

Freedom of Information Act 2000 (Section 50)

Decision Notice

15 December 2008

Public Authority: Department of Health
Address: Richmond House
79 Whitehall
London
SW1A 2NS

Summary

The complainant requested copies of any documentation held by the Department of Health (the "DoH") referring to the Director of Public Health at Norwich Primary Care Trust, and relating to Norfolk and Norwich Hospital, between specific dates. Although some information was disclosed, some was withheld under sections 36(2)(b)(i) and (ii), and 40. During the course of the investigation the DoH informed the Commissioner that it was also relying upon section 42 to withhold some of the information in question. After investigating the case the Commissioner decided that the withheld information was not exempt from disclosure under sections 36(2)(b)(i) and (ii). He also found that some of the information previously withheld under section 40(2) and 40(3)(a)(i) should be disclosed. However, he upheld the DoH's use of section 40(2) and 40(3)(a)(i) in relation to some of the withheld information, and also found that this provided an exemption for some of the information the DoH had previously withheld under section 36. He also upheld the DoH's use of section 42. Finally, the Commissioner also found that the DoH had not complied with the requirements of section 17(1)(b) and (c).

The Commissioner's Role

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

The Request

2. The complainant wrote to the DoH in a letter dated 31 July 2006 and requested the following information under the Act:

“I would be most grateful if you would forward to me all documentation you hold which refers to Dr Peter Brambleby, Director of Public Health at the Norwich Primary Care Trust and which relates to the Norfolk and Norwich Hospital. The relevant time period is between 30 March 2004 to date [i.e. 31 July 2006]. Such documentation should include all emails, letters, memoranda, reports, briefings to Ministers, file notes etc. In particular, I would be grateful if you could include a briefing to the relevant Minister prepared by the Strategic Health Authority and relating at least in part to Dr Brambleby and on or around 13 May 2004.”

3. In an undated letter the DoH acknowledged this request and informed the complainant that it was unable to respond within 20 working days as it was considering the public interest test in relation to section 36. It informed the complainant that it required another 20 working days to reach a decision, and intended to respond by 2 October 2006.
4. In a letter dated 26 September 2006 the DoH wrote to the complainant again, and informed him that it was unable to respond to his request, as it was still considering the public interest test in relation to section 36. It informed him that it would require an additional 20 working days, and would respond by 30 October 2006.
5. In an undated letter the DoH provided a full response. It disclosed some information, but withheld some information and stated,

“Some parts of the text have been redacted in order to comply with Section 40...which relates to information whose release might contravene the provisions of the Data Protection Act regarding the personal data of living individuals. Text so affected is marked accordingly in the redacted documents. Additionally some information has been redacted in order to comply with Section 36...Section 36 applies if the information released would, in the opinion of the Qualified Person...be reasonably likely to be prejudicial to conduct of public affairs...”

Section 36 is a qualified exemption, and we are required to consider the balance of the public interest in releasing or withholding this information, While there may be a public interest in seeing how decisions are made and the information may inform a debate of public interest, there is also concern that release of some of this information may inhibit the free and frank exchange of advice between officials and to Ministers. Additionally there may be a risk that information may not be recorded if its authors feel that it may be disclosed or that appropriate advice is not sought because it would be subject to release. In this instance, the public interest in withholding this information has been held to outweigh the public interest in releasing it. Text so affected is marked accordingly in the redacted documents.”

It informed the complainant of his right to seek an internal review and his right to complain to the Commissioner.

6. The complainant wrote to the DoH on 18 December 2006 and requested an internal review of this decision.
7. The DoH carried out an internal review and responded in a letter dated 21 February 2007. The DoH stated that it upheld its use of sections 36 and 40. The DoH informed the complainant of his right to complain to the Commissioner.
8. The complainant acknowledged the DoH's response in a letter dated 29 May 2007. He stated that Dr Brambleby (the focus of this request) had given his consent for the DoH to disclose information about him to the complainant. The complainant again asked for the DoH to carry out an internal review of its decision.
9. The DoH responded in a letter dated 2 August 2007. It acknowledged the complainant's request for an internal review, but pointed out that it had already carried one out. It advised the complainant that if he remained dissatisfied he could complain to the Commissioner.

Background

10. Norfolk and Norwich University Hospital NHS Trust initiated an inquiry into the negative pressure facilities at the Norfolk and Norwich University Hospital in April 2004. This inquiry followed allegations by Dr Brambleby concerning the provision of negative pressure facilities at the Hospital, which raised questions in relation to the safety of patients, staff and visitors. The inquiry involved the National Audit Office and the DoH.¹

The Investigation

Scope of the case

11. The complainant contacted the Commissioner on 21 August 2007 to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the DoH's refusal to disclose all of the requested information was correct.
12. Although not raised by the complainant the Commissioner has also considered whether the DoH acted in compliance with section 17 of the Act.

Chronology

13. The Commissioner wrote to the complainant on 21 November 2007 and asked him to confirm whether he was acting on behalf of Dr Brambleby, or on behalf of

¹ http://www.nscsha.nhs.uk/resources/pdf/board/meetings/2004/01oct/papers/ag10_clingov_011004.pdf. See also a press release from the Norfolk and Norwich University Hospital NHS Trust in June 2004 which states that, "An inquiry into concerns about hospital negative pressure rooms raised by the Director of Public Health for Norwich Primary Care Trust has confirmed no patients, staff or visitors have been exposed to excess risk." <http://www.nnuh.nhs.uk/News.asp?ID=51>

