

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 13 June 2007

**Public Authority:** The Independent Regulator of NHS Foundation Trusts (Monitor)  
**Address:** 4 Matthew Parker Street  
London  
SW1H 9NL

### Summary

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The complainant requested copies of correspondence exchanged between Monitor and two other public authorities, namely Rotherham General Hospitals NHS Trust and the South Yorkshire Strategic Health Authority for the twelve months prior to February 2005. The complainant also asked for minutes of any meetings involving Monitor and the two other public authorities. During this period Monitor was considering Rotherham General Hospitals NHS Trust's application to become a foundation hospital trust. The public authority provided the complainant with several documents but redacted parts of a number of these documents on the basis of section 40 and 41. Having reviewed the redacted information the Commissioner is satisfied that section 41 has been applied correctly in regard to the majority of the withheld information. However, the Commissioner also decided that a small portion of the redacted information was not exempt by either section 40 or 41, but this information has now been communicated to the complainant.

### 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 Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

## The Request

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### The first request

2. The complainant originally made a request to Monitor on 15 February 2005. The complainant asked for:

*'copies of letters and emails sent by or on behalf of Bill Moyes to the chairman of Rotherham General Hospitals NHS Trust and/or the trust in the last 12 months and their responses.*

*I would also like to request copies of letters and emails sent by or on behalf of Bill Moyes to the chairman and/or the chief executive of South Yorkshire Strategic Health Authority over the same period and their responses.*

*I would also like to request copies of minutes or reports received or compiled by Monitor about the Rotherham trust not already published on the website over the same time period'.*

3. On 14 March 2005 Monitor provided the complainant with copies of 14 separate documents which were covered by the scope his request. Whilst Monitor did not withhold any complete documents from the complainant on the basis of the exemptions contained within the Act, it did redact parts of eight separate documents. Monitor explained to the complainant that it considered these parts of the documents to be exempt by virtue of the exemptions contained at section 40 (personal data) and 41 (information provided in confidence) of the Act.
4. The eight documents which contained redactions were:
- i. A letter dated 18 November 2004 from Beachcroft Wansbroughs [solicitors acting for the Trust] to Monitor.
  - ii. A letter dated 25 November 2004 from the Trust to Monitor.
  - iii. Meeting notes dated 18 October 2004 between Monitor and Allan Wittrick, Finance Director of South Yorkshire Strategic Health Authority (SYSHA).
  - iv. Meeting notes dated 18 October 2004 between Margaret Oldfield, Chair of the Trust and Monitor.
  - v. Meeting notes dated 18 October 2004 between John McIvor, Chief Executive of Rotherham PCT and Monitor.
  - vi. Meeting notes dated 26 October 2004 between Monitor and Mike Farrar, Chief Executive of SYSHA.

- vii. Meeting notes dated 2 November 2004 between Monitor and Paul Nesbit, Chief Executive of the Trust.
  - viii. A telephone note dated 8 November 2004 of a conversation between Stephen Hay of Monitor and Margaret Oldfield of the Trust which took place on 3 November 2004.
5. The complainant and Monitor exchanged correspondence over the following weeks in which the complainant questioned Monitor's decision to redact parts of the eight documents on the basis of sections 40 and 41. On 17 May 2005 Monitor informed the complainant that it had conducted an internal review into its decision to redact parts of the eight documents on the basis of sections 40 and 41 and had concluded that the exemptions had been applied correctly and that under the Act the complainant was not entitled to any further information.
  6. The complainant subsequently complained to the Commissioner in July 2005 about Monitor's decision to redact some information. The Commissioner contacted Monitor in August 2006 and asked it to provide unredacted copies of the eight documents listed above and any submissions Monitor wished to make in support of its decision to redact parts of the eight documents listed above on the basis of section 40 and 41.
  7. The fact that, at the time of the request, February 2005, Monitor was not a public authority falling within the scope of the Act became clear during the course of the Commissioner's correspondence with Monitor. In an email dated 15 September 2006 Monitor clarified to the Commissioner that Monitor was only added to Schedule 1 of the Act by Statutory Instrument 2005/3593 Freedom of Information (Additional Public Authorities) Order 2005 which was laid before Parliament on 16 January 2006 and which came into force on 7 February 2006. Monitor informed the Commissioner that it did not consider the complainant's request valid as it had been made before Monitor was covered by the Act.
  8. Consequently, the Commissioner informed the complainant on 23 September 2006 that it had concluded that his request, and by extension his subsequent complaint under section 50 to the Commissioner, was invalid because at the time of his request Monitor was not officially covered by the Act. The Commissioner informed the complainant that in order for him to be in a position to make a decision as to the applicability or otherwise of the exemptions to the redacted information, he would need to remake his request to Monitor and if necessary request an internal review of its decision.

