

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 19 March 2008

Public Authority: Hounslow Primary Care Trust
Address: Phoenix Court
531 Staines Road
Hounslow
TW4 5DP

Summary

The complainant submitted a request to Hounslow Primary Care Trust ('the Trust') for communications between it and a number of named organisations and individuals in relation to the care provided to his late father-in-law and issues concerning a particular nursing home. It took the Trust nearly seven months to respond to this request. The complaint alleged that this response did not include all of the information the Trust held covered the by scope of this request. During the course of the Commissioner's investigation the Trust located a significant number of further documents and disclosed these to the complainant. However, the Trust relied on sections 31, 41 and 42 to withhold a small number of these documents and section 40 to redact the names of various individuals. The Commissioner has concluded that Trust was incorrect to withhold documents on the basis of section 31, but correct to withhold documents on the basis of section 41 and 42. The Commissioner has also concluded that the Trust was incorrect to withhold the majority of the individuals' names on the basis of section 40. The Commissioner has concluded that on the balance of probabilities, the Trust does not hold any further documents falling within the scope of the request. However, the Commissioner has also concluded that in handling this request the Trust committed numerous procedural breaches of the Act.

The Commissioner's Role

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

The Request

The first request

2. The complainant made a previous information request prior to the request which is the focus of this decision notice. The Commissioner considers it necessary, for reasons which will become clear below, to briefly outline the Trust's handling of this earlier request before turning to the specific request which is the focus of this decision notice.
3. The complainant originally submitted a request to the Trust on 1 January 2005 for information the Trust held relating to the treatment provided to his late father in-law. The request specifically asked for correspondence the Trust had sent or received concerning the treatment of his late father in-law with 30 separate organisations or individuals. The Trust provided the complainant with some information covered by the scope of his request on 21 March 2005. However, the complainant contacted the Trust on 22 March 2005 and explained that he was unhappy with the quantity of information that had been disclosed to him and suggested that he believed that the Trust held substantially more information than had been disclosed. The Trust failed to respond to this request for an internal review until the Commissioner's intervention. The Trust then completed an internal review and on 10 February 2006 informed the complainant that it was refusing to answer his request on the basis of section 12 of the Act (cost of compliance exceeds the appropriate limit), although the Trust invited the complainant to submit a refined request.

The second request

4. On 14 February 2006 the complainant submitted a narrowed request to the Trust in which he asked for all incoming and outgoing correspondence between the Trust and:

Vicarage Farm Nursing Home ('VFNH')
Dr X
Metropolitan Police
West London Coroner

regarding the care provided to the complainant's late father in-law and for the police enquiry following the death of his father in-law.

5. The complainant contacted the Commissioner on 24 March 2006 and complained that the Trust had failed to respond to his refined request of 14 February 2006. Over the following months the complainant and Commissioner contacted the Trust numerous times by email, by post and by telephone in order to get the Trust to respond to this revised request. However, despite the Commissioner's intervention the Trust failed to respond to this request. Consequently, the Commissioner issued a decision notice (FS50072714) on 11 August 2006 which obliged the Trust to respond to the refined request of 14 February 2006 within 35 calendar days.

6. The Trust provided the complainant with a response on 7 September 2006 and disclosed some information covered by the scope of his 14 February request. In this letter the Trust's representative noted that 'I can confirm that we have not withheld any other material'.
7. However, the complainant contacted the Trust on 11 and 15 September 2006 and explained that in his opinion, the Trust had still failed to provide him with all of the information covered by the scope of his request.
8. Subsequently, the Trust provided the complainant with further information covered by the scope of his request on 3 October 2006.

The Investigation

Scope of the case

9. On 15 September 2006 the complainant contacted the Commissioner in order to complain that the Trust had failed to provide him with all of the information covered by the scope of his request. Subsequently, the complainant also confirmed to the Commissioner that despite the further disclosures made by the Trust on 3 October 2006 he remained of the view that the Trust held information covered by the scope of his 14 February request which had still not been provided to him. The complainant noted that the additional package of information disclosed to him on 3 October contained a total of 44 items, many of which he had not previously received. The complainant explained to the Commissioner that given the additional amount of documentation that had been disclosed by the Trust in October 2006, despite its previous assurances of 7 September 2006 that no further information was held, he believed that the Trust held further paper work which had not been disclosed.
10. The complainant provided the Commissioner with a detailed outline of the information which he considered had not been provided to him. The complainant also complained that the Trust was incorrect to refuse information to him on the basis of the Data Protection Act 1998 ('DPA').

Chronology

11. The Commissioner wrote to the Trust on 31 October 2006 in order to discuss the complainant's concerns over its handling of this request. The Commissioner explained that the complainant had alleged that the Trust held a number of other documents which had not been disclosed. The Commissioner described in detail what he understood these documents to be and asked the Trust to provide a detailed explanation of the steps it had taken to locate these documents. The Commissioner also asked the Trust to explain why it had withheld certain documents on the basis of section 40 of the Act. The Commissioner also asked to be provided with copies of these withheld documents.

12. Following further correspondence with the complainant, the Commissioner contacted the Trust again on 14 November 2006 in order to explain that the nature of the information that the complainant believed had not been supplied to him was broader than that suggested in the Commissioner's letter of 31 October 2006. Consequently, the Commissioner asked the Trust to respond to a number of further points.
13. Having received no response to his letters of 31 October 2006 and 14 November 2006, the Commissioner emailed the Trust on 6 December 2006 and asked for a substantive response to both of his letters to be provided within 10 working days. On 21 December 2006 the Commissioner contacted the Trust again because he had not received any response from the Trust and explained that if he did not receive a response by 8 January 2007 he would be forced to issue an information notice. Under section 51 of the Act the Commissioner can issue a public authority with an information notice which requires it to provide him with information so that he can make a determination as to the compliance or otherwise with the Act. On 11 January 2007 a case officer spoke to a representative of the Trust who explained that the Commissioner would be provided with a response to his letters the next day.
14. Having received no response from the Trust, the Commissioner served an information notice on the Trust on 18 January 2007. This information notice required the Trust to provide the Commissioner with sight of the documents and information requested in his letters of 31 October 2006 and 14 November 2006. The notice required the Trust to furnish the Commissioner with this information within 30 calendar days.
15. The Acting Chief Executive of the Trust acknowledged receipt of the information notice on 24 January 2007 and stated that a response would be sent in line with the timescale specified in the notice.
16. Having received no further response to the information notice, the Commissioner contacted the Trust on 9 March 2007. The Commissioner informed the Trust that under the terms of the Act he may bring proceedings in the High Court having certified that the Trust had failed to comply with the information notice. However, prior to making such a certification, the Commissioner invited the Trust to make any representations to him which might make such a course of action inappropriate. Having failed to receive any response from the Trust, the Commissioner wrote again to the Trust's Acting Chief Executive on 16 March 2007 and 28 March 2007. However, despite these further letters the Commissioner did not receive any response from the Trust.
17. On 31 July 2007 the Commissioner served draft documents on the Trust which explained that the Commissioner intended to bring proceedings against the Trust in the High Court for contempt of court for failing to comply with the information notice dated 18 January 2007. In his covering letter of 31 July 2007 the Commissioner explained that if he did not receive a response to the information notice by 14 August 2007 the papers would be lodged with the High Court.