- himself. He also asked the complainant to provide him with further documentation relating to his complaint.
14. The complainant responded on 3 January 2008 and provided further documentation about this complaint. Included in this information was a letter from Dr Brambleby stating that he had consented for the DoH to provide the complainant with copies of any information which contained his personal data. However, the complainant did not inform the Commissioner whether he was acting on behalf of himself or Dr Brambleby.
 15. Therefore the Commissioner wrote to the complainant again on 8 January 2008. He informed him that it was still not clear whether he was acting on behalf of Dr Brambleby or himself. He informed the complainant that it was fundamental that this was established before the complaint could be taken forward as, if he was acting on behalf of Dr Brambleby it was highly likely that at least some of the information which he had requested would fall under the definition of Dr Brambleby's personal data, and would potentially be disclosable under section 7 of the Data Protection Act 1998. The Commissioner noted that Dr Brambleby had consented for the DoH to disclose information to the complainant, but pointed out that disclosure under the Act was a disclosure to the public at large. If the complainant was acting on behalf of himself the Commissioner would have to consider whether this information should be disclosed to the public at large, not just to the complainant. Therefore he asked the complainant to clarify whether he was making this request on behalf of Dr Brambleby or himself.
 16. Having received no response from the complainant, the Commissioner wrote to him again on 31 January 2008. He reiterated the points he had made in his previous letter.
 17. The complainant wrote to the Commissioner on 22 February 2008 and confirmed that he had made the request on behalf of himself.
 18. The Commissioner acknowledged this in a letter to the complainant dated 27 February 2008, and confirmed that he would be investigating this case under the Act.
 19. The Commissioner wrote to the DoH on 27 February 2008 and asked it to provide him with a copy of the withheld information, together with its reasoning behind the application of the exemptions it had cited. He also asked that it clarify which information had been withheld under which exemption. He asked for a response within twenty working days.
 20. On 20 March 2008 the DoH contacted the Commissioner by way of a telephone call and asked for a week extension to this deadline. It was agreed that it would respond by 4 April 2008.
 21. The DoH contacted the Commissioner again on 7 April 2008, and asked for a further extension to this deadline. It was agreed that it would ring the Commissioner again on 10 April 2008 with an update as to its progress in providing a substantive response.

22. Having received no update, the Commissioner rang the DoH on 11 April 2008. He was told that the relevant officer was not available, and he asked that he be called back.
23. The DoH contacted the Commissioner on 14 April 2008. It informed him that it was still not in a position to provide him with a substantive response, and asked for a further extension to the deadline. It was agreed that it would respond by 18 April 2008.
24. The DoH wrote to the Commissioner on 17 April 2008 and provided a copy of the withheld information, together with a table of documents which it stated had been provided to the qualified person in order to consider the application of section 36.
25. In relation to its use of section 36 the DoH confirmed that it was relying upon section 36(2)(b)(i) and (ii). It provided arguments in support of its use of this exemption, and how it had carried out the public interest test. It also confirmed that it was relying upon section 40(3)(a)(i) to withhold some of the requested information. In support of its use of this exemption it stated that, "Whilst we accept that there are circumstances in which there is a legitimate interest in knowing the names of officials...we do not accept that this generally applies to officials below the Senior Civil Service (SCS) level." It went on to provide arguments as to why it believed that the disclosure of the names of individuals below the SCS level would be unfair.
26. After considering this response the Commissioner emailed the DoH on 22 May 2008 and asked further questions. In relation to the bundle of withheld information he queried whether he had been provided with copies of all the information that had been withheld. He referred to the table of documents (discussed at paragraph 24), and pointed out that some of the documents referred to in this table were not in the bundle of withheld information provided to him. He also drew its attention to a specific document referred to in the initial request ("a briefing to the relevant Minister prepared by the Strategic Health Authority...on or around 13 May 2004") which it had confirmed to Dr Brambleby that it held (whilst handling the complainant's request) and pointed out that this was not included in the bundle of information provided to him. He asked the DoH to confirm whether it had provided him with a copy of all the withheld information.
27. The Commissioner also noted that some of the information which had been withheld under section 36 was not listed in the table of documents referred at paragraph 24 above. The Commissioner asked the DoH to confirm whether these documents had been provided to the qualified person for consideration as to the application of section 36(2)(b)(i) and (ii). He also identified one of the redacted documents and asked the DoH to clarify which exemption(s) it had been redacted under.
28. In relation to some of the information withheld under section 36(2)(b)(i) and (ii) he noted that much of the withheld information appeared to be internal communications between NHS Trusts and the local Strategic Health Authority, which the DoH had been copied into. He asked for further submissions as to how

- the release of this information would, or would be likely to, inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation.
29. Finally, in relation to section 40 he pointed out that some of the information withheld under this exemption related to individuals holding reasonably senior posts, and/or individuals who worked for the NHS rather than the DoH. Given the references in the DoH's section 40 arguments to ranks of staff (see paragraph 25 above) he asked it to provide further arguments in regard to the withholding of this information. Finally, he also asked the DoH to confirm whether Dr Brambleby had consented to the disclosure of his personal data to the public at large under the Act. The Commissioner asked for a response by no later than 10 June 2008.
 30. The DoH contacted the Commissioner by way of a telephone call on 10 June 2008 and asked for an extension to the deadline. A new deadline of 24 June 2008 was agreed.
 31. The DoH contacted the Commissioner by way of a telephone call on 24 June 2008. It informed him that it was unable to provide a substantive response at that stage, and asked for a further extension to the deadline. It was agreed that it would respond by no later than 1 July 2008. It informed the Commissioner that it was reconsidering its use of section 40 in relation to some of the previously withheld information, and would be providing the complainant with further information relating to this request.
 32. The DoH contacted the Commissioner again on 1 July 2008 and asked for a further extension to the deadline to respond. It was agreed that it would respond by 4 July 2008.
 33. The DoH provided a response in a letter dated 4 July 2008 and provided copies of the withheld information not previously provided to the Commissioner. This included the specific document referred to by the Commissioner, and the documents listed in the table provided to the qualified person (see paragraphs 26 – 27). In regard to the information withheld under section 36 which was not referred to in the table of documents it confirmed that this was being withheld under section 36(2)(b)(i) and (ii). It stated that the table of documents was a descriptive list, "of a representative sample of the documents considered to be exempt from disclosure under section 36(2)(b)(i) and (ii). Sufficient detail on the nature of these documents was given to enable the Minister to reasonably evaluate the potential prejudice in release and assess the relative public interest arguments for and against releasing the documents." In relation to the individual document identified by the Commissioner (referred to in paragraph 27) it confirmed that these redactions had been made under section 40(3)(a)(i). The DoH also provided further submissions in response to the Commissioner's questions about the application of section 36(2)(b)(i) and (ii).
 34. In relation to the Commissioner's comments about its use of section 40 it noted that,

“You correctly identify redactions of the personal data of senior Departmental and NHS officials. I apologise for this overzealousness, which we have now corrected...We continue to withhold the names of junior staff and officials for the reasons given previously.”

