

### **Is disclosure fair?**

45. In considering whether the disclosure of personal data is fair, the Commissioner considered whether Professor Eastell was given any express promise of confidentiality when the Audit Report was written. During the course of the investigation the Trust informed the Commissioner that Professor Eastell had not been given a confidentiality agreement by the auditors. Therefore the Commissioner is satisfied that at the time the Audit Report was written Professor Eastell was not given an express promise of confidentiality.
46. The Commissioner then went on to consider what information is already in the public domain. The Commissioner has noted that a significant amount of relevant information about the allegations made against Professor Eastell, the nature of those allegations and the resultant actions of the Trust (e.g. the fact that an internal audit report was carried out in preparation for an internal disciplinary hearing), has already been put into the public domain by way of coverage in the national press.
47. The Commissioner has also taken into account the circumstances in which the disciplinary proceedings ended (see paragraph 21 above).
48. The Commissioner went on to consider the following questions:
- Would the disclosure cause unnecessary or unjustified distress or damage to Professor Eastell?
  - Would Professor Eastell expect that his information might be disclosed to others?
  - Had Professor Eastell been led to believe that his information would be kept secret?
  - Has Professor Eastell expressly refused consent to disclosure of the information?
49. He has also borne in mind the findings of the Tribunal in *The Corporate Officer of the House of Commons V The Information Commissioner*, which stated,
- “...we find that when assessing the fair processing requirements under the DPA that the consideration given to the interests of data subjects, who are public officials where data are processed for a public function, is no longer

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<sup>5</sup> Information Tribunal EA/2006/0015 and EA/2006/0016, page 23.



first and paramount. Their interests are still important, but where data subjects carry out public functions...or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives. This principle still applies even where a few aspects of their private lives are intertwined with their public lives but where the vast majority of processing of personal data relates to the data subject's public life."<sup>6</sup>

50. Whilst bearing in mind the above the Commissioner has noted the following points:
- The allegations, and the contents of the Audit Report, relate to Professor Eastell's conduct as a senior employee of the Trust, which constituted an aspect of his public life rather than his private life.
  - The fact that there have been allegations made against Professor Eastell, as well as some information about the nature of the allegations and the Trust's actions following the allegations, is already in the public domain.
  - Professor Eastell held a senior post at the Trust.
  - Professor Eastell was not given a written assurance of confidentiality by the authors of the Audit Report.
  - The Trust has provided no evidence to suggest that Professor Eastell has objected to the potential disclosure of the Audit Report.
51. After taking the above points into consideration the Commissioner has formed the view that the disclosure of Professor Eastell's personal data, in relation to the Audit Report, would be fair and lawful.
52. Having formed the view that the disclosure of the Audit Report, in relation to Professor Eastell's personal data, would be fair, the Commissioner has gone on to consider whether any of the conditions in Schedule 2 of the DPA can be met.

### **Schedule 2 condition**

53. The Commissioner considers that the most applicable condition in this case is likely to be schedule 2 (6)(1) of the DPA which gives a condition for processing personal data where,
- “The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject”.
54. The full text of schedule 2 of the DPA can be found in the Legal Annex at the end of this Notice.

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<sup>6</sup> Information Tribunal EA/2006/0015 and EA/2006/0016, page 23 – 24.

