

## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Date: 29 June 2011**

**Public Authority:** The Parliamentary and Health Service  
Ombudsman  
(‘The PHSO’)

**Address:** Millbank Tower  
Millbank  
London  
SW1P 4QP

#### **Summary**

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The complainant requested, under the Freedom of Information Act 2000, some of the relevant correspondence generated in consideration of complaints that she and her father had submitted to the PHSO. The PHSO replied that some of the information requested amounted to her own personal data and was exempt by virtue of section 40(1) (first party personal data). This information was then considered under the Data Protection Act 1998. It also said it would not confirm nor deny whether some recorded information was held by virtue of section 44(2). The remainder of the information was withheld under section 44(1) (statutory bar) and section 40(2) (third party personal data).

The Commissioner has found that section 40(1) was applied appropriately. He has also found that section 44(2) can be applied to neither confirm nor deny whether some information was held. For all of the remaining information, he has determined that the public authority has applied section 44(1) appropriately.

However, the Commissioner has found procedural breaches of sections 10(1) and 17(1), but requires no remedial steps to be taken in this case.

#### **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.

## Background

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2. In 2003 the complainant's father complained about the care and treatment received by her mother from a named Trust.
3. There was a meeting in 2005 that involved the complainant and her father. The complainant had concerns about this meeting and made her own complaint.
4. She was unhappy with how the complaint was dealt with and referred this matter to the Healthcare Commission who had the powers to conduct an independent review of how her complaint was handled.
5. She remained unhappy with how the Healthcare Commission dealt with her complaint and referred the case to the Parliamentary and Health Service Ombudsman ("the PHSO"). In particular, she was unhappy that the case was dealt with alongside her father's. The PHSO refused to take the case forward and confirmed its position after a review. She made a number of requests to understand why this was so.

## The Request

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6. On 17 December 2009 the complainant wrote to complain about the way the PHSO had dealt with her complaint. Within that letter she asked for information under the Act (see Appendix A.)
7. On 22 December 2009 the PHSO wrote to her to clarify what was requested. It changed the wording of some of the requests and asked whether the complainant was happy that she had requested the 12 things that the Commissioner has numbered **[1]** to **[12]** (see Appendix B.)
8. The complainant responded in an undated letter received by the PHSO on 31 December 2009. She accepted that the 12 reworded requests reflected what she had asked for and explained that she had [Individual B redacted]'s report. She also used the opportunity to also ask for three more pieces of information. The Commissioner has identified those requests, continued his numbering (**[13]** to **[15]**) (see Appendix C.)
9. On 30 April 2010 the PHSO issued its response. It documented the 15 requests and answered each individually, confirming or denying where

appropriate (except for what information was held within her father's complaint file). It,

- provided some information that was requested;
- explained that it did not hold other relevant recorded information and explained that she might want to approach the NHS Business Services Authority, which holds old Healthcare Commission files;
- explained that the information that was her own personal data was being withheld under section 40(1) (first party personal data)<sup>1</sup>;
- did not confirm or deny what was held in her father's complaint file, although it did not specify an exemption;
- explained that it had redacted a small amount of third party personal information by under section 40(2) (third party personal data) – the name of a member of staff at the Healthcare Commission<sup>2</sup>;
- explained that the residue was covered a statutory bar – so section 44(1) (prohibitions on disclosure) could be applied to it. It explained that the statutory bar was found in section 15 of the Health Service Commissioners Act 1993 ("HSCA 1993"); and
- provided some information covered by the statutory bar privately under the exception found in section 15(1)(a) – the key information about why the PHSO did not investigate the complaint.

For the sake of clarity, the Commissioner has also placed a detailed request by request guide to the response in Appendix D of this Notice.

10. On 24 May 2010 the complainant requested an internal review. She expressed particular dissatisfaction about the delays that occurred in this case and argued that no exemptions could be applied in light of the PHSO's failure to consider her complaint appropriately. She also explained in detail why she was unhappy with the PHSO's decision not to investigate her complaint.
11. On 8 June 2010 the PHSO acknowledged her letter and explained that the situation would be considered under its complaints procedure. It said that it aimed to respond to it within 16 weeks.

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<sup>1</sup> All of the sections of a statute that are cited in this Notice can be found in full in the Legal Annex attached to it.

<sup>2</sup> This information was relevant to original request [9] and the PHSO confirmed to the Commissioner that it was also applying section 44(1) to this information during the course of his investigation (on 10 November 2010).

12. On 4 July 2010 the complainant explained that the delay was too long and she would forward the complaint to the Commissioner unless her internal review was dealt with more promptly.
13. On 27 July 2010 the PHSO communicated the result of its internal review. It apologised for the delays that the complainant had experienced. It explained what correspondence had been considered and upheld its position in respect of the information access matters.
14. On 15 August 2010 the complainant wrote to the PHSO explaining that she remained unhappy about the delays. On 25 August 2010 the PHSO apologised again.

