

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 25 June 2012

**Public Authority:** Sutton and Merton Primary Care Trust  
**Address:** 120 The Broadway  
London  
SW19 1RH

#### **Decision (including any steps ordered)**

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1. The complainant requested information from the Sutton and Merton Primary Care Trust (the Trust) in relation to the particulars of GP surgeries and the Practice Managers responsible to those surgeries.
2. The Commissioner's decision is that the Trust correctly applied section 21 of the FOIA to parts of the requested information but breached section 16 of the FOIA by failing to provide adequate advice and assistance. It also incorrectly applied section 41 of the FOIA to withhold information. In addition, the Commissioner considers that, on the balance of probabilities, the Trust does not hold the information requested in point 5 of the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information requested in parts 3, 4 and 6 of the request.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

#### **Request and response**

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5. On 24 October 2011, the complainant wrote to the Trust and requested information in the following terms:

*Could you please provide me with the following relating to doctor's surgeries / GP surgeries within the PCT.:*

- 1. name*
- 2. postal address*
- 3. email address*

*'In relation to each surgery please also include the below contact details for Practice Managers that are responsible to each practice / surgery.*

- 4. name*
- 5. telephone number*
- 6. email address*

*In accordance with the governments transparency agenda please provide the information electronically and if possible in an easily accessible, machine readable format (for example csv, xls).'*

6. The Trust responded on 24 October 2011. It informed the complainant that it was the Trust's policy not to disclose personal email addresses and informed the complainant that the other information he had requested was available from the 'NHS Choices' website.
7. Following an internal review on 4 January 2011, the Trust upheld its original decision that the information requested was available by other means, namely from the NHS Choices website. It informed the complainant that the information was therefore exempt under section 21 of the FOIA (information reasonably accessible to the applicant by other means).
8. However, it stated that mindful of providing advice and assistance under section 16 of the FOIA, the Trust was providing a spreadsheet of GP surgery addresses within the Trust's area and that of adjoining Trusts.

### **Scope of the case**

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9. The complainant contacted the Commissioner to complain about the way his request for information had been handled. Specifically, he complained that the Trust had not disclosed to him the information he had requested.
10. The Commissioner's investigation has therefore focused on whether the Trust correctly applied the FOIA to the request.

## Reasons for decision

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11. On the Commissioner's involvement in this complaint the Trust informed him that it was applying section 21 of the FOIA to points 1, 2 and 4 of the request and section 41 of the FOIA (information provided in confidence) to points 3 to 6.
12. The Commissioner informed the Trust that it appeared that some of the information requested in point 4 of the request (Practice Manager names) was not available on the NHS Choices website and sought clarification on the Trust's application of the FOIA in this regard.
13. The Trust informed the Commissioner that where such information was not available on the NHS Choices website it was applying section 41 of the FOIA.
14. As the Commissioner investigated further the Trust informed the Commissioner that it had misunderstood the meaning of 'confidence' and was no longer applying section 41.
15. When the Trust was asked to explain what approach it was taking to withhold the information in the absence of a reliance on section 41, it informed the Commissioner that it was again relying on the exemption within section 41 together with section 21.

### Points 1 to 3

16. The Trust has informed the Commissioner that it holds the names and addresses of the GP surgeries as well as contact email addresses for those surgeries.

### Points 4 and 6

17. The Trust confirmed that where GP surgeries had Practice Managers it held their names and email addresses. However, where the surgeries did not have such Practice Managers the Trust held the names and email addresses of the Senior Partners of the surgeries.
18. The complainant informed the Commissioner that, in his view, where there was no Practice Manager at a surgery, he would read his request to be for the details of the person at the surgery who carried out the function of being the head of the surgery or who was the point of contact for patient complaints.
19. The Trust confirmed to the Commissioner that the Senior Partners carried out this function where no Practice Manager existed. The Commissioner asked the Trust to clarify what meaning it had given to

the request in terms of Practice Managers and its view of the complainant's reading. The Trust did not inform the Commissioner of any alternative readings that it had considered or of its position as to whether the Senior Partners would be covered by the request.