55. When considering whether a schedule 2 condition for processing can be met, the Commissioner has taken into account the legitimate interests of the third parties to whom the information would be disclosed, i.e. the general public, as well as the legitimate interests of Professor Eastell.
56. In considering the application of this schedule 2 condition the Commissioner has adopted the approach of the Information Tribunal in *The Corporate Officer of the House of Commons V The Information Commissioner*. The Tribunal noted that this condition involved a balance of interests broadly comparable with the public interest test for qualified exemptions under the Act, but found that in order for this condition to be satisfied, the legitimate interests of those to whom the data would be disclosed (i.e. the general public) had to outweigh the rights, freedoms and legitimate interests of the data subject.<sup>7</sup>
57. As the Trust did not argue that the information in the Audit Report was the personal data of Professor Eastell, it did not provide the Commissioner with any specific arguments as to how the release of the information would prejudice the legitimate interests of the Professor.
58. However, in a letter sent to the Commissioner on 29 May 2007, the Trust argued that, "ultimately no judgement was reached in the disciplinary action as Professor Eastell resigned his post, so any supposition regarding an outcome is just that – supposition, and the external accusation was neither confirmed nor denied." The Trust has also stated that it believes that disclosure would cause substantial distress.
59. The Commissioner acknowledges these points. However, in relation to the argument that disclosure would cause distress, he is mindful that it is already in the public domain that there have been allegations made against Professor Eastell, in relation to alleged financial irregularities, and that the Trust had commissioned an Audit Report as part of an internal disciplinary process. He has also taken into account the senior role of the Professor in the Trust..
60. The Commissioner has gone on to consider the legitimate interests of those to whom the data would be disclosed. The Commissioner believes that the general public has a strong legitimate interest in access to information about the efficient and proper use of public money in the NHS, especially given the fundamental role that the NHS has in the life of the population of the country as a whole. The Commissioner also believes that the general public has a legitimate interest in the accountability of public officials and the spending of public money, and, in the particular circumstances of this case, in gaining an understanding of the results of a review of the events which gave rise to allegations that there had been irregularities in the spending of public money by a senior member of staff in an NHS Trust. The Commissioner is also mindful of the fact that some details of the allegations have been made public in the Press, but that because the Professor resigned before the disciplinary hearing concluded, there has been no further information put into the public domain, and therefore disclosure of the Report may provide greater clarity to what is already in the public domain.

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<sup>7</sup> Information Tribunal EA/2006/0015 and EA/2006/0016, page 27.

61. After considering the above points, and bearing in mind the approach described in paragraph 56 above, it is the Commissioner's view that the legitimate interests of those to whom the information would be disclosed (i.e. the general public) outweigh those of the data subject. Therefore he believes that, in this case, condition 6(1) of schedule 2 of the DPA is satisfied..
62. Therefore the Commissioner believes that, in relation to Professor Eastell's personal data, the disclosure of the Audit Report would not be in breach of the first principle of the DPA.
63. As the Trust has referred to the second and sixth data protection principles the Commissioner has gone on to consider whether the disclosure of the Audit Report, in connection to Professor Eastell's personal data, would be in breach of these principles.
64. The second principle of the DPA requires that personal data shall be obtained only for one or more specified and lawful purpose, and shall not be further processed in any manner incompatible with that purpose or purposes.
65. In regard to the second principle the Commissioner does not consider that disclosure of this information in response to a request under section 1 of the Act would constitute processing incompatible with the purpose for which the information was obtained.
66. The sixth principle of the Act requires that personal data is processed in accordance with the rights of data subjects under the DPA.
67. However, after examining the information concerned and the taking into account the representations of the Trust, the Commissioner is satisfied that the disclosure of the Audit Report would not be in breach of the sixth principle.
68. Therefore, it is the Commissioner's view, the disclosure of Professor Eastell's personal data, in relation to the Audit Report, would not be in breach of the data protection principles.
69. Therefore he believes that section 40(2) is not engaged, and that it does not provide an exemption from disclosure.
70. This is an absolute exemption, and is not subject to a public interest test.
71. The full text of section 40 can be found in the Legal Annex at the end of this Notice.

