

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 10 January 2011**

**Public Authority:** The Department of Health  
**Address:** Richmond house  
79 Whitehall  
London  
SW1A 2NS

### Summary

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The complainant requested a full extract of the minutes from the NHS Management Board in July 2006 that mentioned 'new management arrangements' that were referred to in a letter dated 21 August 2006.

The public authority provided an extract of the minutes dated 19 July 2006 and confirmed that no further relevant recorded information was held in respect to this request. It confirmed its position in its internal review.

The complainant referred the following things to the Commissioner:

- (i) She believed further relevant recorded information was held in respect to her request; and
- (ii) She believed that the public authority had failed to provide reasonable advice and assistance to her.

The Commissioner has determined that on the balance of probabilities the public authority does not hold any further relevant recorded information. He also finds that the public authority complied with its obligations under section 16(1) and does not uphold the complaint. He therefore requires no remedial steps to be taken.

### 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. On 21 August 2006 the then Acting Chief Executive of the NHS (Sir Ian Carruthers OBE) wrote a letter to all the Strategic Health Authority Chief Executives. This letter was entitled 'National Programme for IT – Responsibilities and Information Governance (Gateway ref. 7042)' and contained the following [The Commissioner has italicised the part that was referred to in the request]:

**'National Programme for IT – responsibilities and information Governance**

Following the recent NAO report and PAC Chief Executive's hearing, I want to restate the key responsibilities and accountabilities in relation to the National Programme for IT. *New arrangements shared with you at the NHS Management Board in July will ensure that we can deliver our commitment to implement the pertinent NAO recommendations on implementation and tracking progress against the business cases.'*

It then outlined the responsibilities that were stated to be agreed.

## The Request

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3. On 23 April 2010 the complainant wrote to the public authority and requested a number of items of information, which included the following request:

*'On 21 August 2006, Sir Ian Carruthers, in his capacity as acting Chief Executive of the NHS, wrote to the Chief Executives of the Strategic Health Authorities ("SHA") making reference to the "new management arrangements shared with you at the NHS Management Board in July 2006".*

*Please provide us with a full extract of the minutes of that meeting which deals with the "new management arrangements"*

*which were shared with the SHA Chief Executives at that NHS Management Board meeting.*

*Note that this request will not be satisfied by reference to a summary of that meeting (and in any event, the summary for the July 2006 meeting is not available on the Department of Health's website although other meeting summaries before and after this date are available).'*

4. On 14 May 2010 the public authority issued its response. It explained that it did hold some relevant recorded information and provided it. This consisted of full extracts of part 2.8 of the 19 July 2006 meeting and part 6 of the 10 December 2008 meetings. It explained that these extracts had been taken from minutes that were marked as drafts and that it believed this version was the only copy it held.
5. On 9 June 2010 the complainant requested an internal review. She explained that the response was inadequate. This was because the extract of the minutes of the 19 July 2006 meeting was only short and she clarified that she wanted an extract of all the parts of those minutes that directly or indirectly refer to the 'new management arrangements'.
6. On 17 June 2010 the public authority communicated the results of its internal review. It confirmed that it believed that it had provided all the information that was requested. It also confirmed that there are no other direct or indirect references within those minutes, which relate to the 'new management arrangements'. It explained that the complainant had a right of further appeal to the Commissioner.

## **The Investigation**

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### **Scope of the case**

7. On 28 July 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - She did not believe that the very limited draft minutes satisfy her request;

- She believed that it seemed inconceivable that information that was specifically referenced in the letter was not documented in the minutes;
  - She believed that it was astonishing that the DoH only held 'draft' minutes and not full and approved minutes; and
  - She believed that the DoH had not adequately searched their records.
8. On 6 October 2010 the complainant agreed with the Commissioner that the scope of his investigation would be:
1. Whether on the balance of probabilities the Department of Health held any further relevant recorded information in respect to part one of the request dated 25 April 2010 (the request outlined above).
  2. Whether the Department of Health offered reasonable advice and assistance with regard to this request in line with its obligations under section 16(1) of the Act.
9. 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 can make no decision about how a public authority authorises its minutes.

### **Chronology**

10. On 4 September 2010 the Commissioner wrote to the public authority and the complainant to explain that he had received an eligible complaint. He asked the public authority to explain its position.
11. On 6 September 2010 the public authority provided the Commissioner with its opening submissions. It also provided the Commissioner with a full copy of the 19 July 2006.
12. On 28 September 2010 the Commissioner wrote to the complainant. He explained his understanding of the request and asked for the complainant to confirm the scope of his investigation. He received a response on 6 October 2010.
13. On 7 October 2010 the Commissioner made detailed enquiries of the public authority and received answers to some of them on the same day. He also wrote to the complainant to acknowledge receipt of her letter.