18. Having received the Commissioner's latest communication, the Trust subsequently telephoned a solicitor in the Commissioner's office and informed him that the Trust would send a substantive response to the information notice by 17 August 2007 at the latest. On this basis the Commissioner agreed to suspend lodging the documents in the High Court.
19. The Commissioner received a response from the Trust to the information notice on 15 August 2007. This response included answers to the questions contained within the information notice and copies of the information the Trust had also initially withheld on the basis of section 40. The Trust's submissions to the Commissioner also appeared to include a number of further documents that fell within the scope of the complainant's request but which it appeared had not yet been disclosed to the complainant.
20. On 1 September 2007 the Commissioner wrote to the Trust in order to seek clarification on a number of issues. The Commissioner noted that he had been provided with a significant amount of documents falling within the scope of the request, however, it was not clear from the Trust's submissions whether it had in fact already disclosed some of these documents to the complainant or alternatively, if it had not disclosed these documents whether it would be willing to now do so. The Commissioner informed the Trust that its position was that if it did not want to disclose these documents under the Act, it would need to explain which exemptions within Part II of the Act it was relying on to withhold these documents and why it considered these exemptions to apply. The Commissioner informed the Trust that he intended to provide the complainant with a schedule of documents which he had recently received so that the Commissioner could clarify which documents the complainant was currently in possession of. The Commissioner asked the Trust if it had any objections to this.
21. The Commissioner received a response from solicitors acting on behalf of the Trust on 21 September 2007. The Commissioner was informed that the Trust had no objections to the complainant being provided with a schedule of documents. The Trust's solicitors indicated on the schedule which documents it understood had already been disclosed to the complainant, which documents it was now prepared to disclose to the complainant, and which documents it considered to be exempt from disclosure. The Trust's solicitors identified a number of documents that it considered to be exempt on the basis of section 30, some on the basis of section 41 and some on the basis of section 42. The Trust's solicitors failed to provide any explanation as why it believed these exemptions applied.
22. The Commissioner wrote to the Trust on 2 October 2007 and explained that he needed to be provided with a detailed explanation as to why it believed each of the exemptions applied to the various documents. The Commissioner asked the Trust a number of specific questions about the application of the exemptions it had cited. The Commissioner also informed the Trust that it could not in fact rely on section 30 of the Act because it did not have the necessary statutory powers needed to cite this exemption. The Commissioner also asked the Trust to now disclose to the complainant the further documents it had located and it did not consider exempt under the Act.

23. On 16 October 2007 the Trust's solicitors informed the Commissioner that it had now disclosed further documents to the complainant, but it had removed the names of patients and employees on the basis of section 40(2) of the Act. The Trust's solicitors provided the Commissioner with an explanation of why it considered some documents to be exempt under section 41 and 42 of the Act. The Trust's solicitors also informed the Commissioner that the Trust was now relying on section 31(1)(g) to withhold the documents it had previously suggested were exempt under section 30.
24. On 16 November 2007 the Commissioner wrote to the Trust again in order to seek further clarification on why it believed that a number of exemptions applied to some of the withheld documentation. The Commissioner also informed the Trust that the complainant had reviewed the recently disclosed material and he believed that a substantial number of documents had still not been disclosed to him. The Commissioner provided the Trust with a list of these documents and asked the Trust to confirm whether it did in fact hold these documents.
25. The Commissioner received a response to this letter on 14 December 2007. In this response the Trust's solicitors indicated that a small number of further documents had been located and these had been recently provided to the complainant. However, with regard to the other outstanding documents the Trust's solicitors informed the Commissioner that:

'We can confirm that those documents listed by [the complainant] that have not been disclosed with this letter are either not within the power, control or possession of the Trust, or are exempt from disclosure as outlined in previous correspondence'.
26. The Commissioner contacted the Trust again on 30 January 2008. The Commissioner informed the Trust that the explanation it had received from its solicitors concerning the list of outstanding information compiled by the complainant (see quote above) was insufficient. The Commissioner explained that this response was not sufficiently detailed to allow him to conclude his investigation of this complaint. The Commissioner drew the Trust's attention to previous decision notices he had issued and the decisions issued by the Information Tribunal. The Commissioner highlighted the fact that these rulings suggested that the Commissioner has to investigate complaints in detail and reach a reasoned and evidenced conclusion as to whether particular documents falling within the scope of a request are held by the public authority and if so, whether each of the documents is exempt from disclosure and which exemption in the Act is applicable.
27. The Commissioner received a response from the Trust's solicitors on 13 February 2008. In this response the Trust's solicitors provided the Commissioner with a detailed explanation of its position with regard to each of the outstanding documents. The Commissioner has discussed the content of this response in detail in the analysis section below.

Findings of fact

28. The scope of the complainant's complaint in relation to his request of 14 February 2006 has to some degree broadened during the course of the Commissioner's investigation, due largely to the Trust's identification of further documents falling within the scope of the request. Therefore, the Commissioner believes that it would be useful if he summarises below the outstanding matters for his consideration.

Information not disclosed to the complainant

29. The complainant has identified a significant number of specific documents which he believes the Trust may hold, but have not been disclosed. The Commissioner has listed these documents in the annex attached to this notice..
30. The complainant has also described a number of classes of documents which he believes the Trust may also hold. These can be summarised as:
- Documents relating to the police investigation into his father-in-law's death
 - Further correspondence between Trust and GMC concerning Dr X.
 - Documents relating to replacement of a particular practice nurse.

Exemptions relied upon by the Trust

31. The Trust is withholding four documents on the basis that they are exempt on the basis of section 41 (all of the documents that the Trust has withheld are listed in the annex).
32. The Trust is withholding five documents on the basis that they are exempt on the basis of section 42.
33. The Trust is withholding five documents on the basis of section 31.
34. The Trust has also made redactions to a number of documents on the basis of section 40(2).

Analysis

Procedural matters

35. Section 1 of the Act states that:

'1(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'.