## The Investigation

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### Scope of the case

15. The complainant first contacted the Commissioner on 16 July 2010. She explained that she was dissatisfied that the PHSO appeared to have indicated that an internal review was not to be conducted for 16 weeks.
16. On 19 September 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled. She asked him to consider the following points:
  - the delays were completely unacceptable, as was the time taken to conduct the internal review; and
  - she had not received the information she was entitled to.
17. Section 7 of the Data Protection Act 1998 ("the DPA") gives an individual the right to request copies of personal data held about them, known as to as the right of subject access. The Commissioner has conducted an assessment under section 42 of the DPA into the public authority's compliance with the DPA, which he sent to the complainant in a separate letter dated 9 November 2010. This does not form part of this Decision Notice. An assessment under section 42 of the DPA is a separate legal process from the consideration under section 50 of the Act.
18. On 9 May 2011 the Commissioner discussed this case with the representative of the complainant. It was agreed and confirmed in writing that the Commissioner's investigation would focus on whether the recorded information that was located, but withheld by PHSO, was withheld correctly. There are eight sets of information and the

Commissioner has outlined what they are below. They will be referred to as set 1 to 8 for the remainder of this Notice:

1. the information in her file about the merging of her complaint and her father's (from original request **[2]**);
  2. the information about [Individual C redacted]'s involvement in her complaint (from **[5]**);
  3. the information about the allocation of her complaint to [Individual D redacted] (from **[6]**);
  4. the information contained in her letter to the PHSO dated 29 January 2008 and [Individual D redacted]'s response to it (from **[7]**);
  5. the information that was exchanged between [Individual A redacted]'s Office and the Manchester Office of the Healthcare Commission regarding her complaint (from **[8]**);
  6. the outstanding information exchanged between the PHSO and the Healthcare Commission relating to the transfer of the complaint between the two bodies. This consists of the names of individuals that were written to and their response to that request (from **[9]**);
  7. the correspondence between the Trust and [Individual E redacted] – a letter asking about the Trust's response to the Healthcare Commission's recommendations and its response (from **[10]**); and
  8. the report from the Ombudsman's reviewer regarding the complainant's complaint (from **[11]**).
19. The Commissioner will also consider whether the PHSO was correct not to confirm nor deny whether information was held in another complainant's file for aspects **[3]** and **[13]**.
  20. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. For clarity, the Commissioner cannot adjudicate on the public authority's processes regarding how it handles complaints.

## **Chronology**

21. On 14 September 2010 the Commissioner wrote to the PHSO to explain that it should have regarded the communication dated 24 May 2010 as a request for an internal review. He explained that internal reviews should be conducted in 20 working days and asked for one to be done in 20 working days. He explained what he had said to the complainant.

22. On 17 September 2010 the PHSO explained to the Commissioner that the internal review was done on 27 July 2010. It provided the Commissioner with a copy of it. On the same day, the Commissioner wrote to the complainant and the PHSO to explain that the case was eligible for substantive consideration. The complainant confirmed what she remained dissatisfied about on 19 September 2010.
23. On 18 October 2010 the Commissioner wrote to the PHSO to ask it to explain its handling of the request under the DPA. He also asked for a copy of the withheld information along with its arguments about why its position was correct. In addition, he provided an update to the complainant.
24. On 3 November 2010 the PHSO wrote to the Commissioner to explain its handling of the request. It also provided the information that he had requested.
25. On 9 November 2010 the Commissioner wrote to the complainant and the PHSO with the result of his assessment made under section 42 of the DPA. He explained that the remaining issues under the Act would be considered separately.
26. On the same day, the Commissioner wrote to the PHSO to make enquiries about its handling of the request under the Act. He received a detailed response dated 10 November 2010. This explained the PHSO's position. It explained why it believed that the statutory bar applied. It also confirmed that it was withholding the information requested in original request **[5]** under the same exemptions (although it had not specified this in its refusal notice). It also confirmed that it believed that the statutory bar also applied to the information that it was previously withholding by virtue of section 40(2) for original request **[9]** and explained why.
27. On 9 May 2011 the Commissioner discussed the scope of this case with the complainant's representative. He also asked him to provide some information of relevance. He received this information on 12 May 2011.
28. On 10 May 2011 the Commissioner spoke to the PHSO and asked for some relevant information. He received it the same day.
29. On 11 May 2011 the Commissioner spoke to the complainant's representative on the telephone. It was agreed that he would confirm in writing what was agreed on 9 May 2011. He did this the same day.
30. On 12 May 2011 the Commissioner wrote to the PHSO to make further detailed enquiries. He received a response to them on 23 May 2011.

## Analysis

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### Exemptions

31. As a preliminary matter, it is important to note that any disclosure under the Act amounts to a disclosure to the public at large and not just to the complainant. If the public authority is prepared to disclose the requested information to the complainant under the Act it should be prepared to disclose the same information to any other person who asks for it. The Tribunal in the case of *Guardian & Brooke v The Information Commissioner & the BBC* (EA/2006/0011 and EA/2006/0013) (following *Hogan and Oxford City Council v The Information Commissioner* (EA/2005/0026 and EA/2005/0030)) confirmed "*Disclosure under FOIA is effectively an unlimited disclosure to the public as a whole, without conditions*" (paragraph 52).<sup>3</sup>
32. It must also be noted that it is only necessary to prove to the Commissioner's satisfaction that one exemption can be applied appropriately to any piece of information for it to be correctly withheld.