14. On 8 October 2010 the Commissioner asked for further clarification from the public authority and received it on the same day.

## Analysis

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### Substantive Procedural Matters

#### *Section 1(1)*

*Did the public authority hold further relevant recorded information that is relevant to the request for information?*

15. Section 1 provides that any person making a request for information to a public authority is entitled (a) to be informed in writing by the public authority whether it holds information of the description specified in the request and (b) if that is the case to have that information communicated to him.
16. It follows that it is necessary for information to be held in recorded form at the date of the request for it to be subject to the Act.
17. It is important to note the standard of proof that the Commissioner uses to determine whether relevant recorded information is held. In *Linda Bromley & Others v Information Commissioner and Environment Agency* [EA/2006/0072] ('Bromley'), the Information Tribunal confirmed that the test for establishing whether information was held by a public authority was not one of certainty, but rather the balance of probabilities. The standard of proof has been recently confirmed by the Tribunal decision of *Innes v Information Commissioner* [EA/2009/0046] and this decision is particularly persuasive because the standard of proof was the main issue that it was referred.
18. He has also been assisted by the Tribunal's explanation of the application of the 'balance of probabilities' test in *Bromley*. It explained that to determine whether information is held requires a consideration of a number of factors including the quality of the public authority's final analysis of the request, scope of the search it made on the basis of that analysis and the rigour and efficiency with which the search was then conducted. It also requires considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.

19. The Commissioner has applied his test to this case and has also considered the arguments of both sides.
20. The complainant has argued that further recorded information must be held. The Commissioner has summarised these arguments into four points which will be considered in his analysis:
  - The draft minutes had not been checked properly;
  - The final approved minutes should exist;
  - The public authority has not searched its records properly; and
  - More detailed information ought to exist for the term 'new arrangements' for it to be so prominent in the content of the letter dated 21 August 2006.
21. The public authority has provided the Commissioner with detailed submissions. The Commissioner will break these arguments into the factors identified in paragraph 18 above when determining whether further recorded information is held on the balance of probabilities.

*The quality of the public authority's final analysis of the request.*

22. The request is worded very narrowly. The information requested must have the following qualities:
  - (1) The request asks for minutes of NHS Management Board meeting;
  - (2) It relates to 'new management arrangements' that were shared with Strategic Health Authorities in relation to the National Programme for IT;
  - (3) This information was shared in July 2006 (in order to be subject to the letter dated 21 August 2006); and
  - (4) The information must be a full extract of the final minutes that are held.
23. The Commissioner is satisfied that the public authority correctly understood what was being requested. The public authority has confirmed in writing its understanding of the request and the Commissioner is satisfied that it is the only objective reading of the request.

*The scope of the search it made on the basis of that analysis and the rigour and efficiency of that search*

24. The public authority explained that it checked what meetings were held in July 2006 for the NHS Management Board. It explained that the meetings tended to be monthly and that it located one such meeting, the meeting dated 17 July 2006.
25. It found this out by consulting the Board Secretary's notes and through liaising with the current Secretariat of the NHS Management Board.
26. The current Secretariat explained that their predecessor managed to locate the minutes that were marked as 'draft' minutes and they were contained as an attachment to an email that was sent in 2006. It explained that the 'draft' minutes were the only copy of the minutes that it was able to locate.
27. The public authority then checked the minutes for any general references to the IT Project or the 'new management arrangements'. It provided the complainant with part 2.8 which was the only information that met this description.
28. The public authority provided the Commissioner with a full copy of the draft minutes dated 17 July 2006. The Commissioner has considered these minutes and agrees that the only parts that were relevant to the request dated 23 April 2010 are those that have been identified and provided by the public authority. He therefore believes that the complainant's first argument summarised in paragraph 20 is incorrect.
29. The complainant's argument about the necessity for the presence of a final version of the minutes has been considered carefully by the Commissioner.
30. The Commissioner asked the public authority to explain its process in 2006 when the minutes were generated. The public authority explained that the draft minutes were circulated to the Board with the papers for the September 2006 meeting (there being no August 2006 meeting) and approved without amendment at that meeting. It explained that the normal practice at that time was not to circulate final minutes where the draft minutes had been agreed without amendment.
31. The above paragraph is useful for two reasons. The first is that at the time there was no business reason for the public authority to hold a different draft of the minutes. The second relates to timing. The minutes were approved after the letter was sent to the individuals. This

meant that the detail of the 'new management arrangements' could logically be placed in the letter rather than the minutes.