36. Section 10 of the Act states that a public authority must comply with section 1 no later than 20 working days following the date of receipt of the request.
37. If, when replying to a request, a public authority withholds information on the basis that it is exempt from disclosure on the basis of the exemptions contained in Part II of the Act, then it must provide the applicant with a refusal notice compliant with section 17 of the Act.
38. In dealing with the complainant's revised request of 14 February 2006, the Commissioner believes that the Trust committed numerous breaches of these procedural requirements of the Act.
39. The Trust failed to respond to the complainant's request of 14 February 2006 until 7 September 2006 a period which clearly exceeds the twenty working days limit proscribed by section 10 of the Act. The previous decision notice issued FS50072714 has already found the Trust in breach of the Act for failing to respond to this request within this time limit and therefore the Commissioner does not need to find the Trust in breach of section 10 again.
40. However, as is clear from both the 'Scope of Case' and 'Chronology' sections above, subsequent to the Trust's initial disclosure of information on 7 September 2006 it made a number of further disclosures of information following further enquiries from both the complainant and the Commissioner.
41. Perhaps most notably, on 7 September 2006 a senior manager at the Trust informed the complainant that 'I can confirm that we have not withheld any other material.' However, on 3 October 2006 the same representative of the Trust provided the complainant with a further 44 documents.
42. In the Commissioner's opinion by adopting a piecemeal approach to disclosing information to the complainant that fell within the scope of his request, it in effect committed a number of section 10 breaches by failing to disclose information. The Commissioner has commented further on the Trust's piecemeal disclosure in the 'Other Matters' section of the notice.
43. As is also clear from the 'Chronology', during the course of the Commissioner's investigation, the Trust subsequently relied on a number of exemptions to withhold information, exemptions which it had not cited when initially responding to the complainant's request. By failing, to provide a refusal notice which cited the exemptions upon which the Trust relied, the Commissioner considers that the Trust breached section 17 of the Act.

Information not disclosed to the complainant

44. The complainant has alleged that despite the Trust's various disclosure of information, he believes that the Trust may still hold further information covered by the scope of his request which has not been disclosed to him.
45. The complainant has identified a number of specific documents which he believes the Trust may hold. These are listed in the annex at the end of this notice.

46. The complainant has also described a number of classes of documents which he believes the Trust may also hold.
47. These can be broadly summarised as:
 - Documents relating to the police investigation into his father-in-law's death
 - Further correspondence between Trust and GMC regarding Dr X.
 - Documents relating to replacement of a particular practice nurse.
48. In order to investigate the complainant's allegations the Commissioner asked the Trust to explain on a number of occasions the steps it had taken to search and locate information falling within the scope of the request. The Commissioner also provided the Trust with lists of potentially missing documents and asked for a detailed explanation of whether it held these documents.

The Trust's position

49. In the last communication the Commissioner received from the Trust's solicitors (13 February 2008) he was provided with a detailed explanation of the steps the Trust had taken to locate the information requested by the complainant.
50. The Commissioner was informed that the Trust had expended considerable time and resource in seeking to locate the various documents referred to by the complainant. The Commissioner understands that archive records relating to this case are contained in 22 box files. The Trust has explained that it has conducted a number of searches of these files in order to identify the information that may fall within the scope of the complainant's request. The Trust explained that its most recent search involved a five day search of its record facility.
51. The Trust has explained that in order to effectively conduct any further searches of this archive it would be most practical for this to be achieved by a full scale exercise to catalogue its documents. In the Trust's opinion this exercise would 'realistically take at least several weeks in order to arrange for the re-sourcing and to conduct a useful cataloguing process'.
52. Furthermore the Trust's position is that it does not believe that it is likely to hold the majority of the documents listed in the annex.
53. With regard to the documents that relate to the care home inspections conducted by the Ealing, Hammersmith & Hounslow Health Authority (EHHHA) in the period prior to 1 April 2002 the Trust has explained that: On 1 April 2002 the EHHHA was abolished and its statutory function was divided between three new established NHS PCTs, namely: Ealing PCT, Hammersmith and Fulham PCT, and Hounslow PCT and also to the North West London Health Authority (which became the North West London Strategic Health Authority until its abolition and succession by the London Strategic Health Authority). The Trust has explained that not all of the EHHHA's records were transferred to the newly formed Trust and that the Trust does not routinely keep historic records of care home inspection reports conducted by its predecessor organisation.

54. Furthermore, the Trust has explained that since 1 April 2002, the statutory inspection role was taken over by the National Care Standards Commission for the period between 1 April 2002 to 31 March 2004.
55. With regard to the remaining documents (i.e. non-inspection report documents) the Trust has explained that despite having conducted a recent five day search for these records, they cannot be located and it is likely that a number of these documents were not transferred to the Trust following the break-up of the EHHHA.

The Commissioner's position

56. In investigating cases involving an issue where it is disputed whether information is held by a public authority, the Commissioner has been guided by the approach the Information Tribunal adopted in the case Information Commissioner v Environment Agency (EA/2006/0072). In this case the Tribunal indicated that the test for establishing whether information was held by a public authority was not certainty, but rather whether on the balance of probabilities, the information is held.
57. In light of the Trust's handling of these information requests, i.e. piecemeal disclosures following further inquiries from the complainant and the Commissioner, the Commissioner accepts that is perfectly understandable for the complainant to believe that the Trust may hold more information. To a large extent, the more information that the Trust has disclosed during the course of the Commissioner's investigation, the more suspicion grows that they may still have further information covered by the scope of the complainant's request. Moreover, the Commissioner appreciates that a number of the missing documents are very similar to those previously located and disclosed, e.g. a number of the inspection reports of VFNH have been disclosed but the Trust have argued that they cannot find copies of other inspection reports.
58. In the initial stages of his investigation the Commissioner had serious reservations as to whether the Trust had in fact disclosed all of the relevant information. These reservations were based not only on the issues identified by the complainant, but also on the weakness of the Trust's responses to the Commissioner's inquiries.
59. However, following recent discussions with the Trust, the Commissioner is now satisfied that the Trust has conducted a sufficiently in-depth and thorough search of its archived records. The Commissioner notes that in the most recent search a member of the Trust's staff spent 5 working days searching for relevant documents. Furthermore, the Commissioner considers that the Trust's explanation as to why it may not hold the outstanding documents to be reasonable; i.e. there was no need or reason for the Trust to inherit all of the missing documentation that was created by its predecessor the EHHHA. Simply, because the Trust holds some of this archived material the Commissioner does not necessarily accept that this means that the Trust must hold the remainder of the missing archived information. Another similar explanation could be that only a

limited number of documents were transferred from the EHHHA to the Trust and in fact the remainder of the information is not in fact held by the Trust.

60. Given the recent extensive searches that the Trust has now conducted, the Commissioner is satisfied that on the balance of probabilities, the Trust does not hold any further information covered by the scope of the request.¹

Exemptions

Section 31

61. Section 31(1)(g) states that information is exempt from disclosure if its disclosure would, or would be likely to, prejudice:

'(g) the exercise by any authority of its functions for any of the purposes specified in subsection (2)'.

62. The full list of the purposes listed in subsection (2) of section 31 is included in the legal annex attached to this notice.

63. Clearly for a public authority to rely on section 31(1)(g) to withhold information, it must also cite a specific purpose in subsection (2) and explain to which authority that purpose relates.

64. Despite the Commissioner asking the Trust a number of times to explain which purpose of sub-section (2) it considered relevant, the Commissioner was simply provided with the following response by the Trust's solicitors:

'The information contained in the documents our client is seeking to exempt under Section 30 relates to investigation carried out by Hounslow CID. As such, the release of these documents could prejudice the exercise of its function to investigate potentially criminal activities. These documents are therefore exempt from disclosure pursuant to section 31(1)(g).

Our client has attempted to clarify with Hounslow CID the current status of this investigation but has been unable to do so'.