### **The second request**

9. The complainant re-submitted his request to Monitor on 27 September 2006. Monitor provided the complainant with a response on 13 October 2006. In this response Monitor confirmed that whilst it was prepared to disclose the 14 documents provided in response to the original request, it had decided to still redact parts of the eight documents listed above. Monitor confirmed that it was relying on section 41 in relation to all of the redactions and as an alternative, or in

any event, and to the extent where necessary, it also considered the exemption contained at section 40 of the Act to apply to all of the redactions.

10. The complainant contacted Monitor on 16 October 2006 and asked it to complete an internal review into its decision to redact this information.
11. Monitor informed the complainant of the outcome of its internal review on 16 November 2006. It confirmed that it continued to rely on sections 40 and 41 to withhold the information with one exception. With regard to the interview with Margaret Oldfield dated on 18 October 2004 (document number iv) a section headed 'Issues' was generated by Monitor and therefore should be disclosed. This paragraph of information was subsequently provided to the complainant.

## The Investigation

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### Scope of the case

12. On 9 January 2007 the complainant contacted the Commissioner again to complain about the way his second request for information had been handled. The complainant provided the Commissioner with detailed arguments as to why he believed Monitor had incorrectly applied sections 40 and 41 to the redacted information.
13. With regard to section 41 the complainant argued that some of the redacted information was likely to have been generated by Monitor and therefore could not be covered by this exemption. The complainant suggested that he thought this was particularly true in respect of the redactions in document number 8. The complainant also questioned whether the information was actually imparted in circumstances which imposed an obligation of confidence; he argued this condition of section 41 was not met simply because Monitor considered these meetings to be "confidential". Furthermore, the complainant suggested that Monitor's claims that the meetings were confidential were undermined by their decision to release a number of meeting notes in response to his request.
14. Furthermore, the complainant informed the Commissioner that Monitor had provided him with a copy of its 'Guide to Applicants' which implied that meetings of this nature would be considered confidential. However, the complainant suggested that as this document was produced in November 2005, a year after the date of the redacted information, this could not be considered relevant to his request. The complainant argued that Monitor had failed to properly consider the public interest test which is inherent in section 41 despite it being an absolute exemption.
15. With regard to section 40, the complainant argued that Monitor's main objection is that none of the conditions under schedule 2 of the Data Protection Act 1998 ('the DPA') are met was incorrect. He suggested conditions five and six were both met. (These conditions are listed in the legal annex at the end of this decision notice). Furthermore, the complainant argued that disclosure of the redacted information

would not breach the first data protection principle as Monitor had suggested. The complainant stated that disclosure would not be unlawful because no breach of confidence has been proven by Monitor. With regard to fairness, the complainant argued that disclosure would only be unfair if the information related to an individual's private life and as the information in this case concerned individual's acting in a public role, disclosure could not be unfair.