### Section 40(1)

33. As noted above, the Commissioner has already considered the complainant's own personal data in an assessment under section 7 of the DPA.
34. Section 40(1) provides that information that is the complainant's own personal data is absolutely exempt from disclosure under the Act.
35. The Commissioner has carefully considered the withheld information in this case to determine whether it amounted to the complainant's own personal data. He considers that the withheld information in sets 1, 2, 3 and 4 amounts entirely to her own personal data. The Commissioner determines that this information is exempt by virtue of section 40(1).
36. The Commissioner also considers that some, but not all of the information in sets 5, 6, 7 and 8 amounts to the complainant's own personal data. However, the Commissioner has decided it is appropriate to consider how section 44(1) applies to all the information contained in these last four sets to be sure that all the withheld information is considered.

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<sup>3</sup>The decision is available online at the following link:  
[http://www.informationtribunal.gov.uk/Documents/decisions/guardiannews\\_HBrooke\\_v\\_info\\_comm.pdf](http://www.informationtribunal.gov.uk/Documents/decisions/guardiannews_HBrooke_v_info_comm.pdf).

37. The information that is not the complainant's own personal data, can be split into two categories,
  1. the information that is being withheld by virtue of section 44(1)(a) of the Act – the information for sets 5 to 8. This includes the information previously withheld under section 40(2) ('category one'); and
  2. residual information, which, if held would be in another complainant's file whose existence has not been confirmed or denied, by virtue of section 44(2) – part of original requests **[3]** and **[13]** ('category two').
38. Section 44(1) provides an exemption from disclosure under the Act for information which is prohibited from disclosure under any law or enactment. It is an absolute exemption, so if the statutory bar applies then the information is exempt and no public interest test is necessary.
39. Section 44(2) explains that the duty to confirm or deny whether recorded information is held does not arise where even that confirmation or denial would be prohibited by the statutory bar.
40. As stated, the PHSO is relying on a mixture of the two and the Commissioner will divide his analysis the same way to ensure the integrity of the withheld information. In particular, he will not confirm or deny whether relevant information is held within another complainant's file in this Decision Notice.

*Category one – the information being withheld by virtue of section 44(1)*

41. In its refusal notice dated 30 April 2010, the PHSO identified section 15 of the HSCA 1993 as the relevant statutory prohibition, which meant the relevant recorded information could not be released. It provided more detail in its submissions.
42. The Commissioner will first detail the relevant parts of the legislation before moving on to consider its operation in this case. The Commissioner has considered the withheld information when coming to a decision about whether the statutory bar can be applied appropriately or not.

***The HSCA 1993***

43. Section 11(2) of the HSCA 1993 explains that the public authority has a duty to conduct an investigation in private.
44. The Ombudsman has argued that the requirement for her investigations to be conducted in private would, or would be likely to be, undermined



and jeopardised by the disclosure of the requested information to the whole world. Such disclosure of the information withheld could conceivably inhibit, or discourage, individuals from bringing their concerns to the attention of the Ombudsman or having confidence in engaging with her office as freely and frankly as possible. The Commissioner acknowledges that the privacy of an investigation is an important factor when considering this statutory bar.

45. Section 15 of the HSCA 1993 then discusses what information cannot be released by the public authority:

*'(1) Information obtained by a Commissioner or his officers in the course of or for the purposes of an investigation shall not be disclosed ...'*

46. The HSCA 1993 goes on to set out a number of exceptions to this provision. These are set out in full in the legal annex to this Notice.

### ***The application of the statutory bar to the information requested***

47. For it to be possible for the PHSO to disclose information under the Act it is necessary for the information to:

1. have been obtained other than *'... by the Commissioner or his officers in the course of or for the purposes of an investigation'* under the HSCA 1993. If the information falls outside this provision then the statutory bar would not be appropriately applied; or
2. fall within one of the exceptions found in section 15(1)(a) to (e) of the HSCA 1993.

### ***(1) Was the withheld information 'obtained by the Commissioner or his officers in the course of or for the purposes of an investigation'?***

48. The first issue to be considered by the Commissioner, therefore, is whether the information requested by the complainant and withheld by the Ombudsman under section 44 of the Act, can be said to have been obtained by the Ombudsman in the course of, or for the purpose of, an investigation under the HSCA 1993.

49. Section 3 of the HSCA 1993 sets out the matters subject to an 'investigation'. These matters include a complaint made to a Commissioner (now the Ombudsman as she has inherited the Commissioner's obligations) by or on behalf of a person that has sustained injustice or hardship through the failure in a service provided by a health care body, a failure of a body to provide a service, through maladministration or other miscellaneous complaints that aren't disallowed by that Act.

50. The Commissioner considers that the words '*obtained by the Commissioner or his officers in the course of or for the purposes of an investigation*' should be given their natural meaning. '*Obtained*' refers both to information which the Ombudsman proactively obtains as part of her investigations and information supplied by those wishing the Ombudsman to carry out an investigation.
51. The complainant has argued, as the PHSO decided against taking either complaint forward, that it cannot be said that the information that it obtained was obtained in the course or for the purposes of an 'investigation'.
52. The PHSO responded by explaining that this was not the correct approach to take. It has explained that even if it declines to investigate a complaint, it believes that section 15(1) still applies because "*obtained in the course of, or for the purposes of, an investigation*" also includes for the purposes of deciding whether there is going to be an investigation. The PHSO referred the Commissioner to the case of *R (Turpin) v Commissioner for Local Administration [2001] EWHC Admin 503* (where Collins J stated this was so in paragraph 64)<sup>4</sup>.
53. The Commissioner has considered the situation and is content that the PHSO's position is correct in that the process of deciding and reviewing whether there is going to be an investigation is caught by the statutory bar, providing it is generally held for the purposes of deciding whether there should be an investigation. He finds support in a recent First Tier Tribunal (Information Rights) decision in *Purser v the Information Commissioner and the Local Government Ombudsman [EA/2010/0188]*. The Tribunal was asked to consider the operation of a similarly worded statutory bar when that body had decided against taking an investigation forward. It stated at paragraph 20:

*'A necessary part of any investigation by a statutory body is determining whether a complaint falls within its powers and if so whether there are reasons, for example that the individual should pursue another route for redress, why the statutory body should not take up the issue. Even though a formal decision not to investigate was taken, there still needed to be, and was, an investigation to establish what steps were appropriate. In the course of this investigation there was the generation of information and analysis derived from the material supplied and the legal framework of the Ombudsman. The Tribunal was satisfied that these actions and processes were "information obtained ...for the purposes of an investigation".'*

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<sup>4</sup> <http://www.richardbuxton.co.uk/v3.0/node/103>

54. With the above in mind, the Commissioner will now consider each of the four outstanding sets of information in turn:

*Set 5*

55. As noted above, this information consists of the information that was exchanged between [Individual A redacted]'s Office and the Manchester Office of the Healthcare Commission regarding the complainant's complaint.
56. The Commissioner has considered this set of information and is satisfied that it relates entirely to the consideration that was undertaken in respect of deciding whether to investigate the complainant's complaint.
57. He is satisfied that the analysis of the complainant's complaints relies entirely on the information gained from the complainant and the other parties. The reason why the information was obtained was for its investigatory purposes. The Commissioner is satisfied that it would not be possible to remove the information that was obtained in the course or for the purpose of the investigation because it is permeates through all of the information held for this set of information.
58. The Commissioner has also considered the Information Tribunal's decision in *Commission for Local Administration in England v The Information Commissioner* [EA/2007/0087]<sup>5</sup>, which was an appeal against the Commissioner's decision **FS50112347**<sup>6</sup>. This case concerned the statutory prohibition contained in section 32(2) of the Local Government Act 1974, which is similar to the section 15 statute bar of the HSCA 1993. From this decision, the Commissioner considers that it is important to note the following:
1. there is a distinction between information that concerns the content of the complaint and information that relates to the process that was undertaken in investigating it – the first is definitely caught by the statutory bar while the second is unlikely to be (paragraph 10); and
  2. there is also a distinction between information that has been obtained from a third party and internally generated information – the first is definitely caught by the statutory bar while the second is unlikely to be (paragraph 11).

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<sup>5</sup><http://www.informationtribunal.gov.uk/DBFiles/Decision/i66/Comm%20for%20Local%20Authority.pdf>

<sup>6</sup> [http://www.ico.gov.uk/~/\\_/media/documents/decisionnotices/2007/FS50112347.ashx](http://www.ico.gov.uk/~/_/media/documents/decisionnotices/2007/FS50112347.ashx)

59. The Commissioner has considered the comments outlined above and notes that had it been possible to separate the purely internally generated information from the information obtained when considering whether to undertake an investigation, then the purely internally generated information should have been disclosed. However, as noted above, he does not consider that it is possible to separate the information in this way. This follows his earlier decision is **FS50140862**<sup>7</sup> which was upheld by the Tribunal in *Mr Colin Parker v the Information Commissioner and the Parliamentary and Health Service Ombudsman* [EA/2007/0046]<sup>8</sup>. He is satisfied therefore that this information was '*obtained by the Commissioner or his officers in the course of or for the purposes of an investigation*' allowed by section 3 of the HSCA 1993.

#### Set 6

60. As stated, this set concerns the outstanding information that was exchanged between the PHSO and the Healthcare Commission relating to the transfer of the complaint between the two bodies. This consists of the names of individuals that were written to and their response to that request.
61. The Commissioner is satisfied that these communications preceded the investigation and asked for information necessary for the PHSO to consider whether it should investigate this case.
62. Therefore for the reasons outlined in paragraphs 56 and 57 above, he is satisfied that this information was '*obtained by the Commissioner or his officers in the course of or for the purposes of an investigation*' allowed by section 3 of the HSCA 1993.

#### Set 7

63. As above, this set concerns the correspondence between the Trust and [Individual E redacted]. It consists of a letter asking about the Trust's response to the Healthcare Commission's recommendations and its response.
64. This information was clearly generated to enable the PHSO to consider whether the complainant's complaint merited a full investigation.

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<sup>7</sup>[http://www.ico.gov.uk/~media/documents/decisionnotices/2007/DECISION\\_NOTICE\\_FS50140862.ashx](http://www.ico.gov.uk/~media/documents/decisionnotices/2007/DECISION_NOTICE_FS50140862.ashx)

<sup>8</sup><http://www.informationtribunal.gov.uk/DBFiles/Decision/i137/Parker.pdf>

65. As this is so, he considers that it is *'obtained by the Commissioner or his officers for the purpose of an investigation'* because this amounts to the evidence that was considered about the merits of the complaint.

*Set 8*

66. As noted above, the complainant complained that the PHSO had decided not to investigate her complaint and a report was made to consider this complaint. The report amounts to the set 8 information.