65. However, the Trust's solicitors did indicate to the Commissioner that Hounslow CID had 'previously indicated that they were opposed to the disclosure of these documents'.

¹ The Commissioner also notes that section 12 of the Act allows public authorities to refuse to answer requests if the cost of complying with a request is estimated to exceed the appropriate limit. In this case, the limit for the Trust is £450 based on a cost of £25 per hour for undertaking any of the following four activities: determining whether it holds the information; locating the information; retrieving the information; and extracting the information. Although the Trust has not sought to rely on section 12 of the Act to refuse to answer the second request of 14 February 2006, the Commissioner believes that on the basis the time the Trust has expended in responding to this request it would now be able to correctly rely on section 12 of the Act.

66. Furthermore, although section 31 is a qualified exemption, the Commissioner was not provided with any comment in relation to the Trust's consideration of the public interest test in relation to disclosure of this information and why it had concluded that the public interest favoured withholding this information. Again this was despite a number of requests from the Commissioner for the Trust to do so.
67. On the basis of the Trust's brief submissions, the Commissioner assumes that the purpose in sub-section (2) of section 31 upon which the Trust is relying is 31(2)(a) which states:
- 'the purpose of ascertaining whether any person has failed to comply with the law'.
68. As section 31 is a prejudiced based exemption, the Trust has to be able to demonstrate that disclosure of this information would, or would be likely to result in the prejudice that the exemption is designed to protect. In this case, the prejudice would be to the Metropolitan Police's ability to ascertain whether any person has failed to comply with the law.
69. As the Commissioner has noted above the Trust failed to provide any explanation as to how disclosure of this information would result in this prejudice. This is despite the Commissioner informing the Trust that the onus is on the public authorities, rather than the Commissioner, to demonstrate why they consider an exemption or exemptions to apply. In circumstances where it is possible that disclosure may harm a police investigation, the Commissioner would not consider disclosure of the information lightly; simply because a public authority had failed fully understand how the Act was worked this does not automatically make the information not exempt from disclosure. However, the Commissioner has reviewed in detail these documents and does not believe that their disclosure under the Act would, or would be likely to, prejudice the Metropolitan Police's ability to ascertain whether any person has failed to comply with the law. Therefore, the Commissioner has concluded that the documents numbered 1 to 4 are not exempt from disclosure on the basis of section 31(1).

Section 41

70. Section 41 of the Act provides an exemption from the right to know if the information in question was provided to the public authority in confidence. In order for information to be considered to have been provided in confidence, it has to meet two criteria:
- Firstly, it has to have been obtained by the public authority from a third party.
 - Secondly, disclosure of the information has to constitute an actionable breach of confidence.
71. The Commissioner believes that a breach will be actionable if:
- The information has the necessary quality of confidence;

- The information was imparted in circumstances importing an obligation of confidence.

72. However, a breach of confidence will no longer be actionable when there is a public interest defence.

Was withheld information obtained from a third party?

73. The Commissioner accepts that all four documents numbered 10-13 in the annex were obtained by the Trust from a third party; in the case of the first document this was provided to the Trust by a GP and with regard to the remaining documents these are letters received by the Trust from that GP's practice manager. Therefore the four documents potentially fall within the scope of section 41.

Does the information have the necessary quality of confidence?

74. In the Commissioner's opinion, information will have the necessary quality of confidence if it is not otherwise accessible, or if it is more than trivial.

75. The Commissioner is satisfied that these four documents are not otherwise accessible to the complainant or public. With regard to the issue of accessibility, the Commissioner has noted that document 11 was in fact cc'd to a third party and that document 12 is in fact a letter sent to the GMC and simply passed on by the confider to the Trust for its information. Therefore, other parties in addition to the Trust and the confider may have access to these respective documents (assuming that is that the third parties have not destroyed their copies). However, in the Commissioner's opinion, simply because information is disclosed to a limited audience this does not mean that it has lost its quality of confidence.

76. The Tribunal in the case of *S v the Information Commissioner and the General Register Office (EA/2006/0030)* supported this view:

'information in the public domain loses the quality of confidence but dissemination to a limited number of people does not stop information from being considered to be confidential' (Tribunal at paragraph 78).

77. With regard to the issues of triviality, the Tribunal in the case of *S* commented that 'information cannot be said to be trivial if it is of importance to the person whose privacy is being infringed'.

78. Two of the documents withheld by the Trust concern the performance issues of a GP. The two other documents concern the employment status of the practice manager at this particular GP's surgery. Therefore, the Commissioner is satisfied that the information contained in the four documents is not trivial and consequently, the documents do have a quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

79. The Commissioner does not believe that there can be an absolute test of what constitutes a circumstance giving rise to an obligation of confidence, he notes that the judge in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415 suggested that a 'reasonable person' test may be a useful one:

'If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence'.

80. Given the nature of issues that the documents cover, i.e. the performance of a GP and the employment status of an individual, in the Commissioner's opinion it is reasonable to conclude that these documents were provided to the Trust in circumstances importing an obligation of confidence.

Would the Trust have a defence to a claim of confidence based on the public interest in disclosure of this information?

81. Section 41 is an absolute exemption rather than qualified exemption and therefore there is no public interest test to be applied under section 2 of the Act. However, under common law there is a defence of public interest to a claim of breach of confidence. This means that disclosure will not constitute an actionable breach of confidence if there is a public interest in disclosure which outweighs the public interest in keeping the information confidential. Under the public interest test in the Act, it is assumed that information should be disclosed unless the public interest in maintaining the exemption exceeds that public interest in disclosure. Under the law of confidence this test is reversed; the public interest test assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence. Disclosure would, therefore, be lawful where the public interest in disclosure outweighed the public interest in maintaining the duty of confidence.

82. The Commissioner believes that a consequence of disclosure of any confidential information will, to some degree, undermine the principle of confidentiality which in essence relies on a bond of trust between the confider and confidant. In general people would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected.

83. With regard to the specifics of this case, the Commissioner believes that there is a public interest in doctors, in this case a GP, being able to discuss issues relating to their performance in confidence with parties that have a vested interest in the performance of that particular doctor (in this case the local health authority). Without this assurance, doctors may be less willing to voluntarily raise issues they may have concerning their own performance in order to seek help to deal with such issues. Similarly, doctors may be less willing to voice concerns about the

performance of medical colleagues if they are concerned that such concerns would not be treated confidentially.

84. Equally, the Commissioner believes that there is a public interest in employees being able to discuss issues relating to employment disputes in confidence whether this discussion is in fact with their employers or with a third party acting as a mediator. By allowing employees to attempt to reconcile issues of dispute in private it may be possible to avoid the need for costly employment tribunal cases.
85. The Commissioner accepts that there is a general public interest in disclosing information which allows individuals to gain an understanding of the basis upon which decisions have been made by public authorities. Disclosure of this information may, to some extent, provide the public with a greater understanding of how the Trust's predecessor dealt with difficulties at a local GP's practice.
86. However, having carefully considered the above issues, the Commissioner has concluded that in this case the public interest in disclosure does not outweigh the public interest in maintaining the duty of confidence owed to the confiders. Consequently, the Commissioner is satisfied that disclosure of the four documents would constitute an actionable breach of confidence and therefore the exemption contained at section 41 of the Act has been correctly applied.