## **Chronology**

16. The Commissioner contacted Monitor on 18 January 2007 and asked it to provide unredacted copies of the eight documents listed above. The Commissioner also invited Monitor to provide any further submissions in order to support its decision to redact parts of the documents numbered i to viii on the basis of section 40 and 41 of the Act.
17. On the 8 February 2007 Monitor provided the Commissioner with copies of unredacted copies of the eight documents.
18. The Commissioner wrote to Monitor on 21 March 2007 and suggested that having reviewed the redacted information, he had concluded that not all of the redacted information fell within the scope of section 41 because some of it had been generated by Monitor and therefore had not been provided to it by a third party. The redactions in question concerned two short sentences in document vi. The Commissioner also suggested to Monitor that he was unclear how these two sentences in document vi would be exempt by virtue of section 40.
19. Following further discussions between Monitor and the Commissioner, Monitor provided the complainant with the information contained within these two sentences in document vi. The Commissioner wishes to note that in providing the complainant with these two sentences Monitor also inadvertently provided the complainant with other information contained within document vi that it considered to be exempt by virtue of section 41. Having discussed this issue with Monitor the Commissioner established that this disclosure was made in error.

## **Findings of fact**

20. The Commissioner has established that the Monitor Board originally reviewed the Trust's application for foundation status in March 2004. A decision was taken to defer this application in order to allow the Trust more time to develop its application.
21. Throughout 2004 the Trust continued to develop its application with the aim of being granted foundation status by 1 April 2005. In February 2005 the Trust asked Monitor to continue considering its application but with the aim of being authorised on the 1 June 2005, rather than 1 April.
22. Monitor was granted the Trust foundation status with effect from 1 June 2005,

## Analysis

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23. Monitor argued that in relation to the decision to withhold the redacted information, it was relying in the first instance on section 41 and then, and to the extent where necessary, section 40. As the Commissioner has found that section 41 has been applied correctly to the redacted information (with the exception of the two sentences mentioned in paragraph 19) he did not consider the application of the section 40 exemption.
24. The one exception to this approach was in regard to Monitor's decision to withhold the mobile phone numbers of the Trust's Chair and Chief Executive contained within document number vii. The Commissioner considers that the most appropriate exemption which applies to this information to be section 40 and has outlined why he considers this information to be exempt by virtue of section 40 in paragraphs 50 to 60 below.
25. With regard to the information contained within document vi that Monitor disclosed to the complainant in error, the Commissioner does not believe that this inadvertent disclosure affects his decision regarding Monitor's application of section 41. The Commissioner's decision relates to Monitor's application of the exemptions at the time the second request, i.e. September 2006, and does not concern itself with matters after this date.

## Exemptions

### Section 41

26. Section 41 of the Act provides an exemption from the right to know if the information in question was provided to the public authority in confidence. There are 2 components to the exemption:
  - The information must have been obtained by the public authority from another person and
  - Disclosure of the information would give rise to an actionable breach of confidence. In other words, if the public authority disclosed the information the provider of the information could take the authority to court for breaching a duty of confidence.

### Was the redacted information obtained from a third party?

27. With the exception of the information referred to in paragraph 19 which has now been provided to the complainant, the Commissioner accepts the information Monitor redacted from the eight documents was obtained by Monitor from a third party.
28. With regard to the two letters (documents i and ii) which have been redacted, they were both sent to Monitor by third parties. With regard to the meeting minutes and telephone notes (documents iii to viii), although these documents contain



comments from both Monitor employees and employees of the Trust and SHA the Commissioner is satisfied that the only information that has been redacted is that of the opinions, views or information provided by non-Monitor employees. Therefore, the Commissioner is satisfied that the redacted information was generated by a third party and therefore falls within the scope of section 41.

**Was the information imparted in circumstances which created an obligation of confidence?**

29. However, a duty of confidence will only be owed if the information in question has the necessary "quality of confidence". The 3 key elements for this are:

- the information must have been imparted in circumstances which created an obligation of confidence,
- that the information must not be trivial, and
- that the information must not be readily available by other means.