67. The report considered the substantive issues that arose from her complaint along with how the PHSO handled it.

68. Having considered the withheld information carefully, the Commissioner accepts that the detailed review discusses the complaint that it received in detail and how it went about investigating its merits. The Commissioner is satisfied that the information contained in the report cannot be separated from the substance of the complaints that have been referred to the PHSO.

69. It follows that he accepts that is also caught by the statutory bar in that it is information *'obtained by the Commissioner or his officers for the purpose of an investigation'*.

70. The above analysis does not mean that the statutory bar necessarily applies. This is because there are exceptions to the statutory bar found in section 15(1)(a) to (e) of the HSCA 1993.

**(2)** Do any of the exceptions found in section 15(1)(a) to (e) of the HSCA 1993 apply in this case?

71. The Commissioner can discount sections 15(1)(b) to (d) because in this case the PHSO is not releasing the information in these limited circumstances to achieve these purposes. These three sections are only relevant where a body that is charged with investigating those offences requests the information from the PHSO and this has not occurred.

72. The outstanding sections that may be applicable are sections 15(1)(a) and 15(1)(e). Section 15(1)(a) allows the PHSO to disclose information where it is both for the purposes of the PHSO's investigation and for any report made in respect of it.

73. The PHSO has explained that it had disclosed to the complainant under a separate regime some information that relates to how it came to its decision. It explained that this disclosure to the relevant parties is all the information that it believes it needs to disclose for the purposes of its investigation and to report its conclusions. The Commissioner recognises that section 15(1)(a) operates to provide the PHSO with discretion to

disclose information obtained in the course of or for the purposes of an investigation where it believes that it would be beneficial for the purposes of that investigation.

74. The discretion remains with the PHSO. The Upper Tier Tribunal confirmed that the Commissioner does not have the power to consider how any public authority uses its discretion in its recent decision *OFCOM v Morrissey and the Information Commissioner* [2011] UKUT 116 (AAC)<sup>9</sup>. The Tribunal confirmed that the correct channel to challenge the use of discretion was the administrative court. It follows that the exception cannot apply to the four sets of withheld information in this case.
75. Section 15(1)(e) also requires further consideration. It is important to note that section 15(1)(e) has been restricted by section 15(1)(1B) which explains that disclosure can only be made to:
- 'to any persons to whom he thinks it should be disclosed in the interests of the health and safety of patients'.*
76. The Commissioner has noted that the complainant's allegations about her mother's care are serious and if proven, may mean that the PHSO would be entitled under section 15(1)(e) to contact relevant individuals to protect the health and safety of patients. However, the discretion once again lies with the PHSO and the Commissioner cannot overturn the PHSO's use of its discretion.
77. It follows that no exceptions apply in this case to the statutory bar. This means that the Commissioner must find that the PHSO was entitled to rely on section 44(1) in respect to these four sets of information.
78. By virtue of section 2(3) of FOIA, the exemption in section 44(1) is absolute. The only issue the Commissioner can consider is whether disclosure of the withheld information was prohibited by or under the statutory bar.
79. As he is satisfied that the statutory bar applies, the PHSO was entitled to withhold the information from the public and the Commissioner upholds its position.

*Category two – section 44(2)*

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<sup>9</sup>[http://www.informationtribunal.gov.uk/DBFiles/Decision/i365/Morrissey%20v%20IC%20&%20Ofcom%20\(EA-2009-0067\)%20-%20Decision%2011-01-10%20\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i365/Morrissey%20v%20IC%20&%20Ofcom%20(EA-2009-0067)%20-%20Decision%2011-01-10%20(w).pdf)

80. Section 44(2) works in the same way as section 44(1) with the only exception being that the public authority is not required to confirm or deny whether it holds relevant recorded information. .
81. The PHSO explained in its detailed final submissions that it felt that it was appropriate not to confirm nor deny whether recorded information was held in another complainant's complaint file as to do so would reveal information that had been received in the course of an investigation (at least that another complaint was being looked at) and contravene the statutory bar. It stated that it could therefore rely on section 44(2).
82. After due consideration, the Commissioner is satisfied that revealing whether relevant recorded information was held to the public in another complainant's complaint file would reveal information '*obtained by the Commissioner or his officers in the course of or for the purposes of an investigation*' for the same reasons as are outlined in paragraphs 48 to 59 above.
83. He is also satisfied that there are no exceptions that apply in this case for the same reasons as are outlined in paragraphs 71 to 77 above.
84. It follows that the Commissioner accepts the application of section 44(2) to not confirm nor deny whether relevant recorded information was held in another complainant's complaint file.

## **Procedural Requirements**

### *Section 10(1)*

85. Section 10(1) requires that sections 1(1)(a) and 1(1)(b) are complied with within twenty working days (except for limited exceptions that are not relevant to this case). The PHSO failed to confirm it held information or provide disclosable information in 20 working days and thus breached section 10(1).

### *Section 17(1)*

86. Section 17(1) requires that a valid refusal notice is issued within the time of statutory compliance. The PHSO failed to issue a refusal notice in time and therefore breached section 17(1).

## **The Decision**

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87. The Commissioner's decision is that the PHSO dealt with the request substantively in accordance with the Act, because:

- It was appropriate to apply section 40(1) (first party personal data) to the information that it withheld contained in sets 1 to 4; and
- It was appropriate to apply section 44(1) (statutory bar) to the information that it withheld contained in sets 5 to 8. This is because section 15 of the HSCA 1993 acts as a statutory bar.