The DoH stated that after reconsidering the application of section 40 to some of the information in question it would now make a further disclosure to the complainant. It provided the Commissioner with a new copy of the withheld information, with the further intended disclosures marked. Finally it confirmed that Dr Brambleby had only consented to the disclosure of his personal data to the complainant.

35. The Commissioner contacted the DoH by email on 15 July 2008. He asked the DoH to confirm whether it had disclosed the further information to the complainant. Further to this he noted that one of the pieces of withheld information had the phrase '*legal advice*' written on it. He asked whether the DoH was seeking to apply section 42 of the Act to this information. He also asked for clarification as to the status of one of the documents which had been redacted. He asked for a response by no later than 30 July 2008.
36. The DoH contacted the Commissioner on 24 July 2008 and confirmed that it had disclosed the further information to the complainant.
37. In a letter dated 30 July 2008 the DoH provided a further response to the Commissioner. It confirmed that it was citing section 42 to the information identified by the Commissioner – although it did not provide any arguments to support its use of this exemption, nor any arguments regarding any public interest test it had carried out. It also provided clarification as to the status of the redacted documents in response to the Commissioner's query.

Analysis

Procedural matters

Section 17

38. The Commissioner has considered whether the DoH has complied with its obligations under section 17(1) of the Act.
39. Section 17(1) requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal 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.
40. In its initial refusal notice and in the internal review the DoH informed the complainant that it was relying upon 'section 36' and 'section 40' to withhold

information. However, it did not refer to the specific sub-section number of the exemptions claimed. For this reason the Commissioner believes that the DoH did not comply with the requirements of section 17(1)(b) of the Act.

Additionally, the DoH did not cite section 40 until the 3rd letter to the complainant (referred to in paragraph 5 above), which was sent sometime after 26 September 2006 (the date of the 2nd letter). Therefore, the DoH did not issue a refusal notice in respect of section 40(2) and 40(3)(a)(i) within twenty working days. This is in breach of section 17(1) of the Act.

41. Further to this, during the course of the investigation the DoH informed the Commissioner that it believed that some of the withheld information was exempt from disclosure under section 42. This had not been previously referred to by the DoH when it issued a refusal notice to the complainant. Therefore the Commissioner believes that the DoH has not complied with section 17(1)(b) and (c).
42. The full text of section 17 can be found in the Legal Annex at the end of this Notice.

Section 36(2)(b)(i) and (ii)

43. The DoH informed the complainant that it was citing section 36 as it believed that disclosure would be reasonably likely to prejudice the effective conduct of public affairs. The Commissioner believes that this was a reference to section 36(2)(c) of the Act. However, in its letter to the Commissioner of 17 April 2008 the DoH clarified that it was not relying upon section 36(2)(c), and instead argued that some of the requested information was exempt under section 36(2)(b)(i) and (ii).
44. Section 36(2)(b) states that information is exempt from disclosure if in the reasonable opinion of the qualified person disclosure of the information would, or would be likely to, inhibit,
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation.

This exemption is qualified and is therefore subject to a public interest test.

45. The full text of section 36 can be found in the Legal Annex at the end of this Notice.
46. When investigating cases involving the application of section 36, in order to establish whether the exemption has been correctly applied the Commissioner has to:
 - ascertain who is the qualified person or persons for the public authority in question;
 - establish that an opinion was given;
 - ascertain when the opinion was given; and

- consider whether the opinion given is reasonable.
47. With regard to the fourth bullet point, in deciding whether the opinion was 'reasonable' the Commissioner has been guided by the Tribunal's decision in *Guardian Newspapers & Brooke V ICO & BBC* in which the Tribunal considered the sense in which the qualified person's opinion is required to be reasonable. It concluded that, "in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at." In relation to the issue of reasonable substance, the Tribunal indicated that, "the opinion must be objectively reasonable."²
48. The Commissioner has also been guided by this Tribunal's findings where it indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus, "does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant". Therefore, in the Commissioner's opinion this means that when assessing the reasonableness of an opinion the Commissioner is restricted to focussing on the likelihood of that inhibition or harm occurring, rather than making an assessment as the severity, extent and frequency of prejudice or inhibition of any disclosure.

Engagement of the exemption

49. Section 36(5)(a) states that in relation to information held by a government department in charge of a Minister of the Crown, the qualified person includes any Minister of the Crown. In this case the Commissioner has established that the reasonable opinion was given by a Minister of the Department of Health, and he is therefore satisfied that the Minister was a qualified person for the purposes of section 36.
50. In its submissions to support its use of section 36, the DoH has explained that the Minister's opinion was sought on 30 August 2006 and 25 October 2006, and her opinion was given on 1 September 2006 and 27 October 2006 respectively.
51. The DoH has confirmed that, "the test applied by the qualified person was that the disclosure of the requested information would, or would be likely to inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation."
52. The DoH has also confirmed that, "the Minister was shown evidence of relevant file notes and copies of relevant e-mails...her opinion to withhold such information was based on having seen this information." In its letter of 17 April 2008 the DoH provided the Commissioner with a table of documents which it said formed the basis of the submission to the Minister on 27 October 2006, "for approval to withhold a series of documents". In its letter of 4 July 2008 it clarified this statement, stating that the Minister,

² EA/2006/0011 & EA/2006/0013, para's 60 and 64.

“...was presented with a descriptive list...of a representative sample of the documents considered to be exempt from disclosure under section 36(2)(b)(i) and (ii). Sufficient detail on the nature of these documents was given to enable the Minister to reasonably evaluate the potential prejudice in release and assess the relative public interest arguments for and against releasing the documents. It is not normal practice to present the Minister with dossiers of documents that officials consider protected from disclosure by section 36. Rather, clear arguments for and against release are presented (with the appropriate public interest test assessed), and illustrative selections of documents are appended to inform decision-making.”