20. The Commissioner therefore considers that the Trust does hold the information requested in points 4 and 6.

### **Point 5**

21. The Trust informed the Commissioner that it did not hold telephone numbers specifically for the Practice Managers. However, it explained it did hold 'emergency bypass' telephone numbers which it would only use to contact the surgeries in the event of an emergency. It explained that for routine contact it would source a surgery's telephone number from NHS Choices. As it also had the email addresses of Practice Managers, the Commissioner has therefore considered this to be an argument that the Trust would have no business reason to hold Practice Manager telephone numbers.
22. The complainant argued to the Commissioner that unless the Trust could provide him with reassurances that the line which corresponded to the 'emergency bypass' number was not used by Practice Managers or other staff for purposes other than being contacted in emergencies, then he would regard this as the information he requested.
23. The Commissioner asked the Trust to clarify 'whose' telephone number the emergency bypass number was and whether it was essentially a contact number for the Practice Manager (ie who would answer it), and for clarification on the use of the line.
24. The Trust informed the Commissioner that the use of the line was down to the individual GP practice and that it was not able to inform him who the line corresponded to within the practice or who would answer a call to that number as this would be down to the individual practice.
25. The Commissioner considers that, on the evidence in front of him, these 'emergency bypass' numbers cannot be said to be that of the Practice Managers and so are not within the scope of the complainant's request.

### **Section 21 & Section 16**

26. Section 21(1) of the FOIA can be applied when all the relevant requested information is reasonably accessible to the applicant. It is an absolute exemption and so there is no public interest test.

27. However, under section 16 of the FOIA a public authority has a duty to provide advice and assistance to those requesting information, so far as it would be reasonable to expect the authority to do so.
28. Prior to the Commissioner's involvement the Trust had applied section 21 to all of the information requested. Subsequently it has limited this to the information requested in points 1 and 2 and also to point 4 where Practice Managers are listed for certain surgeries on NHS Choices.
29. The Trust has stated that the information in this regard is reasonably accessible to the applicant via the NHS Choices website.
30. Having viewed the information available on the NHS Choices website, the Commissioner accepts that this information is reasonably accessible to the applicant. However, he would consider that the Trust failed to provide sufficient advice and assistance within the statutory time for compliance in directing the complainant to that information. It referred the complainant to the NHS Choices website but did not provide a link to the website, part of the website or specific instructions on how to access the information. The Commissioner would expect such steps to be taken in this case to fulfil the Trust's duty to provide advice and assistance as set out in section 16 of the FOIA.
31. The Commissioner considers that in the Trust's initial response and internal review to the complainant it incorrectly applied section 21 to points 3 to 6 of the request. The Trust argued that all of the information requested was available on the NHS Choices website. However, this was not the case.

## **Section 41**

32. Section 41(1) of the FOIA states that information is exempt from disclosure if it was obtained from a third party and the disclosure of that information would constitute an actionable breach of confidence.
33. The Commissioner considers that, for the purposes of section 41, a breach will always be actionable if:
  - the information has the necessary quality of confidence;
  - information was imparted in circumstances importing an obligation of confidence; and
  - there was an unauthorised use of the information to the detriment of the confider (the element of detriment is not always necessary).
34. The Commissioner is of the view that an actionable breach is not just one that is arguable but one that would succeed on the balance of

probabilities. Further, he considers that a breach will no longer be actionable when there is a defence in the public interest.

35. For the exemption to apply therefore, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed.

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

36. The Trust informed the Commissioner that the withheld information was provided to it by the individual GP surgeries who are legal entities independent from the Trust and who offer their services to the general public covered by locally agreed contracts.
37. The Commissioner is therefore satisfied that the information was obtained from third parties.

### **Necessary quality of confidence**

38. In the Commissioner's view, information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. Information which is known only to a limited number of individuals will not be regarded as being generally accessible, though it will be if it has been disseminated to the general public. Information which is of importance to the confider should not be considered trivial.
39. The complainant has argued to the Commissioner that the withheld information cannot be said to have the necessary quality of confidence because individual patients may be able to access that information from their surgery. He also highlighted that some Practice Manager names were listed on the NHS Choices website.
40. The complainant has argued that Practice Managers are to be seen as high profile figures within surgeries and that not only do their job descriptions often highlight this public facing role as an 'ambassador', they are also responsible for the surgeries and deal with complaints made to the surgeries.
41. On a number of occasions the Commissioner sought the Trust's view on this issue and its arguments for why the information had the necessary quality of confidence.
42. The Trust has informed the Commissioner that the withheld information is held in 'cascade listing' format and that the information is only held for the purpose of providing alerts and confidential updates to the surgeries. It further stated that whilst some Practice Managers may place their names on the NHS Choices website, this is not a contractual requirement.