30. With regard to the first criterion, Monitor highlighted a passage in its Guide to Applicants, a document provided to Trusts who were in the process of applying to Monitor for foundation status. The passage in question stated that:

*"For the application process to work effectively there must be a free exchange of information and views between Monitor and an applicant Trust. That free exchange is in the interests of both Monitor and the applicant Trust. It is also in the public interest. Monitor will respect the confidentiality of information supplied or acquired in the course of the application process, in so far that it is not inconsistent with Monitor's legal obligations under the Freedom of Information Act. In particular, Monitor would regard the minutes of meetings between Monitor and the applicant trust as confidential, and, if required by law to disclose such minutes, would do so only after confidential or personal information has been excised".*

31. However, as noted above in paragraph 14, the complainant highlighted the fact that the guidance referred to above is dated November 2005, a full year after the meetings which are the focus of this request took place. The Commissioner accepts this to be a reasonable argument and therefore acknowledges that Monitor cannot rely upon the covering statement quoted above to imply that the third parties concerned were *explicitly* imparting the information in confidence during the meetings in question.

32. Furthermore, the Commissioner does not accept that a confidentiality clause or agreement will, per se, mean that all information caught by the clause or agreement should be, or will be considered confidential. To accept such a tenet would essentially allow public authorities to contract out of the Act. If such a clause or agreement exists, then the Commissioner believes that it is necessary to look behind the clause or agreement to the nature of the information concerned, with a view to considering whether the information contained within each document or section is exempt by virtue of section 41.

33. However, in this case the Commissioner considers that it is reasonable to conclude that an implicit obligation of confidence is attached to the redacted information. The Commissioner understands that this information, whether contained in letters, or expressed in meetings or during telephone conversations, was divulged for the limited purposes of Monitor assessing the suitability of the Trust for foundation status. In the Commissioner's view it is reasonable to assume that the third parties involved had an expectation that any opinions and views which they expressed during the meetings would remain private, and moreover it was only because of this assurance and understanding that they would talk freely and candidly.
34. Furthermore, the Commissioner is aware that the third parties in question were consulted by Monitor when it received the complainant's request and they expressed serious concern that the meeting minutes would be disclosed under the Act and at the time of the meetings in question took place, it was their understanding that any comments they made during the meeting were made in confidence. Therefore, the Commissioner is satisfied that information was imparted in circumstances creating an obligation of confidence and the first criterion is met.

#### **Is the information of a trivial nature?**

35. The redacted information constitutes the opinions of the Trust chair and members of the SYSHA on the senior personnel at the Trust and possible reconfiguration matters following the potential granting of foundation status to the Trust. Therefore, the Commissioner accepts that the redacted information is focused on substantive issues and is not of a trivial nature.

#### **Is the information readily available by other means?**

36. At the time of the request, the Commissioner also accepts that the redacted information was not readily available by other means. Whilst it was public knowledge that the Trust was in discussion with Monitor about its application for foundation status, the precise nature of the issues that were being discussed, were not. On the basis of the above, the Commissioner is therefore satisfied that the information has the quality of confidence necessary for a duty of confidence to be owed.

#### **Would a disclosure of the information constitute an actionable breach of confidence?**

37. For the exemption at section 41 to apply, the disclosure of the information to a third party must constitute an *actionable* breach of confidence. With regard to whom would be able to take an action, the Commissioner is satisfied that the Trust would be able to take an actionable breach of confidence against Monitor if the redacted information was disclosed. Furthermore, the Commissioner also considers that the Trust's employees would also have an actionable claim for breach of confidence against both the Trust, as its employer, as well as Monitor.