Section 42

87. Section 42 of the Act provides that information is exempt from disclosure if the information requested is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings. There are two types of privilege, legal advice privilege and litigation privilege.
88. The Trust has argued that the documents numbered 14 to 18 are covered by legal advice privilege. This type of privilege applies to confidential communications made between a client and its professional legal advisor or any part of a document which evidences the substance of such a communication. For advice privilege to apply the dominant purpose of the communication between the client and the legal advisor must be that of seeking or providing legal advice.
89. The Commissioner has inspected all five of the documents that the Trust considers to be exempt under section 42 of the Act.
90. Document 14 is a two part report, the first part being a chronology of events at VFNH and the second part being a commentary by the Trust's external lawyer in relation to events detailed in the first part of the report. The Commissioner has established that the first part of the report has in fact been disclosed to the complainant, albeit with redactions made on the basis of section 40 which are considered below. The second part of the report contains a commentary by the Trust's solicitor as to the significance of the events covered in the chronology. In this part of the report the solicitor also advises the Trust on a number of possible courses of action in respect of its regulatory powers, particularly with regard to its enforcement actions. Therefore, the Commissioner is satisfied that the second part of this report is covered by legal advice privilege.

91. With regard to documents 15 and 16 these two documents contain a summary of the regulatory options available to the Trust in respect of the current owners of VFNH and also an explanation of the procedures for taking such action. Again, the Commissioner is satisfied that the dominant purpose of these communications was that of the provision of legal advice in relation to the future of VFNH.
92. Document 17 again contains advice from the Trust's external lawyer in relation to the VFNH, but in this instance the correspondence focuses on the legal procedures for registering the new owners of VFNH and the steps the Trust must complete in order for relevant legal requirements to be met. Again, the Commissioner is satisfied that the dominant purpose of this correspondence is that of the Trust's external lawyer advising the Trust on how to meet the legal requirements of transfer of ownership of VFNH.
93. Document 18 consists of a draft letter from the Trust's external lawyers to the National Care Standards Commission (NCSC) written on behalf of the Trust. The Commissioner is aware that legal professional privilege applies to communications between a client (in this case the Trust) and their lawyer. The Commissioner accepts that although the ultimate recipient of this letter was to be a third party, namely the NCSC, this actual document is a draft version sent by the external lawyer to the Trust. The Commissioner accepts that the purpose of this correspondence was therefore to inform the Trust about its external lawyer's view as an appropriate response to the NCSC concerning the legal issues surrounding the transfer of ownership of VFNH. Therefore, the Commissioner is satisfied that the dominant purpose of this correspondence was that of the Trust being provided with legal advice, albeit that this correspondence took the form of a draft letter to a third party.
94. In summary the Commissioner is satisfied that all five documents that the Trust has withheld on the basis of section 42 fall within the scope of that exemption.

Public interest test

95. Section 42 is a qualified exemption and is therefore subject to the public interest test. Public authorities can only refuse to supply information where the public interest in maintaining the exemption outweighs the public interest in disclosure.
96. The Trust has advanced the following points in relation to the public interest concerning these documents:

‘The information contained within these documents remains privileged and does not relate to public policy decisions. Furthermore, the refusal to disclose will not interfere with justice or the right to a fair trial. Accordingly... [our position is] that the public interest does not override privilege’.
97. In his experience, the Commissioner usually finds that public authorities argue that disclosure of legal communications would have the effect of limiting the free and frank exchange of views between a legal advisor and their client. The

Commissioner accepts that a client needs to be confident that information shared with a lawyer, and advice received from that lawyer, will remain confidential. Without the security created by such confidence there are risks of a lack of openness between client and lawyer which could reduce the ability of public authorities to seek and obtain frank, unfettered advice without the fear of intrusion.

98. The Commissioner is also mindful of the Information Tribunal's decision of 27 April 2006 in *Christopher Bellamy v The Information Commissioner and the Secretary of State for Trade and Industry* (Appeal No: EA/2005/0023). The judgement comments on the public interest inherent in maintaining legal professional privilege and states that:

there is a strong public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest. It may well be that, in certain cases ...for example, where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight.' (Paragraph 35)

99. However, it is important to remember that these factors are balanced against the arguments in favour of disclosing the legal advice which forms part of the requested information. The Commissioner recognises that there is a strong public interest in people understanding the reasons for decisions made by public authorities. Furthermore, the Commissioner believes that there is a public interest in increasing public confidence and trust in legal advice being dispensed in an equitable and purposive manner to a public authority which allows the public authority to make informed decisions with all of the relevant knowledge of the law.
100. In relation to the specific information withheld by the Trust, as the Commissioner has implied in the preceding paragraphs, the information relates to EHHHA's use of its regulatory powers in response to issues of performance at VFNH. The legal advice pertains to the EHHHA's various regulatory options open to the Trust in dealing with its concerns in respect of the VFNH, including the ultimate decision to cancel the registration of the current owners and transfer ownership to new owners.
101. The Commissioner is aware that the EHHHA had a number of major concerns in relation to the running of the Home and that these concerns had originated not only from complaints from patients and their families, but also from problems highlighted in the EHHHA's inspections of the Home. The Commissioner accepts that disclosure of the information could therefore inform the public, and in particular patients of the VFNH, families of these patients, that at the time the EHHHA followed the correct regulatory procedures in dealing with the issues of concern at VFNH.
102. On balance, the Commissioner has concluded that the public interest favours withholding the five pieces of legal advice. Although there is a legitimate public interest in the Trust being transparent about how, and why, its predecessor took the actions it did in relation to VFNH, the Commissioner believes that this is out

weighed by the inherent public interest in protecting legal professional privilege, and in particular the Trust being able to seek further legal advice on similar issues again should the need arise.

Section 40

103. Section 40(2) provides an exemption for information which is the personal data of any third party where disclosure would breach any of the data protection principles contained in the Data Protection Act 1998 (DPA).

104. In order to rely on the exemption provided by section 40, the information being requested must therefore constitute personal data as defined by the DPA. The DPA defines personal data as:

‘...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.’

105. The information which the Trust has redacted on the basis of section 40 consists of the names of various patients and members of staff contained within the various documents which the Trust has previously disclosed to the complainant. The complainant has explained that whilst he accepts that it is appropriate that the names of patients should be redacted from documents, he does not feel it is appropriate for the names of staff to also be removed.

106. The Commissioner is satisfied that the names of staff constitute the personal data of these individuals; clearly disclosure of their names allows them to be identified. The Commissioner has asked the Trust to provide an explanation as to why it considers section 40 to apply to this information, i.e. which of the data protection principles would be breached if this information was disclosed. As with its responses in relation to the other exemptions, the Trust failed to provide a detailed explanation of why it believed this exemption to apply. Instead the Trust's solicitors stated that:

‘We can confirm that the basis under which the names were redacted was Section 10(1) of the Data Protection Act 1998, namely that disclosure will cause distress to those named in the reports. However, the Trust was happy to disclose redacted versions of the documents concerned, rather than refusing disclosure completely. We trust that this will suffice’.