32. The previous Board Secretary has also provided the Commissioner with his notes in relation to the discussion in respect to Part 2.8 of the minutes. From those notes it was clear that the meeting only contained a brief discussion about this item on the agenda and there was no reference to any discussion of detail. This provides further evidence that there is no further relevant recorded information that meets the terms of the request for information.
33. The Commissioner has considered the complainant's arguments about the search being inadequate. In the Commissioner's view the search was reasonable. It was clear that there was only one set of minutes that needed to be found at an early stage. The public authority's practice outlined in paragraph 30 above meant that it was reasonable to stop the search once the single set of minutes had been found.
34. Finally, the Commissioner has considered the complainant's arguments about more information being required to enable the record of the meeting to cohere with the contents of the letter. The Commissioner has been satisfied that no more information in the minutes was required for this purpose due to the timing of the letter and the fact that the minutes are only to be a record of what was said in the meeting.

### *Conclusion*

35. The Commissioner after careful consideration has concluded that on the balance of probabilities there is no further relevant recorded information held by the public authority in respect of this request for information. He finds that the request can only be read as outlined in paragraph 22 and he has been satisfied by the results of his enquiries outlined above. He has carefully considered the complainant's contrary arguments and found that they are not supported by the evidence.

### **Procedural Requirements**

#### *Section 16(1)*

36. The complainant expressed particular concern at the quality of the advice and assistance that she received in this case. In particular, she argued that there must be other information outside the minutes held about the 'new management arrangements', the public authority should have actively identified it and offered it to her. The



Commissioner believes that it is appropriate for him to come to a considered conclusion about this matter.

37. Section 16(1) provides an obligation for a public authority to provide advice and assistance to a person making a request, so far as it would be reasonable to do so. Section 16(2) states that a public authority is to be taken to have complied with its section 16 duty in any particular case if it has conformed with the provisions in the Section 45 Code of Practice in relation to the provision of advice and assistance in that case.
38. Paragraphs 8 to 11 of the Code outline the situations when a public authority would be expected to go back to the complainant and clarify his request for information. It states this would be expected when the public authority is not able to identify and locate the information sought.
39. The public authority has explained that in its view the request was clear and unambiguous. Therefore, paragraphs 8 to 11 cannot apply because it understood what was requested and did not need to go back to the complainant to enable it to identify and locate the information sought. It explained that the complainant was welcome to submit a new request should she want different information. It explained that it also provided information from minutes that fell outside the request because it knew that they contained information that the complainant may believe to be relevant.
40. In this case, the Commissioner has considered the request objectively alongside the request for an internal review. In the Commissioner's opinion at no stage would it have been apparent that the complainant wanted anything besides the minutes of the meeting. Indeed the way the request is worded explains that anything but the minutes would not be acceptable to the complainant. There was never any doubt what information was being sought and therefore paragraphs 8 to 11 did not require the public authority to go back to the complainant.
41. In addition, there are no other relevant paragraphs in the section 45 Code of Practice that relate to the issues that the complainant has mentioned. There is no paragraph that says that additional information beyond what was requested should be offered in providing reasonable advice and assistance.
42. The Commissioner has also carefully considered the content of all the correspondence exchanged in this request. The Commissioner believes that the public authority expressed its position clearly, in accordance with the Act and tried to explain the reason for its position. It provided

all the information that it could. The complainant did not agree with its position and there was no way to resolve this impasse without approaching the Commissioner to adjudicate the case.

43. The Commissioner is therefore satisfied that the public authority complied with all the provisions in the Section 45 Code of Practice and therefore it complied with its obligations under section 16(1) of the Act.
44. Finally, the Commissioner notes that there are no other procedural provisions of the Act that have been breached in this case.

## **The Decision**

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45. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act because it:
  - Provided all the recorded information that it held was relevant to the request that it received; and
  - It provided the advice and assistance that was in line with its obligations under section 16(1) of the Act.

## **Steps Required**

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46. The Commissioner requires no steps to be taken.

## Right of Appeal

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47. 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: 0845 600 0877

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)

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.

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 10<sup>th</sup> day of January 2011**

**Signed .....**

**Andrew White**  
**Group Manager – Complaint Resolution**

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

## **Legal Annex**

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

#### **Section 1 - General right of access to information held by public authorities**

(1) 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.

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

(3) Where a public authority—

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

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#### **Section 16 – Duty to provide advice and assistance**

(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.