38. However, the duty of confidence is not absolute. The courts have recognised three broad circumstances in which information may be disclosed in spite of a duty of confidence. These include where the disclosure is consented to by the confider, where disclosure is required by law, and where there is a public interest in disclosing the information which overrides any duty of confidence which may be owed. There are no issues surrounding the consent, law, or crime in this case. Therefore the only issue the Commissioner examined is whether the public interest in disclosing the information overrides any duty of confidence which is owed.
39. The public interest test inherent within section 41 differs from the public interest test contained in the qualified exemptions contained within the Act; the default position for the public interest test in the qualified exemptions is that the information should be disclosed unless the interest in withholding the information outweighs the interest in disclosing the information. With regard to the public interest test inherent within section 41, this position is reversed; the default position being that information should not be disclosed because of the duty of confidence unless the public interest in disclosure outweighs the interest in withholding the information.
40. 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 the duty of confidentiality. However, the Tribunal's view was that no exceptional case has to be made to override the duty of confidentiality that would otherwise exist. Rather, all that is required is a balancing of the public interest in putting the information in 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 disclosure of the information**

41. 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.
42. Furthermore, the Commissioner recognises that publication of the unredacted meeting minutes and letters would promote accountability and transparency by allowing the public to form a view as to how carefully and rigorously Monitor had considered the Trust's application before deciding to grant foundation status.
43. The complainant has specifically highlighted how the decision to grant the Trust foundation status was a key development for the hospital, its staff and the tens of thousands of people who rely on its services and therefore how the decisions were taken about its creation are of a major public interest. The complainant suggested that this was particularly true given, in his opinion, the fact that the Trust performed badly following the decision by Monitor to grant it foundation status. In support of this argument the complainant provided the Commissioner with a copy of an article which was published in the *Yorkshire Post* in March

2006.

(<http://www.yorkshiretoday.co.uk/template/ViewArticle.aspx?SectionID=55&ArticleID=1393467>). In summary, the article explained how the Trust was considering making further job losses in response to the fact it was facing a £5 million deficit. The complainant has argued that the poor performance of the Trust suggests that Monitor made a poor decision in granting the Trust foundation status when it did, and therefore there is a public interest in information being disclosed so that a more complete examination of facts surrounding Monitor's assessment can be made.

44. The complainant has also argued that how Monitor, which was a relatively new organisation at the time, performs its role as a regulator and decision maker is also of major public interest because of the significant influence Monitor has in the health sector nationally, and not just in relation to the decision taken in order to grant this particularly Trust foundation status.
45. The Commissioner does recognise that there is a public interest in the general public being able to scrutinise the decisions of Monitor to grant foundation status to NHS Trusts. Monitor can then be held accountable for the decisions it has taken, and any issues about the underperformance of Trusts after being granted foundation status can be scrutinised and questioned.

#### **Public interest arguments in favour of maintaining the duty of confidence**

46. However, the Commissioner believes that the public interest in transparency and accountability is already met by the information disclosed by Monitor regarding its procedures for assessing Trusts applications for foundation status. Monitor has made available on its website the document 'Applying for NHS Foundation Trust Status' which provides a detailed outline of how Trusts should prepare an application to Monitor, the factors that Monitor assess when considering an application and an explanation of how these factors are analysed by Monitor. Furthermore, once each Trust has been granted foundation status, the terms of its authorisation are also published on Monitor's website. From these documents the Commissioner believes that the public can gain a sound understanding of the factors considered by Monitor in assessing this Trust's application for foundation status.
47. Furthermore, having reviewed the information that was provided to the complainant in response to his request the Commissioner believes that these disclosures provide a detailed picture of the decision making process which led to the Trust being granted foundation status in June 2005. The Commissioner notes that the redacted information constitutes a relatively small part of the eight documents in question; in some documents redactions have simply been made to a single sentence or a single paragraph. Having reviewed the redacted information the Commissioner does not believe that this information would add greatly to the public's understanding of Monitor's decision to grant the Trust foundation status and therefore there is little public interest in the disclosure of the redactions.