53. The DoH also provided the Commissioner with a summary of the factors the Minister took into account in reaching her opinion on the application of section 36(2)(b)(i) and (ii). These were:

- Original concerns around probity relating to a Private Finance Initiative to construct effective negative pressure facilities at the Norfolk & Norwich NHS Trust were brought to the attention of the Comptroller and Auditor General by the local Primary Care Trust's Director of Public Health, Dr Brambleby.
- The Strategic Health Authority responded appropriately, taking immediate action and composing an expert group to assess the clinical risks, whilst calling for the Trust concerned to undertake a full inquiry.
- The Trust undertook an inquiry and the Panel reported on 7 September 2004. The Trust set out its response to the inquiry on the following day, accepting all of the recommendations and publishing an internal action plan to address them.
- NHS Counter Fraud and Security Management Services were made aware of the accusations of possible fraud – but concluded that there was no evidence of fraud and/or corruption.

54. The DoH went on to provide the Commissioner with an explanation as to why it considered the information to be exempt on the basis of section 36(2)(b)(i) and (ii), stating that,

“...the Minister was presented with an analysis of the public interest test in this case. Whilst recognising the public interest in releasing information relating to an issue of public importance and thereby informing and promoting public debate on that issue, the [DoH] considered that the public interest would not be served by disclosure. The arguments presented were that disclosure would be likely to deter officials from making rigorous assessments of the risks of a particular situation; inhibit officials' readiness to provide candid advice to other officials and Ministers; discourage officials from keeping thorough records of the decision making process; and deter experts from providing advice or engaging in debate because of the possibility that their participation would be subsequently disclosed. In summary, therefore, the [DoH] considered that disclosure would be likely to inhibit both the provision of advice and the exchange of views for the purposes of deliberation.”

55. The Commissioner notes that the bullet points at paragraph 53, which outline the factors which the Minister took into account, do not specifically relate to the issue of the potential inhibition of the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation. Instead, these points are factual statements about the circumstances surrounding this request, which would in themselves feed into the public interest factors quoted in paragraph 54. However, the Commissioner notes that some of these public interest factors do in themselves relate to the potential inhibition of the factors listed in section 36(2)(b)(i) and (ii).
56. Given the events providing the background to this request – where concerns regarding a potential threat to public health, which also raised questions regarding probity, relating to a Private Finance Initiative hospital, were publicly raised by the local Primary Care Trust's Director of Public Health – the Commissioner believes that it is reasonable to assume that relevant NHS bodies (e.g. the local Strategic Health Authority) would confer with the DoH regarding what actions to take, and reporting on whether any of the allegations were substantiated. The Commissioner believes that it is reasonable to conclude that the disclosure of the withheld information on this case would reveal examples of free and frank discussions and exchanges of views explaining the background issues to this case, and what options were open to the DoH and the NHS at the time of these events. Furthermore, the Commissioner believes that it would be reasonable to conclude that disclosure could lead to NHS employees and DoH officials being unwilling to discuss such matters in a free and frank nature in the future when dealing with similar situations because they would be concerned that such discussions may be placed in the public domain.
57. On this basis the Commissioner is of the view that in this case the Minister's opinion appears to be reasonable in substance and reasonably arrived at. Therefore he is satisfied that section 36(2)(b)(i) and (ii) is engaged.
58. Before moving on to consider the public interest test, the Commissioner also notes that none of the DoH's submissions clearly identify whether it considers the likelihood of the inhibition occurring as one that 'would be likely to' occur, or whether the likelihood meets the higher test of 'would occur'. On this matter the Commissioner has noted the comments of the Tribunal in *McIntyre V ICO & the Ministry of Defence*, in which the Tribunal explained,

"We consider that where the qualified person does not designate the level of prejudice, that Parliament still intended that the reasonableness of the opinion should be assessed by the Commissioner but in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level."³

³ EA/2007/0068, para 45.

59. The Commissioner has therefore proceeded on the basis that the DoH's position is that should the information be disclosed the likelihood of inhibition is one that is simply likely to occur, rather than one which would occur.
60. The Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

Considering the public interest test

61. In considering the public interest test in this case the Commissioner is mindful of the Tribunal's views in *Guardian Newspapers & Brooke V ICO & BBC*. In that case the Tribunal considered and refined an earlier judgement where they provided some principles about the application of the public interest test in section 36 cases. The Tribunal provided the following factors for consideration:
 - a) The lower the likelihood is shown to be that the free and frank exchange of views would be inhibited, the lower the chance that the balance of the public interest will favour maintaining the exemption.
 - b) Since the public interest in maintaining the exemption must be assessed in all the circumstance of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought. The authority may have a general policy that the public interest is likely to be in favour of maintaining the exemption in respect of a specific type of information, but any such policy must be flexibly applied, with genuine consideration being given to the circumstances of the particular request.
 - c) The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a general rule, the public interest in maintaining the exemption will diminish over time.
 - d) In considering factors that militate against disclosure, the focus should be on the particular interest that the exemption is designed to protect, in this case the effective conduct of public affairs through the free and frank provision of advice and the free and frank exchange of views by public officials for the purposes of deliberation.
 - e) While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process.
62. In the same case the Tribunal went on to discuss the distinction between consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the Act:

“The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s 36(2)(a) or (c). But when it comes to weighing the balance of public interest under s 2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice.”⁴

63. Therefore in the Commissioner’s opinion, whilst due weight should be given to reasonable opinion of the qualified person when assessing the public interest, he can and should consider the severity, extent and frequency of inhibition to the free and frank provision of advice and/or the free and frank exchange of views for the purposes of deliberation.⁵

Public interest arguments against disclosing the information in relation to section 36(2)(b)(i) and (ii)

64. The DoH has argued that it considers that the public interest in maintaining the exemption outweighs the public interest in disclosure, as disclosure would be likely to deter officials from making rigorous assessments of the risks of a particular situation, inhibit officials’ readiness to provide candid advice to other officials and Ministers, discourage officials from keeping thorough records of the decision making process, and deter experts from providing advice or engaging in debate, because of the possibility that their participation would be subsequently disclosed.
65. Further to this, in its letter to the Commissioner dated 4 July 2008, the DoH argued that,

“...we believe that disclosure of this information could inhibit NHS officials’ willingness to include the DoH in similar deliberations in the future. We believe that this would be to the detriment of free and frank provision of advice and exchange of views between the DoH and NHS bodies which could hamper the ability of both to make candid assessments of difficult situations and act appropriately.