### **Third party data**

72. The Commissioner then went on to consider whether the Audit Report contained the personal data of any third parties.

73. As stated in paragraph 32 above, the Trust has informed the Commissioner that it believes that the Audit Report contains the personal data of the members of staff who had contributed to the Report and provided evidence. The Trust has informed the Commissioner that these staff members were given assurances of confidentiality, and has also stated that, “as these staff are not public facing staff they have the right to confidentiality under the DPA principles.” The Trust stated that it believed that the disclosure of this personal data would be in breach of the first, second, and sixth principle of the DPA
74. After considering the contents of the Audit Report the Commissioner is satisfied that it does contain the personal data of the third parties who gave evidence to the authors of the Report, in that it identifies third parties by name and, in some cases, by job role or title. In addition the Commissioner notes that it also contains the personal data of third parties who were involved in some way with the events surrounding the allegations.
75. The Commissioner then went on to consider whether the disclosure of this data would be in breach of the first data protection principle. In particular he considered whether the disclosure of this data would be fair.
76. Taking into account the fact that the allegations were not made against the third parties; the written assurances of confidentiality that the Trust has informed the Commissioner were given to the third parties who gave evidence; the fact that these third parties were not of a similar senior rank to Professor Eastell; and the fact that these third parties were not the focus of the investigation; the Commissioner has formed the view that the disclosure of the names and job titles of the third parties would be unfair, and therefore in breach of the first data protection principle.
77. After forming this view the Commissioner has gone on to consider whether it would be possible to anonymise the Audit Report, by redacting the details of the names and job roles or titles of the third parties.
78. He notes that the Trust has stated that “as the staff were identified by name, role and function within the body of the report, together with their working relationship to Professor Eastell, it would be impossible to redact the report so that staff confidentiality could be maintained.”
79. However, after careful consideration of this argument and the contents of the Audit Report, the Commissioner is not convinced that it would be impossible to anonymise the Audit Report. He is of the view that it would be possible to remove the names and job roles or titles, so as to satisfactorily anonymise the Audit Report, and to replace this information with an anonymous reference – for example, the name and title, ‘John Smith, Company Secretary’, could be replaced throughout the Report with the anonymous reference ‘A’.
80. It is the Commissioner’s view that removal of the names and job roles or titles of the third parties mentioned in the Audit Report would mean that its disclosure would not breach the data protection principles.

81. Therefore, in the Commissioner's opinion, disclosure of the information in an anonymised form, i.e. with personally identifiable information of the other staff members removed, would not breach the data protection principles. Therefore section 40(2) of the Act provides no basis for exempting the anonymised information from disclosure.

### **Section 31**

82. The Commissioner then went on to consider whether the exemption listed at section 31 of the Act was engaged in this case, and if so, whether the public interest in maintaining the exemption outweighed the public interest in disclosure.

83. In this case the Trust has applied section 31(1)(g), and sections 31(2)(b) and (d).

84. Section 31(1)(g) states that information is exempt if its disclosure under the Act would be likely to prejudice, "the exercise by any public authority of its functions for any of the purposes specified in subsection (2)." In this case the Trust has stated that it believes that the following purposes apply:

- Section 31(2)(b) – the purpose of ascertaining whether any person is responsible for any conduct which is improper, and,
- Section 31(2)(d) – the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on.

85. In order to demonstrate potential prejudice the Trust has argued that the members of staff who gave evidence for the Audit Report had been given promises of confidentiality, and that "any apparent lack of confidentiality during the disciplinary process will actively rebound on the efficacy of that process." The Trust believes that there would be a marked reluctance for staff, especially staff who are not public facing, to appear as witnesses in any form of hearing, if they thought that any promises of confidentiality could be undermined by a request under the Act.

86. Therefore the Trust has argued that the release of information which identifies the staff members who cooperated with the Audit Report would actively discourage staff members from doing so again in the future. This, it has stated, would prejudice the Trust's ability to carry out similar investigations in the future.

87. The Commissioner notes that the Trust's arguments regarding the prejudice which it believes would be caused by the disclosure of the Audit Report relate only to the information contained within the Report from which the witnesses can be identified. Therefore he has only considered the application of this exemption in relation to these specific parts of the Audit Report.

88. For this exemption to be engaged, disclosure has to prejudice, or be likely to prejudice the purposes stated by the Trust. Therefore the Commissioner has initially considered the question of prejudice.