48. The Commissioner notes that the complainant specifically argued that there was a compelling public interest argument in the redacted information being disclosed because of the poor financial performance of the Trust since it had been granted foundation status in July 2005. The complainant cited the Yorkshire Post article above in support of this argument.
49. Although the Commissioner acknowledges that this article was correct to suggest that the Trust was facing a £5m deficit, he notes that the article acknowledges that the NHS across the country is facing a difficult financial position, largely as a result of cost pressures associated with national initiatives such as Agenda for Change and Consultants Contracts. The article acknowledges that the Trust is facing a difficult position for the same reasons. Consequently, the Commissioner does not accept the argument that the Trust performed financially poorly following the granting of foundation status simply because of local factors attributable only to the Trust, and specifically because it was not ready to be granted foundation status. As the article suggests the Trust's performance is likely to be attributable to financial pressures which all NHS Trusts, both foundation and non-foundation faced.
50. The Commissioner believes that this conclusion is supported by evidence submitted by the Audit Commission to the House of Commons Select Committee for Health in June 2006. This Audit Commission's evidence suggested that there were a number of reasons why NHS bodies were in deficit:

*'We do not believe that there is a single cause of deficits. A number of NHS bodies have reported experiencing cost pressures arising from national initiatives such as the implementation of the new Agenda for Change pay system, the consultant contract, the new General Medical Services (GMS) contract and the need to meet performance targets for access and service provision...[the Audit Commission's report] also pointed to the challenges facing financial management in the NHS including through the introduction of patient choice, payment by results (on which the Commission has issued two separate reports), preparation for and implementation of foundation trust status, implementation of the National IT programme and implementation of new contracts of employment for consultants, GPs, dentists and, through Agenda for Change, for other NHS staff. The report particularly noted that accurate costing of the new contracts was likely to provide a significant challenge for NHS bodies which would also have to ensure that budgets and payroll systems were able to cope with the new requirements'.*

(Source:

<http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhealth/1204/1204we07.htm> )

51. Furthermore, the Commissioner has established that Monitor's website includes a section entitled 'NHS Foundation Trusts – Risk Rating'. This section explains that each Trust must submit an annual plan to Monitor and Monitor assesses this annual plan through in-year monitoring in order to generate a risk rating for each Trust with respect to three areas namely: finance, governance, and mandatory services. The risk ratings for each Trust are published on Monitor's website and updated quarterly. By reviewing recent risk ratings for this Trust, as well as the

earlier risk ratings which are published in Monitor's annual reports, the Commissioner has concluded that when this Trust's performance is considered in the context of the other foundation Trusts, it is reasonable to conclude that although the Trust may not have been the best performing it was clearly not the worst. In fact, it would appear to be an essentially average performer in terms of the three risk ratings mentioned above.

52. For the duty of confidence to be overridden in this case, the Commissioner considers that the performance of the Trust would have to have been so poor so that it could be concluded that the decision to grant it Trust status was so flawed that it would be in the public interest to disclose the redacted information. On the basis of the above, and all of the information available to the Commissioner, he does not consider this to be the case.
53. Having reviewed the redacted information the Commissioner believes the disclosure of this information could harm the working relationships of the senior personnel at the public authorities concerned. In the redacted information both the Trust chair and members of the SYSHA express honest and candid opinions about senior personnel at the Trust. As the numerous parties involved continue to work in the health sector, and are likely to have reason to work with, or come into contact with each other, the Commissioner believes that these working relationships could be harmed if the redacted information was disclosed. The Commissioner does not believe that it is in the public interest for the working relationships of the senior executives responsible for the delivery of NHS services in the South Yorkshire region to be jeopardised.
54. Furthermore, the Commissioner believes that disclosure of the redacted information may lead to a reluctance on the part of the third parties involved in future applications to Monitor to freely and candidly express their opinions on sensitive issues. The Commissioner recognises that any adverse effect on the ability of Monitor to be able to candidly discuss issues with executives of applicant Trusts, and other interested parties, could harm its ability to be in possession of the full facts relating to whether a Trust should be granted foundation status. The Commissioner believes that such a restriction on Monitor's ability to assess an application could compromise its position as a decision making body and that would clearly be against the public interest.
55. Having carefully considered the public interest arguments the Commissioner has concluded that, in this case, the public interest in disclosure does not outweigh the public interest in maintaining the duty of confidence. As noted above, he is satisfied that the disclosure of the information would constitute an actionable breach of confidence and therefore the exemption contained at section 41 has been correctly applied to the redacted information not provided by Monitor.