In the specific context of this case, we are convinced that it was correct to involve the DoH...in the investigation of and action upon allegations of mismanagement of a major PFI and allegations of potential infrastructure problems that could have placed public health at risk. The DoH has a clear and proper interest in such allegations and investigations, disclosure of the details of which we are convinced would prejudice the proper consultative relationship DH – NHS and could furthermore prejudice the provision of advice and exchange of views on this and similar topics within the DoH.”

⁴ EA/2006/0011 and 0013, para 88.

⁵ EA/2006/0011 and 0013, para 91.

66. The Commissioner accepts that there is a public interest in the free and frank provision of advice and the exchange of views for the purposes of deliberation. In this instance NHS employees and DoH officials were seeking to deal appropriately with serious allegations which, if proven, would potentially endanger public health, as well as bringing up questions of probity and possible corruption. These allegations had been made by a well placed employee of an NHS Trust, who had put these allegations into the public domain. The Commissioner accepts that in circumstances such as this there is a need for free and frank discussions, exploring all available options, in order to allow NHS bodies / the DoH to be able to make an informed choice and act appropriately. The Commissioner believes that it is in the public interest to avoid the inhibition of frankness and candour of officials providing advice and exchanging views in such circumstances.
67. However, the Commissioner notes that the DoH have not made any specific arguments in relation to any of the specific pieces of information withheld under this exemption. After reading through the DoH's arguments, he has reservations that they suggest a blanket approach to the application of the exemption, i.e. that all information of this type should be withheld. Whilst the Commissioner acknowledges that the DoH has released some information to the complainant, he has not been provided with any specific arguments as to why disclosure of the specific pieces of information withheld under section 36(2)(b)(i) and (ii) (either in redacted documents or in some cases entire documents) would be likely to have the inhibitory affect described in this exemption.
68. As stated above, in considering the application of this exemption the Commissioner has been guided by the views of the Tribunal as stated in *DfES V ICO & The Evening Standard* (see paragraph 62 above), and specifically its statement that in cases where the public authority has cited section 36, "when it comes to weighing the balance of public interest...it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice."
69. In forming a view on the likelihood, and potential severity, of inhibition the Commissioner has noted the DoH's arguments. However he has also noted that a lot of the details of the background events surrounding this request were put in the public domain – for example details of the inquiry into the allegations were put into the public domain, including the Inquiry Panel's Terms of Reference and its findings, as well as the Trust's response to these findings. The Commissioner believes that given the potentially serious nature of the allegations, NHS employees and DoH officials would naturally wish to confer in a free and frank manner in order to explore all available options as to how to deal with these allegations. However, he also believes that the public would expect that NHS employees and DoH officials would explore all available options, and confer in a free and frank manner, in order to act appropriately in relation to these allegations. The Commissioner again notes the generic nature of the DoH's arguments (as discussed in paragraph 67 above) and the fact that it has not detailed how any specific pieces of the withheld information would inhibit NHS employees and DoH officials in the future. Given these factors the Commissioner is not persuaded that the disclosure of the withheld information would naturally, "...inhibit NHS officials' willingness to include the DoH in similar deliberations in

the future.” He believes that these individuals were carrying out their roles, and exploring in full the options available to the NHS/DoH following these potentially serious allegations. He would also point out that the NHS bodies which were consulting with the DoH are themselves subject to the Act, and could receive requests for the same correspondence (including any responses they had received from the DoH). It is not the involvement of the NHS bodies with the DoH which creates the chance of this information being disclosed to the public. In view of the lack of any specific arguments about how the disclosure of the withheld information would be likely to cause the severe inhibition argued by the DoH, the Commissioner is not persuaded that such severe inhibition would be likely to occur. In reaching this view the Commissioner has also noted the age of this information – Dr Brambleby’s allegations and the Inquiry occurred in 2004 – and the fact that by the time of the request the inquiry into the allegations had been completed.

70. The DoH has also argued that the disclosure of the withheld information would discourage officials from keeping thorough records of the decision making process, and this would not be in the public interest. As noted above, it has not referred to any specific parts of the withheld information, nor detailed whether any specific part has any specific sensitivity.
71. In considering this argument the Commissioner has been mindful of the Tribunal’s views on a similar argument presented by a public authority in *Guardian Newspapers & Brooke v ICO & BBC* (which concerned a request for minutes of a BBC Board of Governor’s meeting). In that case it was argued that keeping proper minutes was, “part of the process of carrying out proper deliberations,” and that disclosure in a particular case might discourage proper minute keeping in future. The Tribunal did not accept this argument, and stated that, “For purposes of effective administration a responsible public authority ought to keep suitable minutes of important meetings, whether or not the minutes may be disclosed to the public at a later date.” Although the Commissioner accepts that this case does not focus on the minutes of a meeting, he believes that the Tribunal’s comments are also attributable to internal communications between NHS employees and DoH officials in circumstances such as those which provide the background to this case.⁶
72. In reaching a view on this argument the Commissioner has also noted the Tribunal’s conclusions in *DfES v ICO & The Evening Standard*. In that case the Tribunal noted that, “We do not consider that we should be deflected from ordering disclosure by the possibility that minutes will become still less informative [...] Good practice should prevail over any traditional sensitivity as we move into an era of greater transparency.”⁷
73. After considering the Tribunal’s comments the Commissioner is not persuaded by the DoH’s arguments that the disclosure of the information withheld under section 36(2)(b)(i) and (ii) would lead to poor record keeping.

⁶ EA/2006/0011 and 0013, para 107.

⁷ EA/2006/0006, para 83.