43. It also argued that some surgeries may choose to provide the information which the Trust was withholding, but that this would be a matter for each individual surgery. It further argued that the Practice Manager's role of 'ambassador' was limited to the patients and prospective patients of the surgery rather than the public at large.

#### Point 3 - Surgery email addresses

44. The Trust has not informed the Commissioner of any specific reason why the email addresses of surgeries would have the necessary quality of confidence. The postal addresses of surgeries are already in the public domain and the Commissioner can see little difference between those addresses and electronic addresses for the surgeries.
45. The Trust has informed the Commissioner that it fears the email addresses may become blocked with unsolicited mail. Whilst this may be a concern of the Trust, it has not informed the Commissioner of any concerns by the third parties of such effects or any examples of such harm occurring in the past. The Commissioner considers that the information has not been shown to be more than trivial and therefore does not consider this information to have the necessary quality of confidence.

#### Points 4 and 6 - Practice Manager names and email addresses

46. The Commissioner considers that the Trust's arguments as to how this information has the necessary quality of confidence are undermined, at least in terms of the names of Practice Managers, for that information being in the public domain for some surgeries. He also considers that the job role of those involved reduces the likelihood that such information can be said to have the necessary quality of confidence.
47. In regard to the email addresses of the Practice Managers, the Commissioner has not been provided with arguments as to why this information in itself has the necessary quality of confidence. The Trust has not presented any arguments to him as to whether the third parties would consider the information to be particularly important to them. It has instead again relied upon a potential detriment to the surgeries to argue that disclosure of the email addresses would lead to the surgeries receiving unsolicited mail which would block the email addresses.
48. However, considering the Trust's limited arguments and the senior position within each surgery of the Practice Managers and their duties and role, the Commissioner considers that such information may not be said to have the necessary quality of confidence as it has not been established that it is more than trivial.

### **Actionable breach not established**

49. As discussed above, the Commissioner considers that for section 41 to apply a public authority must establish that, on the balance of probabilities, an action if brought would succeed. It is not enough for such a breach to be arguable.
50. The Commissioner has taken into consideration all of the arguments put forward by the Trust and the complainant. He is of the view that in this case the Trust has not established that the information requested has the necessary quality of confidence. Whilst the Commissioner appreciates that the purposes for which information is used and which it is understood by the third parties it is to be used may impact a consideration of whether that information attracts confidence, the Trust has not been able to articulate this fully to the Commissioner.
51. As the Commissioner is of the view that the Trust has not established that the requested information has the necessary quality of confidence, it has not therefore established that an actionable breach of confidence would result from disclosure. Consequently the Commissioner has not gone on to consider the remaining limbs of the test.
52. The Commissioner finds that the Trust failed to correctly apply section 41 of the FOIA in this case.

### **Other matters**

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53. Although it does not form part of this decision notice the Commissioner wishes to highlight the following:
54. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. As he has made clear in his "Good Practice Guidance No 5", the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. In this case an internal review was requested on 24 October 2011 and it was provided on 4 January 2012. The Commissioner is therefore concerned that it took approximately 49 working days for the review to be completed by the Trust as he is not aware of any exceptional circumstances to justify this delay.



55. In the Commissioner's opinion, during the course of his investigation the Trust has shown an apparent lack of knowledge of the requirements of the FOIA and this has frustrated the Commissioner's attempts to progress the matter efficiently.
56. The Trust's initial responses to this information request were poor. The Commissioner also considers that the authority's responses to his own enquiries could have been much improved, particularly when explaining reliance on specific exemptions. The Commissioner would expect the Trust to improve the quality of its responses in the future.

## Right of appeal

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57. 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,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

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

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

58. 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.
59. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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**Cheshire**  
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