89. In dealing with issue of prejudice to the purposes set out by the Trust in paragraphs 83 and 84 above, the Commissioner has been mindful of the test of 'likely to prejudice' as enunciated by Mr Justice Mundy in the case of *R (on the application of Lord) V Secretary of State for the Home Office [2003] EWHC 2073*, and followed by the Information Tribunal in the case of *John Connor Press Associates Limited V The Information Commissioner*, where the Tribunal interpreted the expression 'likely to prejudice' within the context of the section 43 exemption as meaning that the chance of prejudice being suffered should be more than hypothetical or a remote possibility, that there must have been a real and significant risk. The Tribunal in that case indicated that the degree of risk must be such that there 'may very well' be prejudice.<sup>8</sup>
90. In *Hogan and Oxford City Council V The Information Commissioner*, the Information Tribunal also applied Justice Mundy's test to section 31(1) of the Act. In this case, the Tribunal stated that "...there are two possible limbs on which a prejudice based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not...The s31(1) prejudice is not restricted to 'would be likely to prejudice'. It provides an alternative limb of 'would prejudice'. Clearly this second limb of the test places a much stronger evidential burden on the public authority to discharge."<sup>9</sup>
91. In determining whether the disclosure of the Audit Report would be likely to prejudice the Trust's ability to ascertain whether a person has acted improperly, the Commissioner notes the strength of the argument that disclosure of this type of information could deter people from acting as witnesses to similar investigations in the future, particularly where those people have been given a promise of confidentiality.
92. However, the Commissioner has also taken account of the fact that he has already formed the view that the Audit Report could be successfully anonymised so as to redact the identities of the individuals who provided evidence to the authors of the Report.
93. In light of the above considerations, having considered the arguments of the Trust, and bearing in mind his view that the Audit Report could be successfully anonymised, the Commissioner is not convinced that the Trust has satisfactorily demonstrated that the likelihood of prejudice is sufficient to meet the prejudice test as laid out in the Tribunal cases referred to above.
94. Nevertheless the Commissioner has gone on to consider the public interest test in relation to the application of this exemption in this case. Specifically, he has considered whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

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<sup>8</sup> Information Tribunal EA/2005/0005.

<sup>9</sup> Information Tribunal EA/2005/0026 and EA/2005/0030, page 9 – 10.



### **Public interest – in favour of maintaining the exemption**

95. In considering the public interest in maintaining the exemption the Commissioner has noted the Trust's comments that there is a public interest in it being able to carry out internal disciplinary processes such as this. He also notes the comments that the disclosure would prejudice any future investigation, as staff would no longer trust any promises of confidentiality which were offered to potential witnesses. Further to this the Commissioner accepts that there is a public interest in a public authority being able to ascertain whether any person is responsible for any conduct which is improper.

### **Public interest – in favour of disclosing the information**

96. In considering the public interest in disclosing the information the Commissioner has been mindful of the strong generic public interests in openness, transparency, public understanding and accountability, in relation to the activities of public authorities.
97. He has gone on to consider these generic public interest issues in the light of the individual circumstances of this case.
98. He believes that there is a strong public interest in the public having access to information about the proper and efficient use of public money in the NHS, especially given the impact this has on such issues as hospital beds, staffing levels and patient waiting lists. He also believes that there is a substantial public interest in the efficient running of the NHS, given the fact that the NHS has such a fundamental role in the life of the population of the country as a whole.
99. It has already been noted in this Notice that there has been coverage in the National Press that accusations of financial irregularities had been made against Professor Eastell, that the Trust had begun disciplinary action, and that the Professor had resigned before that disciplinary process had been completed.
100. The Commissioner believes that there is a strong generic public interest in increasing the accountability of public officials for the spending of public money, and, bearing the above paragraph in mind, in the public gaining an understanding of events surrounding allegations of financial irregularities by a senior member of staff at an NHS Trust.
101. The Trust has argued that, "whilst the release of the report could be argued to be in the public interest...it fails that test if what it releases is a report what gives the details but neither a result nor recommendations on the accusations made, future working practice and codes of conduct. Such a release would fuel purely acrimonious, uncontextualised comment from those with a personal point to make and would not necessarily lead to an appreciation of the constructive or inclusive decision making that the Trust now has in place for the patients and other members of the public."
102. The Commissioner is not persuaded by this argument. The Report is an exploration of the events surrounding the allegations that were made against