Public interest in favour of disclosing the information in relation to section 36(2)(b)(i) and (ii)

74. In its correspondence with the complainant the DoH acknowledged that there is a public interest in seeing how decisions are made, and that the requested information may help inform a debate of public interest. In its correspondence with the Commissioner it has also acknowledged that there is a public interest in releasing information relating to an issue of public importance, thereby informing and promoting public debate on that issue.
75. In considering the public interest factors in favour of disclosure, the Commissioner recognises that there is a public interest in openness and accountability. that there is a strong public interest in the disclosure of information which would further the public's understanding and participation in debates on issues of public importance – especially, as in this case, where matters raise questions regarding public health and safety. In this case, allegations had been made by the Director of Public Health of an NHS Primary Care Trust, which raised questions regarding the health and safety of the public, patients and staff at a hospital.
76. The Commissioner also believes that there is a public interest in the public gaining a better understanding of the actions taken by NHS employees and DoH officials in regard to these allegations, and in informing the public as to whether these actions were appropriate and effective. The Commissioner believes that this would also contribute towards public confidence in NHS employees and DoH officials carrying out their roles in an appropriate manner when dealing with matters such as this. In the Commissioner's opinion the withheld information would contribute to this.
77. The Commissioner also believes that there is a public interest in public authorities, such as the DoH and NHS bodies, responding appropriately to whistleblowers, and in the public having confidence that they will do so.

Balance of public interest arguments

78. After considering the public interest arguments in this case, noting the generic nature of the arguments advanced by the DoH, and noting the timing of the request (2 years after the events in question took place), the Commissioner has determined that although section 36(2)(b)(i) and (ii) is engaged, the public interest in maintaining the exemption does not outweigh the public interest in disclosing the withheld information.

Section 40

79. Section 40(2) provides 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.

80. 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 principles of the Data Protection Act 1998 (the "DPA").

81. In its letter to the Commissioner dated 17 April 2008 the DoH confirmed that it was relying upon section 40(3)(a)(i) to withhold some of the information. In support of its use of this exemption it stated that,

"Whilst we accept that there are circumstances in which there is a legitimate interest in knowing the names of officials...we do not accept that this generally applies to officials below the Senior Civil Service (SCS) level. The nature of the work conducted by Civil Servants below SCS grade is such that they are not responsible for projects and policies of sufficiently high profile as to merit a public interest in knowing their identities. Accountability for such projects and policies is properly at SCS grades, and there are mechanisms in place for holding such individuals to account. We do not believe that releasing names would add any value to the legitimate interest in knowing that there is named accountability for the actions of Civil Servants.

Even if it were found that there is a legitimate interest in ensuring named accountability at this level, we would contend that release constitutes processing that is 'unwarranted...by reason of prejudice to the rights and freedoms or legitimate interests of the data subject'. First, we believe that there is a reasonable expectation of anonymity that extends to all Civil Servants below SCS level. As part of the constitutional necessity of an independent and politically neutral Civil Service, such employees are entitled neither to defend publicly their actions, nor to comment on the policies that they are obliged to implement. To release their names into the public domain and therefore expose them to potential criticism that they are in no position to counter without breaching the terms of their employment would be unfair. It is for this reason that they have a reasonable expectation of their identities being protected."

82. After the Commissioner had written to the DoH stating that some of the withheld information related to senior DoH officials and NHS employees (see paragraph 29), the DoH wrote to him again on 4 July 2008, apologised for its 'overzealous' approach, and informed him that after reconsidering its use of this exemption it had disclosed some of the names previously withheld. It confirmed that the only information it was now seeking to withhold under this exemption was the 'names of junior staff and officials for the reasons given previously' (see paragraph 34).

83. Although the DoH did not state in any of its correspondence to the complainant or to the Commissioner which data protection principle it believed would be breached by the disclosure of these names, the Commissioner notes its reference to disclosure being 'unfair'. On this basis he has proceeded on the basis that the DoH believes that disclosure of this information would be in breach of the first principle of the DPA.

84. In order to reach a view on the DoH's arguments the Commissioner has first considered whether the withheld information is the personal data of third parties.
85. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:
 - from that data, or
 - from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
86. In this instance the information withheld under this exemption is the names and some contact details of DoH officials and NHS employees. The Commissioner believes that the individuals concerned are identifiable from this information, and therefore he is satisfied that it is the personal data of the individuals concerned.
87. The DoH has argued that this information relates to DoH officials and NHS employees of a junior grade, and that, "Whilst we accept that there are circumstances in which there is a legitimate interest in knowing the names of officials...we do not accept that this generally applies to officials below the Senior Civil Service (SCS) level." It has gone on to state that, "The nature of the work conducted by Civil Servants below SCS grade is such that they are not responsible for projects and policies of sufficiently high profile as to merit a public interest in knowing their identities."
88. The Commissioner has gone on to consider whether the disclosure of this information would be in breach of the first principle of the DPA.
89. 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.

In considering whether the disclosure of this information would be a breach of the first principle the Commissioner has initially considered whether the disclosure of this information would be fair.

90. In reaching a view on this he has been mindful of the DoH's arguments as listed at paragraph 87 above.
91. The Commissioner accepts that this information relates to the individuals' public lives, i.e. it is information relating to them carrying out their roles as DoH officials and NHS employees. The Commissioner also acknowledges the DoH's comments regarding the relatively junior ranking of the individual's concerned. Bearing in mind the arguments of the DoH, after considering the withheld information the Commissioner has found no evidence that these individuals were responsible for the decisions taken in relation to the allegations brought by Dr Brambleby and the actions taken by the DoH and NHS bodies. The Commissioner believes that this is an important point in considering fairness in this case.

92. The Commissioner has considered whether the individuals concerned would reasonably expect their names could be released in response to a request under the Act. He has noted their junior ranking and the fact that they do not appear to be public facing. Given this, and the fact that the individuals do not appear to have had any responsibility for the decisions taken in relation to Dr Brambleby's allegations, the Commissioner believes that the disclosure of this information would be unfair.
93. The Commissioner has gone on to consider whether any of the conditions in Schedule 2 of the DPA can be met.
94. 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.
95. In considering the applicability of this condition the Commissioner has first sought to identify the legitimate interests pursued by the parties to whom the data are disclose, i.e. the public at large. The Commissioner considers that the arguments in favour of the public interest for disclosure, as set out at paragraphs 74 to 77 above set out clearly the legitimate interests of the public at large, e.g:
- Seeing how decisions of public authorities are made.
 - To further the public's understanding and participation in debates on issues of public importance such as, in this case, allegations by a whistleblower bringing questions about potential dangers to public health and safety.
 - The public gaining a better understanding of the actions taken by NHS employees / DoH officials in regard to these allegations, and whether their actions were appropriate and effective.
 - Increasing public confidence in the DoH officials / NHS employees carrying out their roles in an appropriate manner.
 - There is a public interest in public authorities, such as the DoH and NHS bodies responding appropriately to whistleblowers, and in the public having confidence that they will do so.
96. The Commissioner has gone on to consider whether the disclosure of the information withheld under section 40 is necessary for these interests. Whilst the Commissioner believes that there is a legitimate interest in the public being informed as to the way in which the DoH and NHS bodies dealt with serious allegations by a well placed NHS employee, potentially affecting public health and raising questions of probity, the Commissioner does not believe that the disclosure of the names of junior ranking DoH officials and NHS employees, who had no direct input into or influence on the way in which these allegations were dealt with, is necessary for these legitimate interests.

