



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

### **Decision Notice**

**Dated 16 May 2006**

**Public Authority: Eastbourne Downs Primary Care Trust**

**Address: 1 St Anne's Road  
Eastbourne  
East Sussex  
BN21 3UN**

#### **Summary Decision and Action Required**

**The Commissioner's decision in this matter is that the Public Authority has dealt with the Complainant's request in accordance with Part I of the Act in that it has complied with its obligations under section 1(1).**

**In view of these matters the Commissioner hereby gives notice that he does not require any remedial steps to be taken by the Public Authority.**

- 1. Freedom of Information Act 2000 (the 'Act') – Applications for a Decision and the Duty of the Commissioner**
  - 1.1 The Information Commissioner (the 'Commissioner') has received an application for a decision whether, in any specified respect, the Complainant's request for information made to the Public Authority (the 'Authority') has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 (the 'Act').
  - 1.2 Where a complainant has made an application for a decision, unless:
    - a complainant has failed to exhaust a local complaints procedure, or
    - the application is frivolous or vexatious, or
    - the application has been subject to undue delay, or
    - the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

- 1.3 The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

## **2. The Complaint**

- 2.1 The Complainant submitted a request, on 7 March 2005, for the following information from the Authority in accordance with section 1 of the Act.
- 2.2 1) letters from the Audit Commission expressing concern at the financial state of the Authority, and
- 2) all information held on all complaints made about individuals including GPs and employees of the Authority.
- 2.3 The Authority responded on 4 April 2005, providing information in relation to part 1) of the request and invoking the exemption under section 40 (personal information) of the Act in relation to part 2) of the request.

## **3. Relevant Statutory Obligations under the Act**

**Section 1(1)** provides that –

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

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

### **Section 40**

40. - (2) Any information to which a request for information relates is also exempt information if-
- (a) it constitutes personal data which do not fall within subsection (1), and
  - (b) either the first or the second condition below is satisfied.
- (3) The first condition is-
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
    - (i) any of the data protection principles, or
    - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
  - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of

the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

## **Section 41**

41(1) Information is exempt information if –

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.

## **4. Review of the case**

4.1 The complainant asked the Commissioner to investigate whether:

a) the information requested under part 1) of the request has been provided to the complainant, and

b) the Authority has applied the exemptions under section 40 and 41 correctly in order to withhold information requested under part 2) of the request.

The Commissioner's considerations of the complainant's allegations are set out in turn as follows:

### **4.2 Audit Commission letters**

The Authority responded to the complainant on 4 April 2005; this included a letter from a District Auditor dated 7 January 2005. The Authority has searched its finance team's central filing system; its accountant's audit files and its electronic systems. No further information has been found as a result of these searches. Additionally, the Authority has stated that the District Auditor's letter was a general circular letter, requiring no specific response; therefore the Authority would not hold any correspondence it generated itself in response to that letter.

### **4.3 Complaints about individuals**

In a letter to the Commissioner of 30 November 2005, the Authority confirmed that it wished to apply the exemption under section 41 (information provided in confidence) as well as that under section 40 (personal information) to withhold the information on complaints made about the individuals listed in part 2) of

the request. The Commissioner's consideration of these exemptions is outlined below.

#### 4.4 **Section 40 (personal data)**

In its response of 4 April 2005 the Authority confirmed that the requested information includes personal information, which is exempt under section 40 of the Act. The personal information includes both that of the complainant herself and that of third parties. The complainant's own personal data is exempt under section 40(1) as the Data Protection Act 1998 (the DPA 1998) provides the appropriate route of access to such information. In a telephone call of 10 May 2006, the Authority assured the Commissioner that the complainant had been provided with her personal data, of which she is the subject (section 1 DPA 1998 refers) in response to the request. The Commissioner is satisfied with this assurance.

With regard to personal data of which a third party is the subject, this is exempt where disclosure of that data would contravene any of the data protection principles in the Data Protection Act 1998 (the "DPA"). This is an absolute exemption which means there is no requirement to consider the public interest.

The Commissioner is satisfied that the information requested by the complainant constitutes personal data and sensitive personal data of the patients who made the complaints. The First Data Protection Principle (the First Principle) requires that personal data are processed fairly and lawfully and only where one of the conditions listed in Schedule 2 (or, in the case of sensitive personal data, one of the conditions in Schedule 3) of the DPA is satisfied.

The Commissioner is of the view that a disclosure would be unfair and therefore contravene the First Data Protection principle. The reasons for this view are outlined below.

The Authority has stated that the patients in question have not consented to their personal data being disclosed and that consent would be unlikely to be obtained. The patients provided this information in order for the Authority to investigate their complaint; there is no reason to believe that they would have given consent to the release of this information to third parties. There is no obligation for the Authority to seek those patients' consent for the release of the information in light of the complainant's request, especially considering the nature of the information likely to be contained in such a complaint. The information has been provided to the Authority by patients in order to complain about their healthcare treatment. The Authority has a duty to consider these complaints with the ultimate aim of ensuring that patients are given adequate treatment. It is important that patients are able to make complaints about their doctors without fear that such information will be disclosed to third parties.

As the First Data Protection principle would be contravened if the information was disclosed, the information is exempt by virtue of section 40.

#### **4.5 Section 41 (information provided in confidence)**

The complainant has asked the Commissioner to consider the exemptions at sections 40 and 41 of the Act separately. To a large extent the two exemptions overlap in this particular case: if disclosure would constitute an actionable breach of confidence, the processing of the personal data in question would be unlawful and thus breach the first data protection principle. The Commissioner is satisfied for the following reasons that section 41 is engaged.

It is clear that the information was obtained by the Authority from other persons making complaints and not generated by the Authority itself. The information therefore falls within section 41(1)(a) of the Act.

The Commissioner is satisfied, moreover, that the information was provided to the PCT in circumstances which created an expectation of confidentiality. Even though he has not inspected the requested information, he is satisfied that by its very nature (complaints about medical malpractice) the information must comprise information which is more than merely trivial. Even if it were possible to extract some information of a non-sensitive kind, it is clear that this would not satisfy the complainant and that even selective disclosure would be likely to undermine the duty of confidence owed to patients.

The Commissioner is satisfied moreover that those who have complained to the Authority would have the ability to take action through the courts for breach of confidence.

In summary, the Commissioner is satisfied that the requested information is exempt by virtue of section 41 of the Act.

### **5. The Commissioner's Decision**

- 5.1 The Commissioner's decision in this matter is that the Public Authority has dealt with the Complainant's request in accordance with Part I of the Act in that it has complied with its obligations under section 1(1).

### **6. Action Required**

In view of these matters the Commissioner hereby gives notice that he does not require any remedial steps to be taken by the Public Authority.

**7. Right of Appeal**

7.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

7.2 Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

**Dated the 16<sup>th</sup> day of May 2006**

**Signed .....**

**Phil Boyd  
Assistant Commissioner  
Information Commissioner  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**