- Professor Eastell. Given the information which is in the public domain, the Commissioner believes that the disclosure of this Report would help inform any debate about those accusations. Furthermore he believes that the disclosure of the Report would help reassure the public that the Trust had taken positive steps following these allegations. This, he believes, would be in the public interest.
103. The Commissioner has also considered the level of prejudice that disclosure may cause to the Trust's internal disciplinary processes. In considering this he has referred to the points listed at paragraphs 89 and 90 above.
104. The Commissioner believes that it is important to note that the terms of reference of the Audit Report were set by the Executive Team of the Trust. The Trust has not provided the Commissioner with any compelling arguments to support its position that such a disclosure would have a "chilling effect" on the openness of staff in cooperating with a report ordered by the Trust's Executive Team. Whilst the Commissioner is open to the idea that such a disclosure may discourage staff members, or members of the public, from coming forward on a voluntary basis in the future, he is not convinced that this would have the same effect on staff members who were called on to cooperate with an Audit Report that had been ordered by the Trust's Executive Team. In the Commissioner's opinion staff would have a duty to their employer to cooperate with any such internal inquiry
105. Finally, as the Commissioner believes that the Audit Report can be effectively redacted, in order to remove the names of the staff members who gave evidence for the Report, he believes that this would go some way to limiting any potential prejudice such disclosure would cause.
106. In conclusion the Commissioner has considered the competing public interest arguments, as set out above. He has considered all the public interest arguments the Trust has stated in favour of maintaining the exemption. However, he believes that in all the circumstances of the case, the public interest in disclosing the Audit Report is not outweighed by the public interest in maintaining the exemption (should his view that the exemption is not engaged, expressed and reasoned earlier in this Notice, be not accepted.)

## The Decision

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107. The Commissioner's decision is that in substantive aspects of this case the Trust has not dealt with the request for information in accordance with the Act in that it incorrectly withheld the requested information under section 31 and section 40. However he has upheld the Trust's decision to withhold the personal data of third parties, other than that of Professor Eastell, who are mentioned in the Report.
108. As the Trust partially failed to provide the information in question, the Commissioner finds that the Trust has acted in breach of section 1 of the Act.

109. As the refusal notice issued by the Trust did not specify the exemptions on which it subsequently sought to rely upon, the Commissioner has decided that the Trust failed to satisfy the requirements of section 17(1).

## **Steps Required**

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110. The Commissioner requires the Trust to take the following steps to ensure compliance with the Act:

The Commissioner requires that the Trust shall provide the complainant with an anonymised version of the Audit Report, as described below.

111. In order to anonymise the Audit Report the Commissioner requires that:
- (i) names and job descriptions of the staff members who are referred to in the Audit Report (other than Professor Eastell) be redacted from the information prior to its provision to the complainant.
  - (ii) these names to be replaced by anonymous references, e.g. A, B, C, etc..
112. The Trust must take the steps required by this Notice within 35 calendar days of the date of this Notice.