107. Section 10(1) of the DPA allows data subjects to provide a notice to a data controller which requires that data controller to not process, or cease processing their personal data on the grounds that the processing of their data is, or is likely to cause distress and that this distress is unwarranted.

108. However, the Commissioner understands that the Trust has not received any notices under section 10 of the DPA from the individuals named in the documents. The Commissioner assumes that the Trust's reference to disclosure of these names causing distress to the various individuals means that the Trust's position is in fact that disclosure of these names will be unfair and therefore breach the first data protection principle.

The first data protection principle

109. The first data protection principle has two components.

1. Personal data must be processed fairly and lawfully and
2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

110. The Commissioner's guidance on section 40 suggests a number of issues that should be considered when assessing whether disclosure of information would be fair, namely:

- The data subject's reasonable expectations of what would happen to their personal data;
- The seniority of these staff;
- Whether these individuals specifically refused to consent to the disclosure of their personal data;
- Whether disclosure would cause any unnecessary or unjustified distress and damage to the individuals;
- The legitimate interests in the public knowing the requested information weighed against the effects of disclosure on the individuals.

111. Furthermore, the Commissioner's guidance suggests that when assessing fairness, it is also relevant to consider whether the information relates to the public or private lives of the third party.

112. Having reviewed the documents to which the Trust has made redactions, the Commissioner believes that the names of the staff which have been withheld can be grouped in four broad categories:

- (i) Names of junior staff working at VFNH (e.g. nurses, cleaners, care assistants etc)
- (ii) Name of person in charge at VFNH at each inspection.
- (iii) Names of people involved in inspection of VFNH.
- (iv) Names of external professionals associated with providing services to home, e.g. GPs.

113. In the absence of any arguments advanced by the Trust in relation to the expectations of these various groups of individuals the Commissioner has tried to establish the type of information currently in the public domain about such inspection reports. The Commissioner has established that the Commission for Social Care Inspection, the body currently responsible for inspection of care homes, makes available on its website full unredacted versions of its inspection

reports of care homes. In relation to VFNH, there are 9 full inspection reports available to download dating back to October 2003. Included in these reports are details of the names of the individuals who carried out the inspections along with the name of the manager of the home at the time of the report. The reports do not name other more junior staff at the home.

114. On the basis of these reports the Commissioner believes that staff involved in the inspection of care homes and managers at these homes should expect that their names will be disclosed. This conclusion is in line with the Commissioner's guidance on the interpretation of section 40 which suggests that:

'Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned.'

115. The Commissioner also believes that a distinction can be drawn between the levels of information which junior staff should expect to have disclosed about them compared to what information senior staff should expect to have disclosed about them. This is because the more senior a member of staff is the more likely it is that they will be responsible for making influential policy decisions and/or decisions related to the expenditure of significant amounts of public funds.
116. With regard to the names of the staff that are named in the redacted documents, the Commissioner accepts that the names of the junior staff should not be disclosed. This is because ultimate responsibility for the level of care provided in the care home rested with the manager or person in charge named in the inspection reports and not with the more junior nursing staff, care assistants or cleaning staff. The Commissioner is satisfied, particularly in light of the level of detail contained in the reports available on CSCI website, that such staff would not have their names disclosed.
117. With regard to the fourth category of individuals referred to in the reports, as these people were relatively senior individuals within the medical sector, i.e., GPs the Commissioner believes that they should also have an expectation that their involvement in providing care to the residents of VFNH will be disclosed.
118. As is outlined above, for third party personal data to be disclosed under the Act, disclosure not only has to be fair and lawful but also has to meet one of the conditions for processing in schedule 2 of the DPA. In this case the Commissioner considers that the most relevant condition is six. This states that:

'the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.'

119. The Information Tribunal in *House of Commons v Information Commissioner and Norman Baker MP* (EA/2006/0015 and 0016) commented on how condition 6 should be interpreted and applied. The Tribunal found that the application of condition 6:

‘involves a balance between competing interests broadly comparable, but not identical, to the balance that applies under the public interest test for qualified exemptions under FOIA. Paragraph 6 [i.e. condition 6] requires a consideration of the balance between: (i) the legitimate interests of those to whom the data would be disclosed which in this case are members of the public...and (ii) prejudice to the rights, freedoms and legitimate interests of the data subjects which in this case are MPs’. (Tribunal at paragraph 90).
120. The Tribunal also found that ‘because the processing must be “necessary” for the legitimate interests of members of the public to apply we find that only where (i) outweighs or is greater than (ii) should personal data be disclosed’. Thus the burden of proof built into the public interest test that is applied to qualified exemptions is reversed.
121. The Tribunal’s approach to condition 6 has influenced the Commissioner’s view in this case. As is clear from the above, the requested information relates to the professional and public life of those falling within categories (ii) to (iv) identified in paragraph 112 above rather than their private lives and therefore any invasion of privacy would be limited. Furthermore, the Commissioner believes that there is an underlying legitimate interest in openness and transparency; this could be particularly true of public authorities, such as the Trust’s predecessor, who at the time these documents were created had a statutory obligation to monitor the level of care in care homes.
122. The Trust has not provided the Commissioner with any specific arguments in order to explain how disclosure of names falling within (ii) to (iv) would prejudice their legitimate interests beyond suggesting that disclosure would cause ‘distress’, i.e. the Trust has failed to explain how or why this distress would occur. However, on the basis of the Commissioner’s argument above, he does not accept that disclosure would cause distress to those individuals falling within (ii) to (vi) because they should have some level of expectation that their names may be disclosed.
123. Therefore, the Commissioner has concluded that the legitimate interests of those to whom the information would be disclosed outweigh those of the individuals falling within categories (ii) to (iv) with regard to disclosure of these individuals identities. Therefore, he believes that, in this case, condition 6(1) of schedule 2 of the DPA is satisfied and disclosure of the schedule 2 of the DPA is satisfied.
124. In light of the number of different names included in these redacted documents, in order to avoid any confusion the Commissioner has provided the Trust with list of the names he requires it to disclose.

The Decision

125. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- The Trust was correct to withhold documents numbered 10 to 13 in the annex on the basis of section 41 of the Act.
- The Trust was correct to withhold documents numbered 14 to 18 in the annex on the basis of section 42 of the Act.
- The Trust was correct to redact the names of the junior staff from the documents previously disclosed on the basis of section 40 of the Act.
- The Commissioner is satisfied that on the balance of probabilities the Trust does not hold any further information falling within the scope of the complainant's request.