## **Section 40**

56. Section 40(2) provides an exemption for information which is the personal data of any third party, where disclosure would breach any of the data protection principles contained in the DPA. (The relevant sections of section 40 are included in the legal annex attached to this notice).

57. In order to rely on the exemption provided by section 40, the information being requested must therefore constitute personal data as defined by the DPA. The DPA defines personal information as:

*“...data which relate to a living individual who can be identified*

*a) from those data, or*

*b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller...”*

58. As outlined above the information which the Commissioner has identified as falling with category is the mobile phone numbers of two individuals, the Chair and Chief Executive of the Trust. The Commissioner is satisfied that this information constitutes personal data because using the information the individuals could be identified.
59. The first data protection principle requires that the processing of personal data should be fair and lawful and that personal data should not be processed unless at least one of the conditions in Schedule 2 of the DPA is met.
60. In deciding whether disclosure of this part of the redacted information would be unfair, the Commissioner has given regard to the reasonable expectations of the data subjects and what the effect of disclosure of the information would be on data subjects.
61. The Commissioner has established that the two individuals, the Chair of the Trust and the Chief Executive of the Trust, provided their mobile telephone numbers for the limited purpose of allowing representatives of Monitor to contact in order them to discuss issues relating to the Trust's application. The Commissioner accepts that the third parties would have had a reasonable expectation that that their mobile telephone numbers would not be disclosed following an information request submitted under the Act.
62. With regard to the effect of disclosing this information under the Act, given that these contact numbers are for the third parties' mobile phone numbers, the Commissioner believes that it would be unfair to disclose the numbers because it would, in effect, allow anybody to contact the third parties at any time of the day regardless of whether the third parties were at work or at home. Therefore, the Commissioner believes that disclosure of the mobile telephone numbers could lead to an unfair infringement into the private lives' of the third parties in question. In light of the above the Commissioner believes that to disclose the mobile telephone numbers would breach the fairness element of the first data protection principle and thus the exemption provided by section 40(2) of the Act is engaged. As the Commissioner has established that the disclosure of this information would be unfair and therefore breach the first principle, he has not gone on to consider whether, as the complainant has argued, conditions five and six of Schedule 2 of the DPA could be met. (See paragraph 15).

## The Decision

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63. 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:
- The Commissioner has concluded that Monitor was incorrect to rely on either section 40 or section 41 in order to withhold the two pieces of information contained in document vi and by failing to provide this information to the complainant Monitor breached section 1 of the Act. As noted in paragraph 19 this information has now been communicated to the complainant.
  - However, the Commissioner has concluded that Monitor was correct to rely on section 41 as the basis to withhold the redacted information in the documents numbered i to viii.
  - Furthermore, the Commissioner has also concluded that Monitor was also correct to rely on section 40 as the basis to withhold details of the mobile telephone numbers of the Trust and Chief Executive.

## Steps Required

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64. In light of the above, the Commissioner requires no steps to be taken.



## Right of Appeal

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65. 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 13<sup>th</sup> day of June 2007**

**Signed .....**

**Steve Wood**  
**Assistant Commissioner**

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

## Legal Annex

### Freedom of Information Act 2000

#### Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

#### Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

#### 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 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.”

### **The Data Protection Act 1998**

**Schedule 2** provides that –

“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 function of the Crown, a Minister of the Crown or a government department, or
- (d) For the exercise of any other function of a public nature exercised in the public interest by any persons.

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 on 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.”