97. As such, the Commissioner does not believe that there is a schedule 2 condition for processing of this information.
98. Therefore the Commissioner believes that section 40(2) and 40(3)(a)(i) provides an exemption from disclosure for the names of junior ranking staff members withheld by the DoH under this exemption.
99. However, after considering the withheld information the Commissioner notes that some names of individuals have been withheld on some documents, where those individuals hold senior DoH/NHS ranks. Further to this he also notes that in other documents disclosed to the complainant, these names have been released. Given the rank of these individuals and the fact that their names have been disclosed to the complainant in other documents, the Commissioner believes that it would be fair to disclose this information.
100. The Commissioner has gone on to consider the application of schedule 2(6)(1) of the DPA to this information. Given their rank and their involvement in the decision making in the circumstances surrounding this request, the Commissioner believes that the disclosure of this information would be necessary for the legitimate interests discussed at paragraph 95 above. The Commissioner has gone on to consider whether the disclosure of this information would be unwarranted by reason of prejudice to the rights and freedoms of these individuals. Again, given their seniority, and the fact that their names have already been disclosed to the complainant, the Commissioner is of the view that disclosure would not cause unwarranted levels of prejudice. Therefore he believes that section 40(2) does not provide an exemption for this information, and this information should be disclosed. This information is listed in Table 1 at the end of this Notice.
101. After considering the withheld information the Commissioner notes that there is further information which he believes is the personal data of third parties not identified as such by the DoH. Furthermore the DoH has not sought to apply section 40 to this information.
102. Although the DoH has not sought to apply section 40(2) and 40(3)(a)(i) to this information, the Commissioner has been mindful of the Tribunal's comments in *Bowbrick V ICO and Nottingham City Council* which stated,

"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, for whatever reason, did not claim the exemption, it would be entirely appropriate for the Commissioner to consider this data protection issue because if this information is revealed, it may be a breach of the data protection rights of data subjects. Otherwise it would put the Commissioner in a very strange position where the Commissioner is responsible for both freedom of information compliance and data protection compliance. S.40 is designed to ensure that freedom of information operates without prejudice to the data protection rights of data subjects. Therefore it would be a very curious

situation if the Commissioner had to forget about his data protection enforcement role when he had his freedom of information hat on."⁸

Bearing these comments in mind the Commissioner has gone on to consider the application of section 40 to this information.

103. This information can be split into two groups. The first is the names of some junior staff which were previously withheld by the DoH under sections 36(2)(b)(i) and (ii). He has identified this information in Table 2 at the end of this Notice. For the reasons listed at paragraphs 91 to 98 above, the Commissioner believes that this information is exempt from disclosure under sections 40(2) and 40(3)(a)(i) of the Act. This information is listed in Table 2 at the end of this Notice.
104. Further to this, the Commissioner has also identified some further information which he considers to be the personal data of a third party. The Commissioner does not think it is appropriate to provide any further details of the contents of this information.
105. The Commissioner has considered whether the disclosure of this information would be in compliance with the first principle of the DPA. After considering the nature of this information, together with the circumstances of this case, the Commissioner believes that the disclosure of this information would be unfair, and therefore this information is exempt from disclosure under sections 40(2) and 40(3)(a)(i) of the Act. This information is listed in Table 2 at the end of this Notice.
106. The full text of the section 40 exemption can be found in the Legal Annex at the end of this Notice.

Section 42

107. In its letter to the Commissioner dated 30 July 2008 the DoH stated that it was relying upon section 42 to withhold some of the requested information. The DoH has confirmed that this information was a communication between the Strategic Health Authority and one of its legal advisors. However, the DoH has not provided any further arguments in support of its use of this exemption, nor any detail as to why it believes that the public interest in maintaining this exemption outweighs the public interest in disclosure.
108. Section 42(1) provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
109. There are two categories of legal professional privilege: advice privilege where no litigation is contemplated or pending and litigation privilege where litigation is contemplated or pending.
110. After considering the information in question the Commissioner believes that in this case the category of privilege the DoH is relying upon is advice privilege. This

⁸ EA/2005/0006, para 51.

- privilege is attached to communications between a client and its legal advisers, and any part of the document which evidences the substance of such communication, where there is no pending or contemplated litigation. Furthermore, the information must be communicated in a professional capacity.
111. In addition to this, the communication in question also needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact, which can usually be determined by inspecting the information in question.
 112. After considering the information withheld under section 42 the Commissioner is satisfied that it falls within the scope of this exemption.
 113. As section 42(1) is a qualified exemption, the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.
 114. In considering the public interest in maintaining this exemption the Commissioner has been mindful of the Tribunal's comments in *Bellamy V ICO*, which stated that,

“...there is a strong public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest... it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...”⁹
 115. The Commissioner has considered these comments in the context of this case.
 116. In this case the local PCT's Director of Public Health had publicly raised, “allegations of mismanagement of a major Private Finance Initiative and allegations of potential infrastructure problems that could have placed public health at risk.”
 117. After considering these circumstances, and given the potential seriousness of the allegations that had been raised, the Commissioner is satisfied that the relevant NHS bodies would potentially need to speak to their legal advisors and obtain legal advice during the process of dealing with these allegations. He believes that it is in the public interest for them to be able to do so in a free and frank manner, and for them to be able to “conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion”.
 118. However, it is important to remember that these factors are balanced against the public interest factors in favour of disclosing the legal advice which forms part of the requested information.
 119. The Commissioner believes that Parliament did not intend this exemption to be used as an absolute exemption. Indeed the Tribunal's decision in *Mersey Tunnel*

⁹ EA/2005/0023, para 35.