## **Failure to comply**

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

## Right of Appeal

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114. 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](mailto: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 27<sup>th</sup> day of September 2007**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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

## Legal Annex

### Section 17

- (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.
- (2)** Where –
- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim –
    - (i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
    - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
  - (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.
- (3)** A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming –
- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
  - (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- (4)** A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

- (5)** A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
- (6)** Subsection (5) does not apply where:

  - (a) the public authority is relying on a claim that section 14 applies,
  - (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
  - (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7)** 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 30**

- (1)** Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

  - (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-

    - (i) whether a person should be charged with an offence, or
    - (ii) whether a person charged with an offence is guilty of it,
  - (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or
  - (c) any criminal proceedings which the authority has power to conduct.
- (2)** Information held by a public authority is exempt information if-

  - (a) it was obtained or recorded by the authority for the purposes of its functions relating to-

    - (i) investigations falling within subsection (1)(a) or (b),
    - (ii) criminal proceedings which the authority has power to conduct,
    - (iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or



- (iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and
  - (b) it relates to the obtaining of information from confidential sources.
- (3)** The duty to confirm or deny 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) or (2).
- (4)** In relation to the institution or conduct of criminal proceedings or the power to conduct them, references in subsection (1)(b) or (c) and subsection (2)(a) to the public authority include references-
  - (a) to any officer of the authority,
  - (b) in the case of a government department other than a Northern Ireland department, to the Minister of the Crown in charge of the department, and
  - (c) in the case of a Northern Ireland department, to the Northern Ireland Minister in charge of the department.
- (5)** In this section-

"criminal proceedings" includes-

  - (a) proceedings before a court-martial constituted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 or a disciplinary court constituted under section 52G of the Act of 1957,
  - (b) proceedings on dealing summarily with a charge under the Army Act 1955 or the Air Force Act 1955 or on summary trial under the Naval Discipline Act 1957,
  - (c) proceedings before a court established by section 83ZA of the Army Act 1955, section 83ZA of the Air Force Act 1955 or section 52FF of the Naval Discipline Act 1957 (summary appeal courts),
  - (d) proceedings before the Courts-Martial Appeal Court, and
  - (e) proceedings before a Standing Civilian Court;

"offence" includes any offence under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957.
- (6)** In the application of this section to Scotland-
  - (a) in subsection (1)(b), for the words from "a decision" to the end there is substituted "a decision by the authority to make a report to the procurator fiscal for the purpose of enabling him to determine whether criminal proceedings should be instituted",
  - (b) in subsections (1)(c) and (2)(a)(ii) for "which the authority has power to conduct" there is substituted "which have been instituted in consequence of a report made by the authority to the procurator fiscal", and
  - (c) for any reference to a person being charged with an offence there is substituted a reference to the person being prosecuted for the offence.

## Section 31

- (1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-
- (a) the prevention or detection of crime,
  - (b) the apprehension or prosecution of offenders,
  - (c) the administration of justice,
  - (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
  - (e) the operation of the immigration controls,
  - (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
  - (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
  - (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
  - (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.
- (2) The purposes referred to in subsection (1)(g) to (i) are-
- (a) the purpose of ascertaining whether any person has failed to comply with the law,
  - (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
  - (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
  - (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
  - (e) the purpose of ascertaining the cause of an accident,
  - (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
  - (g) the purpose of protecting the property of charities from loss or misapplication,
  - (h) the purpose of recovering the property of charities,
  - (i) the purpose of securing the health, safety and welfare of persons at work, and
  - (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.

- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

#### **Section 40**

- (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 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.
- (4) 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).
- (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 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).

(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 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 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 41**

(1) 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.

(2) 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.

## Data Protection Act 1998 –

### Section 2

In this Act “sensitive personal data” means personal data consisting of information as to-

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,
- (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
- (e) his physical or mental health or condition,
- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence,
- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

### Schedule 2

Conditions relevant for purposes of the first principle: processing of any personal data

1. The data subject has given his consent to the processing.
2. The processing is necessary—
  - (a) for the performance of a contract to which the data subject is a party, or
  - (b) for the taking of steps at the request of the data subject with a view to entering into a contract.
3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
4. The processing is necessary in order to protect the vital interests of the data subject.
5. The processing is necessary—
  - (a) for the administration of justice,
  - (b) for the exercise of any functions conferred on any person by or under any enactment,
  - (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or
  - (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.
6. — (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.  
(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.