88. However, the Commissioner has also decided that the PHSO did not fully comply with its procedural obligations, because:

- It breached section 10(1) because it failed to comply with section 1(1) of the Act in 20 working days; and
- It breached section 17(1) because it failed to issue an appropriate refusal notice in 20 working days.

### **Steps Required**

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89. The Commissioner requires no steps to be taken.

### **Other Matters**

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90. Although it does not form part of this Decision Notice the Commissioner wishes to highlight the following matter of concern.

91. The Act provides no time limit for conducting an internal review. However, the Commissioner has issued guidance explaining his view that public authorities should aim to respond fully to all requests for internal reviews in 20 working days. Although it suggests that it may be reasonable to take longer where the public interest considerations are exceptionally complex, the guidance states that in no case should the total time exceed 40 working days. The Commissioner is concerned that in this case, the PHSO appeared to explain that it would take 16 weeks for an internal review to be conducted. He was also concerned that the PHSO took longer than 40 working days to conduct the internal review. .



## Right of Appeal

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92. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

93. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

**Dated the 29<sup>th</sup> day of June 2011**

**Signed .....**

**Pamela Clements  
Group Manager, Complaints Resolution  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## **Appendix A – copy of original request for information dated 17 December 2009**

*'The information, required under the Freedom of Information Act is in chronological order:*

*In February 2007, the Trust made contact with the Commission, passed over what they say was my file and discussed my complaint at length. Will you please send me a copy of the file the Trust sent together with copies of all correspondence and Emails, and at the time, date and content of all telephone contacts;*

*April 2007 onward – will you please send me copies of all memoranda, including Emails and telephone contacts, and meetings, relating to the merging of my complaint with my father's, through to the involvement of [Individual A redacted];*

*June 2007 [Individual B redacted]'s report – will you please send me copies of the input from the Nursing Specialist, the Consultant Surgeon, the specialist Anaesthetise [sic] and the Trust relative to my complaint! Please indicate where there is none;*

*Aug/Sept 07 – will you please send me copies of all memoranda including times, dates and contents of telephone calls between the Commission and the Trust, which resulted in letters dated 12 and 25 September 2007 from the Trust to me, stating that the Commission informed them [the Trust] that my case was closed!;*

*Oct 07 – will you please send me copies of consultations between [Individual C redacted] and senior staff relating to my complaint;*

*Oct/Nov 07 – will you please send me copies of memoranda concerning the taking over of my complaint by [Individual D redacted];*

*Jan/Feb 2008 through to [Individual A redacted]'s involvement, copies of memoranda relating to my 29 January 2008 letter to [Individual D redacted], and the summarisation of the of the Commissions [sic] failure within the Commission [sic] that was enclosed [sic] with it;*

*Will you please send me copies of all communication of whatever nature between [Individual A redacted]'s Office and the Manchester Office relating to my complaint;*

*Will you please send all memoranda and communication between the Commission and the Parliamentary Ombudsman relating to the transfer of [the complainant]'s complaint;*

*Relative to the Parliamentary Ombudsman – will you please send me copies of all memoranda and communications relative to my complaint, received by [Individual E redacted] from expert witnesses and from the Trust;*

*Will you please send me a copy of the report commissioned by [Individual F redacted] regarding my complaint;*

*I reiterate that I only require information relating to my complaint. If on any point raised there is nothing on record, please be sure to indicate this clearly.'*

**Appendix B – copy of PHSO interpretation of the request for information dated 22 December 2009 (the Commissioner has added numbers in square brackets for clarity)**

- [1]** *A copy of the file which [Trust redacted] ('the Trust') passed to the Healthcare Commission in February 2007, together with copies of all correspondence and emails, and at the time, date and content of all telephone contacts;*
- [2]** *From April 2007 onward, copies of all memoranda, including e-mails and telephone contacts, and meetings, relating to the merging of [the complainant's] complaint with [the complainant's] father's, up to the involvement of [Individual A redacted];*
- [3]** *[Individual B redacted]'s report of June 2007 and copies of the input from the Nursing Specialist, the Consultant Surgeon, the specialist Anaesthetist and the Trust relative to [the complainant's] complaint, indicating where there is none;*
- [4]** *Copies of all memoranda including times, dates and contents of telephone calls between the Commission and the Trust, dated August and September 2007, which resulted in the letters dated 12 and 25 September 2007 from the Trust to [the complainant], stating that the Commission informed them [the Trust] that [the complainant's] case was closed;*
- [5]** *Copies of consultations between [Individual C redacted] and senior staff relating to [the complainant's] complaint dated October 2007;*
- [6]** *Copies of memoranda dated October/November 2007 concerning the take over of [the complainant's] complaint by [Individual D redacted];*
- [7]** *From January/February 2008 through to [Individual A redacted]'s involvement, copies of memoranda relating to [the complainant's] letter dated 29 January 2008 to [Individual D redacted], and the summary of the Commission's failure, which was enclosed with that letter;*

- [8] *Copies of all the communications between [Individual A redacted]'s Office and the Manchester Office [of the Healthcare Commission] relating to [the complainant]'s complaint;*
- [9] *All memoranda and communication between the Commission and the Parliamentary Ombudsman relating to the transfer of [the complainant]'s complaint [from the Commission to the Ombudsman];*
- [10] *Copies of all memoranda and communications relative to [the complainant]'s complaint received by [Individual E redacted] from expert witnesses and from the Trust;*
- [11] *Copy of the report commissioned by [Individual F redacted] regarding the [complainant]'s complaint; and*
- [12] *If, on any of the above points, there is nothing on record [the complainant] would like this marked clearly*