Users Association v ICO & Mersey Travel (EA/2007/0052) underlined this point. In that case the Tribunal concluded that the public interest favoured disclosing legal advice received by Mersey Travel, in particular the Tribunal placed weight on the fact that the legal advice related to an issue of public administration and therefore the advice related to the issues which affected a substantial number of people.

120. In the Commissioner's opinion there is a strong public interest in people understanding the reasons for decisions made by public authorities – in this case, how it dealt with the allegations raised by Dr Brambleby. Disclosure of the legal advice may assist the public's understanding of the actions of the relevant NHS bodies and/or the DoH in relation to his allegations.
121. Moreover, the Commissioner accepts that there is a public interest in disclosure of information which aids the understanding and participation in debates on issues of public importance – especially, as in this case, where matters raise questions regarding public health and safety.
122. In the Commissioner's opinion, in line with the Tribunal's findings in the Mersey Tunnel case, it is not necessary to identify 'exceptional' public interest factors in order to outweigh any inherent public interest in maintaining the exemptions contained at section 42.
123. However, the Commissioner accepts that the established public interest arguments in protecting legal professional privilege must be given due weight.
124. After considering the above points, and the information itself, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
125. The full text of section 42 can be found in the Legal Annex at the end of this Notice.

The Decision

126. The Commissioner's decision is that the DoH dealt with the following elements of the request in accordance with the requirements of the Act:
 - It correctly applied section 40(3)(a)(i) to some of the withheld information. In addition to this the Commissioner has also upheld the DoH's use of section 42.
 - The Commissioner also believes that a limited amount of information previously withheld by the DoH under sections 36(2)(b)(i) and (ii) is exempt from disclosure under section 40(3)(a)(i). This information is listed in Table 2 at the end of this Notice.
127. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The DoH did not deal with the request for information in accordance with section 1(1)(b) of the Act in so far as it inappropriately relied upon sections 36(2)(b)(i) and (ii) to withhold some of the requested information. It also inappropriately relied upon sections 40(2) and 40(3)(a)(i) to withhold some of the requested information (listed in Table 1 at the end of this Notice). In failing to comply with the requirements of section 1(1)(b) within twenty working days it also breached section 10.
- The DoH also acted in breach of section 17(1)(b) and (c) in that it sought to rely upon an exemption not cited in its refusal notice. Furthermore, although the refusal notice and the internal review did contain references to sections 36 and 40, neither specified which parts of these exemptions the DoH was relying upon, as required by section 17(1)(b).

Steps Required

128. The Commissioner requires the DoH to take the following steps to ensure compliance with the Act:

The DoH should disclose the information previously withheld under sections 36(2)(b)(i) and (ii) – except for the information which the Commissioner considers is exempt from disclosure under sections 40(2) and 40(3)(a)(i) – as listed in Table 2 at the end of this Notice.

129. The DoH must take the steps required by this Notice within 35 calendar days of the date of this Notice.

Other matters

130. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
131. On the 18 December 2006, the complainant requested an internal review of the DoH's decision to withhold the information he had requested. The DoH provided a response to this request on the 21 February 2007, just over 40 working days later.
133. In March 2008, the Commissioner issued the DoH with a [practice recommendation](#) which identified some problems with the Department's handling of requests. This included the timeliness with which the authority responded to his case officer's enquiries. The Commissioner is concerned to note that in this case some of the delays in obtaining relevant information from the Department, and in acquiring their reasons for applying particular exemptions, postdate his practice recommendation. Whilst he accepts that the implementation of his recommendations will take some time, the Commissioner hopes that the

Department will improve the timeliness of its responses in relation to both current and future investigations carried out by his office

Failure to comply

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

Right of Appeal

135. 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@tribunals.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 15th day of December 2008

Signed

**Richard Thomas
Information Commissioner**

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

Tables of documents

Table (1) Commissioner does not find that section 40 provides an exemption

Document number	Description of information in document
4.	Names of senior DoH officials and NHS employees previously disclosed to complainant in other documents.
16.	Names of senior DoH officials and NHS employees previously disclosed to complainant in other documents.
17.	Names of senior DoH officials and NHS employees previously disclosed to complainant in other documents.

Table (2) Commissioner has considered section 40 and found that it provides an exemption from disclosure

Document number	Description of information in document that is exempt from disclosure
1.	Paragraphs 3, 5, 7, 8 (with bullet points); sub-paragraphs 1, 2, 3; and the penultimate paragraph of the document.
5.	5 th to 9 th sentences of the top email, previously withheld under section 36(2)(b)(i) and (ii).
8.	The contents of both emails on the 1 st page.
18.	Names of junior ranking staff should be redacted.
19.	Names of junior ranking staff should be redacted.
20.	3 rd major paragraph of the second email in the chain. ALSO 3 rd point of the third email in the chain.
21.	3 rd point of the top email in the chain.
22.	2 nd email in chain.
27.	Entire email.
28.	Names of junior ranking staff should be redacted.

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 section (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 36

- (1) This section applies to-
- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
 - (b) information which is held by any other public authority.
- (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-
- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
 - (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or

- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
- (3)** The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).
- (4)** In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".
- (5)** In subsections (2) and (3) "qualified person"-
- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
 - (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
 - (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
 - (d) in relation to information held by the House of Commons, means the Speaker of that House,
 - (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
 - (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
 - (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
 - (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
 - (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
 - (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
 - (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
 - (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
 - (m) in relation to information held by the Greater London Authority, means the Mayor of London,
 - (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and

- (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
 - (i) a Minister of the Crown,
 - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
 - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.
- (6)** Any authorisation for the purposes of this section-
 - (a) may relate to a specified person or to persons falling within a specified class,
 - (b) may be general or limited to particular classes of case, and
 - (c) may be granted subject to conditions.
- (7)** A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-
 - (a) disclosure of information held by either House of Parliament, or
 - (b) compliance with section 1(1)(a) by either House,would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

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) he 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 42

- (1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.
- (2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.