126. However, the Commissioner has also decided that the following elements of the requests were not dealt with in accordance with the Act:

- The Trust committed a number of breaches of section 10 by failing to disclose information to the complainant within 20 working days of his request dated 14 February 2006.
- The Trust also committed a number of breaches of section 17 of the Act by failing to provide the complainant with a refusal notice citing the exemptions that it later relied on to withhold and/or redact some information.
- The Trust was incorrect to redact the names of more senior staff on the basis of section 40 of the Act.
- The Trust was incorrect to withhold documents numbered 1 to 4 on the basis that they were exempt under section 31 of the Act.

Steps Required

127. The Commissioner requires the public authority to disclose the following information to the complainant within 35 calendar days of the date of this notice:

- The documents in the annex numbered 1 to 4.
- Copies of documents 5 to 9 with the names of senior staff unredacted. The Commissioner has provided a separate confidential annex to the Trust confirming the names he requires them to disclose.

Other matters

128. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
129. Firstly, as the decision notice makes clear the Trust informed the complainant on a number of occasions that it did not hold any further information falling within the scope of the request only to subsequently locate additional relevant documents. This piecemeal pattern of disclosure led to the Trust committing numerous procedural breaches of the Act. Furthermore, the Commissioner believes that the Trust's actions suggest that its records management policies and procedures may not conform to the section 46 Records Management Code of Practice. The Commissioner therefore suggests that the Trust review its records management policies, practice and training provision to ensure that they meet the requirements of this Code. He believes that the Trust would benefit from obtaining further advice and guidance from the Records Management Advisory Service at The National Archives (see contact details below) and will advise TNA to expect contact from the Trust in this regard. The Commissioner would hope that such advice will improve the Trust's handling of future requests for information under the Freedom of Information Act.

Records Management Advisory Service (RMAS)
National Advisory Service
The National Archives
Kew
Richmond
Surrey
TW9 4DU

rmadvisory@nationalarchives.gov.uk

130. Secondly, as the decision notice also makes clear, there was a significant failure of the Trust to engage with the Commissioner's investigation of this complaint. Most notably, despite the Commissioner serving the Trust with an Information Notice on 18 January 2007 which required a response within 30 calendar days the Trust did not reply until 14 August 2007. Furthermore, this response was only provided once the Commissioner had served draft High Court papers on the Trust which would certify that the Trust was in contempt of court. This is the first time that the Commissioner has had to take such a serious course of action since the right of access came to effect in January 2005.
131. The Commissioner also notes that this was not in fact the first time that the Commissioner has needed to serve this Trust with an Information Notice. In the early related case of FS50072714, the Commissioner served an Information Notice on the Trust on 4 October 2005 and it was not until the 28 November 2005 that the Trust responded, again outside of the 30 day deadline for a response.
132. Thirdly, even once the Trust did respond to the Commissioner's enquires, these responses (usually communicated via the Trust's external solicitors) failed to fully

answer the Commissioner's enquiries. As a result of the Trust's poor responses, the Commissioner was forced to contact the Trust a number of further times resulting in the time it has taken to conclude this investigation to be significantly increased.

133. The Commissioner considers that other public authorities in the health sector (and possibly public authorities in other sectors) could usefully learn lessons from the account set out in this Decision Notice of the Trust's clearly inadequate records management arrangements and its totally unacceptable performance in the handling of this case. He has therefore directed that this Decision Notice should be brought to the attention of relevant representative bodies in the health sector and specialist health sector media.

Failure to comply

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

Right of Appeal

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

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

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

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

Dated the 19th day of March 2008

Signed

**Richard Thomas
Information Commissioner**

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

Annex of withheld and not disclosed documents

Information the Trust has withheld on the basis of section 31

1. Letter from EHHHA to Coroner's Office dated 24 October 2001 regarding VNFH.
2. File note by EHHHA dated 13 November 2001 regarding police investigation into immigration issues at VFNH.
3. Internal email correspondence between Trust employees dated 24 October 2002.
4. Handwritten note of Trust employee's conversation with DI S dated 25 October 2002.

Documents containing redactions made by the Trust on the basis of section 40

5. Chronological record of various matters and inspections relating to VFNH from 29 September 1997 to 16 October 2001.
6. Report of Interim Unannounced Inspection of VFNH on 12 November 2001.
7. Report of EHHHA unannounced inspections of VFNH on 9 & 12 November 2001.
8. Report of EHHHA unannounced inspections of VFNH on 22 and 26 November 2001.
9. File note dated 12 November 2001 regarding VFNH.

Information the Trust has withheld on the basis of section 41

10. Letter from Dr X to EHHHA dated 27 February 2001.
11. Letter from GP's practice manager to Trust dated 31 March 2003.
12. Letter from GP's practice manager to GMC dated 16 July 2003 regarding Dr X.
13. Letter from GP's practice manager to Trust dated 24 July 2003.

Information the Trust has withheld on the basis of section 42

14. Document entitled 'Report into Vicarage Farm Nursing Home' dated 6 November 2001
15. Letter from external lawyers to EHHHA dated 12 December 2001.
16. Letter from external lawyers to EHHHA dated 14 January 2002.

17. Fax letter dated 25 February 2002 from external lawyer to EHHHA regarding VFNH change of ownership.
18. Draft letter from external solicitors to National Care Standards Commission dated 25 March 2002 regarding VFNH.

Documents that the complainant has alleged the Trust may hold but has not been disclosed

19. The report of the unannounced inspection of VFNH carried out on 20 March 1998.
20. The report of the follow-up inspection of VFNH carried out on 8 July..1998.
21. The report of the pharmacy inspection of VFNH carried out on 2. February 1999.
22. The report of the monitoring inspection of VFNH carried out on 16 & 23 April 1999.
23. The report of the pharmacy inspection of VFNH carried out on 20 July 1999.
24. The report of the monitoring inspection of VFNH carried out on 27 July 1999.
25. The report of the unannounced inspection of VFNH carried out on 6 October 1999.
26. The report of the unannounced inspection of VFNH carried out on 22 October 1999.
27. The report of the unannounced inspection of VFNH carried out on 3 November 1999.
28. The report of the unannounced inspection of VFNH carried out on 11 November 1999.
30. The report of the announced inspection of VFNH carried out on 2 December 1999.
31. The report of the unannounced pharmacy inspection of VFNH carried out on 7 December 1999.
32. The report of the investigative inspection of VFNH carried out on 9 December 1999.
33. The report of the follow-up Inspection of VFNH carried out on 6 January 2000.
34. Notes of the meeting on 10 January 2000 between VFNH and EHHHA

35. The report of the Investigative Inspection of VFNH carried out on 17 January 2000.
36. The report of the Announced Inspection of VFNH carried out on 28 January 2000.
37. The report of the Unannounced Inspection of VFNH carried out on 29 February 2000.
38. Notes of the meeting on 7 March 2000 between VFNH and EHHHA.
39. The report of the Medical Audit Inspection of VFNH carried out on 23 March 2000.
40. The report of the Monitoring Inspection of VFNH carried out on 19 April 2000.
41. The report of the Medical Audit Inspection of VFNH also carried out on 19 April 2000.
42. Letter dated 2 May 2000 from VFNH to EHHHA requesting details of GP replacement.
43. Notes of the meeting on 4 May 2000 between VFNH and EHHHA.
44. The report of the Medical Audit Inspection of VFNH carried out on 8 May 2000.
45. Notes of the meeting on 1 June 200 between EHHHA and London Borough of Hounslow Social Services.
46. Letter dated 10 July 2000 from VFNH to EHHHA regarding issues in last Pharmacy Inspection.
47. The report of the Announced Pharmacy Inspection of VFNH carried out on 18 July 2000.
48. Notes of the meeting on 1 August 200 between VFNH and EHHHA.
49. Letter dated 16 August 2000 from EHHHA to VFNH.
50. The report of the Fire and Estates Standards Inspection of VFNH carried out on 13 September 2000.
51. The report of the Announced Pharmacy Inspection of VFNH carried out on 17 October 2000.
52. Item 3.2 of the Appendix to the Notice to Cancel Registration issued on 24.12.01 by EHHHA to Nashcare Limited mentions the findings of a visit to VFNH on 09.11.00 by Hounslow Social Services. The report of Hounslow Social Services has not been disclosed.