**Appendix C – copy of the additional three requests received by the PHSO on 31 December 2009**

- [13] *May I request confirmation of a call by my father to [Individual B redacted] made to his voicemail at 11:20am on 8 August 2007 and [Individual B redacted]'s reply some minutes later, together with any transcript of their conversation.*
- [14] *Relative to the involvement of [Individual D redacted], may I have a transcript of the [telephone] call made to [the complainant] at 5:24 on 24 August 2009, together with all memoranda relative to that call.*
- [15] *May I have copies of all memoranda, including E-mail and phone records relative to the transfer of your complaint between [Individual E redacted] and [Individual F redacted], together with all records resulting from [the complainant's] letters to [Individual E redacted], dated 29 May and 2 June 2009, and to [Individual F redacted] dated 10 October 2009, including any information about the involvement of [the complainant's] MP, [Individual G redacted], and any information passed between [Individual F redacted] and 'the reports compiler'.*

**Appendix D – a request by request guide to what the refusal notice dated 30 April 2010**

- [1] It holds a small amount of correspondence between the complainant and the Trust, but believed that the complainant already had it. It explained that it did not hold the Trust's complaint file or any correspondence between the Trust and the Healthcare Commission. It explained that the NHS Business Services Authority holds the old Healthcare Commission files and provided its details;

- [2]** It explained that it held some information within the Healthcare Commission file about the merging of her complaint with her father's. It explained that it was unable to provide this information to the public because it was exempt. The information that was her own personal data was exempt by virtue of section 40(1) [first party personal data]<sup>10</sup> and the residue was covered a statutory bar – so section 44(1) [prohibitions on disclosure] could be applied to it. It explained that the statutory bar was found in section 15 of the Health Service Commissioners Act 1993 ('HSCA 1993');
- [3]** It explained that it held a copy of [Individual B redacted]'s report, but as her second letter confirmed that she has received a copy, it did not provide another. It explained that it did not hold the remainder of the information requested on her complaint file. It decided not to confirm or deny whether it held the information in her father's complaint file and explained that he should request it;
- [4]** It reiterated what was said in point [1] above;
- [5]** It explained that it held some information about [Individual C redacted]'s involvement with the case, but that it did not hold copies of the consultations that had been requested;
- [6]** It explained that it held some information about the allocation of the complaint to [Individual D redacted]. However, it was unable to provide this information to the public due to section 40(1) and section 44(1);
- [7]** It confirmed that it held the letters dated 29 January 2008 and 19 February 2008. However, it does not hold any other information in relation to them. It explained that it could not provide the letters to the public due to section 40(1) and section 44(1);
- [8]** It explained that it held some relevant correspondence. However, it explained that it could not provide the letters to the public due to section 40(1) and section 44(1);
- [9]** It explained that it held some relevant correspondence. It explained the purpose was to request the complaint files and it provided the email requesting the files. It said that it had redacted a small amount of third party personal information by virtue of section 40(2) – the name of a member of staff at the Healthcare Commission. It also explained that it could not provide the response from the Healthcare Commission, because it was exempt by virtue of sections 40(1) and 44(1);

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<sup>10</sup> All of the sections of a statute that are cited in this Notice can be found in full in the Legal Annex attached to it.

**[10]** It explained that it held three reports from 'expert witnesses' and was prepared to disclose them privately under the exception to the statutory bar found in section 15(1)(a). This was allowed to explain to the complainant why the PHSO did not investigate this complaint. It also explained that it had further correspondence between [Individual E redacted] and the Trust. It had released some of this information when communicating the outcome of its decision, but it believed that the residue was exempt by virtue of sections 40(1) and 44(1);

**[11]** It explained that it held this information, but could not provide it to the public by virtue of sections 40(1) and 44(1);

**[12]** It explained that it had outlined the recorded information that it held above in its response;

**[13]** It explained that this information was not held on her file. However, it may be held on another complainant's file, but he must request it and in any event, the information would be likely to be exempt by virtue of sections 40(1) and 44(1);

**[14]** It explained that it held the complainant's transcription of the phone call and provided it to her. It explained that it did not hold [Individual D redacted]'s transcript of the call; and

**[15]** It explained that it was able to release:

1. the correspondence between the PHSO and her MP about her complaint; and
2. the case handling entries relating to her letters to [Individual D redacted] dated 29 May 2009 and 2 June 2009 and to [Individual E redacted] dated 10 October 2009 and memoranda between [Individual E redacted] and the 'report's compiler'.

It also explained that it holds no telephone records or E-mails. It also does not information about the transfer between [Individual D redacted] and [Individual E redacted]. Finally, it explained why and provided the relevant case handling entries.

## **Legal Annex**

### **Freedom of Information Act 2000**

#### **Section 1 - General Right of Access**

Section 1(1) of the Act 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 2(3) – Effect of exemptions in part II**

Section 2(3) provides that –

“For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (a) section 23
- (b) section 32
- (c) section 34
- (d) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (e) in section 40 –
  - (i) subsection (1), and
  - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
  - (iii) section 41, and
  - (iv) section 44”

#### **Section 10(1) – Time for compliance with the request**

Section 10(1) of the Act provides that:

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

### **Section 17(1) – refusal of request**

Section 17 (1) of the Act states that:

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

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

### **Section 40(1) – personal data**

Section 40(1) of the Act states 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 44 – Prohibitions on disclosure**

Section 44 of the Act provides that:

“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.”

### **Health Service Commissioners Act 1993**

**Section 3** provides that:

*Matters subject to investigation*

3. General remit of Commissioners



(1) On a complaint duly made to a Commissioner by or on behalf of a person that he has sustained injustice or hardship in consequence of—

- (a) a failure in a service provided by a health service body,
- (b) a failure of such a body to provide a service which it was a function of the body to provide, or
- (c) maladministration connected with any other action taken by or on behalf of such a body,

the Commissioner may, subject to the provisions of this Act, investigate the alleged failure or other action.

(1YA) In the case of the Assembly the Health Service Commissioner for Wales may only conduct an investigation in respect of—

- (a) a failure in a service provided by the Assembly in the exercise of a function of the Assembly relating to the National Health Service (an "Assembly health service function"),
- (b) a failure of the Assembly to provide a service the provision of which is an Assembly health service function, or
- (c) maladministration connected with any other action taken by or on behalf of the Assembly in the exercise of an Assembly health service function.

(1ZA) Any failure or maladministration mentioned in subsection (1) may arise from action of—

- (a) the health service body,
- (b) a person employed by that body,
- (c) a person acting on behalf of that body, or
- (d) a person to whom that body has delegated any functions.

(1A) Where a family health service provider has undertaken to provide any family health services and a complaint is duly made to a Commissioner by or on behalf of a person that he has sustained injustice or hardship in consequence of—

- (a) action taken by the family health service provider in connection with the services,
- (b) action taken in connection with the services by a person employed by the family health service provider in respect of the services,

(c) action taken in connection with the services by a person acting on behalf of the family health service provider in respect of the services, or

(d) action taken in connection with the services by a person to whom the family health service provider has delegated any functions in respect of the services,

the Commissioner may, subject to the provisions of this Act, investigate the alleged action.

(1C) Where an independent provider has made an arrangement with a health service body or a family health service provider to provide a service (of whatever kind) and a complaint is duly made to a Commissioner by or on behalf of a person that he has sustained injustice or hardship in consequence of—

(a) a failure in the service provided by the independent provider,

(b) a failure of the independent provider to provide the service, or

(c) maladministration connected with any other action taken in relation to the service,

the Commissioner may, subject to the provisions of this Act, investigate the alleged failure or other action.

(1D) Any failure or maladministration mentioned in subsection (1C) may arise from action of—

(a) the independent provider,

(b) a person employed by the provider,

(c) a person acting on behalf of the provider, or

(d) a person to whom the provider has delegated any functions.

(2) In determining whether to initiate, continue or discontinue an investigation under this Act, a Commissioner shall act in accordance with his own discretion.

(3) Any question whether a complaint is duly made to a Commissioner shall be determined by him.

(4) Nothing in this Act authorises or requires a Commissioner to question the merits of a decision taken without maladministration by a health service body in the exercise of a discretion vested in that body.

(5) Nothing in this Act authorises or requires a Commissioner to question the merits of a decision taken without maladministration by—

- (a) a family health service provider,
- (b) a person employed by a family health service provider,
- (c) a person acting on behalf of a family health service provider, or
- (d) a person to whom a family health service provider has delegated any functions.

(6) Nothing in this Act authorises or requires a Commissioner to question the merits of a decision taken without maladministration by—

- (a) an independent provider,
- (b) a person employed by an independent provider,
- (c) a person acting on behalf of an independent provider, or
- (d) a person to whom an independent provider has delegated any functions.

(7) Subsections (4) to (6) do not apply to the merits of a decision to the extent that it was taken in consequence of the exercise of clinical judgment.

**Section 11(2)** provides that:

‘ (2) An investigation shall be conducted in private.’

**Section 15** provides that:

‘(1) Information obtained by a Commissioner or his officers in the course of or for the purposes of an investigation shall not be disclosed except—

(a) for the purposes of the investigation and any report to be made in respect of it,

(b) for the purposes of any proceedings for—

(i) an offence under the Official Secrets Acts 1911 to 1989 alleged to have been committed in respect of information obtained by virtue of this Act by a Commissioner or any of his officers, or

(ii) an offence of perjury alleged to have been committed in the course of the investigation,

(c) for the purposes of an inquiry with a view to the taking of such proceedings as are mentioned in paragraph (b),

(d) for the purposes of any proceedings under section 13 (offences of obstruction and contempt) or

(e) where the information is to the effect that any person is likely to constitute a threat to the health or safety of patients as permitted by subsection (1B).

(1A) Subsection (1B) applies where, in the course of an investigation, a Commissioner or any of his officers obtains information which—

(a) does not fall to be disclosed for the purposes of the investigation or any report to be made in respect of it, and

(b) is to the effect that a person is likely to constitute a threat to the health or safety of patients.

(1B) In a case within subsection (1)(e) the Commissioner may disclose the information to any persons to whom he thinks it should be disclosed in the interests of the health and safety of patients; and a person to whom disclosure may be made may, for instance, be a body which regulates the profession to which the person mentioned in subsection (1A)(b) belongs or his employer or any person with whom he has made arrangements to provide services.'