53. The report of the Unannounced Pharmacy Inspection of VFNH carried out on 8 December 2000 has not been released to us.
54. Dr X's letter dated 7 February 2001 to EHHHA mentions previous correspondence which has not been disclosed.
55. The report of the Unannounced Pharmacy Inspection of VFNH carried out on 1 March 2001.
56. The report of the Monitoring Inspection of VFNH carried out on 6 March 2001.
57. EHHHA letter dated 12 March 2001 to Dr X mentions a letter from Dr X which has not been disclosed.
58. The report of the Follow-up Inspection of VFNH carried out on 15 March 2001.
59. The report of the Follow-up Pharmacy Inspection of VFNH carried out on 1 May 2001.
60. The report of the Medical Inspection of VFNH carried out on 3 May 2001.
61. EHHHA letter dated 20 June 2001 to Dr X mentions a letter dated 10 May 2001 from Dr X to EHHHA which has not been disclosed.
62. EHHHA letter dated 11 July 2001 to Dr X refers to her previous letter to Dr X which has not been disclosed.
63. Dr X's response to EHHHA letter dated 16 August 2001.
64. The report of the Unannounced Pharmacy Inspection of VFNH carried out on 13 September 2001.
65. Letter dated 14 November 2001 from EHHHA to VFNH
66. Letter dating from November 2001 from VFNH to EHHHA in response to EHHHA's letter dated 14 November 2001.
67. EHHHA Memo dated 21 November 2001 from to refers to a report which has not been disclosed.
68. The report of the Inspection of VFNH carried out on 7 December 2001
69. The report of the Inspection of VFNH carried out on 11 December 2001.
70. EHHHA letter dated 18 December 2001 to Dr X mentions a letter that EHHHA would be writing to Dr X. which has not been disclosed.
71. EHHHA letter dated 18 December 2001 to Dr X mentions a letter that EHHHA would be writing to Dr X which has not been disclosed.

72. EHHHA letter dated 18 December 2001 to Dr X mentions a letter about Dr X's progress that he had to write to the Health Service Commissioner by 13 March 2002 which has not been disclosed.
73. EHHHA's external lawyer's report that was read out during the internal EHHHA meeting held on 18 December 2001 has not disclosed.
74. Letter(s) from VFNH to EHHHA in response to Inspection Report (issued 11 December 2001) of visits on 22 & 26 November 2001 have not been disclosed.
75. The report of the Inspection of VFNH carried out on 4 & 8 January 2002 and mentioned in the update on VFNH by EHHHA dated 8 February 2002 has not been disclosed.
76. The report of the Pharmacy Inspection of VFNH carried out on 22 January 2002 and mentioned in the update on VFNH by EHHHA dated 8 February 2002 has not been disclosed.
77. The report of the Inspection of VFNH carried out on 7 February 2002 and mentioned in the Update on VFNH by EHHHA dated 8 February 2002 has not been disclosed.
78. Para 3 of EHHHA file note dated 1 March 2002 mentions a letter (presumably dated February 2002) from the Trust's external solicitor's that has not been disclosed.
79. The letter (presumably, though not definitely, dated February or March 2002) from Dr X to the Health Service Commissioner in response to the issue of the Ombudsman's report in December 2001 has not been disclosed.
80. The attachments to the letter dated 6 November 2002 from Dr X's practice manager to the Trust.
81. Trust letter dated 29.07.03 to Dr X's practice manager refers to his letter (presumably dated June or July 2003) to the Trust which has not been disclosed.
82. The attachments to EHHHA letter dated 30 July 2003 to GMC.
83. The GMC's response to EHHHA letter dated 30 July 2003.
84. Unannounced Pharmacy Inspection Report of visit on 13 September 2001
85. EHHHA file note dated 12 November 2001 about the external lawyer's report mentions a list of items sent to that lawyer by the EHHHA. A copy of that list has not been disclosed.
86. EHHHA file note dated 12 November 2001 about the external lawyer's report mentions representatives of the EHHHA visited VFNH on 09 November 2001 and that they would both be compiling reports. Copies of these reports have not been disclosed.

87. EHHHA File Note dated 12 November 2001 about the external lawyer's report mentions that representatives of the EHHHA were expecting to visit VFNH 'next week' (i.e. week beginning Monday, 17 November 2001) A copy of these reports have not been disclosed.
88. The EHHHA's Update on Vicarage Farm Nursing Home dated 08 February 2002 reiterates that, at that time, the EHHHA were still carrying out monitoring visits at VFNH on a weekly basis. The complainant wished to be provided with copies of all weekly reports.
89. Copies of the response by NCSC to the letter dated 23 October 2002 sent by the Trust and any further correspondence between NCSC and the Trust about the EHHHA Review Panel's Report of our complaint relating to VFNH.

Legal Annex

The Freedom of Information Act 2000

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 1(2) provides that -

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

Section 2(1) provides that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

- (a) the provision confers absolute exemption, or
 - (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information
- section 1(1)(a) does not apply.”

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

Section 10

Section 17(1) provides 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 17(2) states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 31

Section 31(1) provides that –

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,

- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment."

Section 31(2) provides that –

“The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,
- (i) the purpose of securing the health, safety and welfare of persons at work, and
- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.”

Section 40

Section 40(2) provides that –

“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.”

Section 40(3) provides that –

“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 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

Section 41

Section 41(1) provides that –

“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.”

Section 42

Section 42(1) provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

The Data Protection Act 1998

Part I

1) In this Act, unless the context otherwise requires—

“personal data” means data which relate to a living individual who can be identified—

(a)

from those data, or

(b)

from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

Schedule 1

The first principle states that:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

Schedule 2

Conditions relevant for purposes of the first principle: processing of any personal data

1. The data subject has given his consent to the processing.

2. The processing is necessary— (a) for the performance of a contract to which the data subject is a party, or (b) for the taking of steps at the request of the data subject with a view to entering into a contract.

3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
4. The processing is necessary in order to protect the vital interests of the data subject.
5. The processing is necessary—
 - (a) for the administration of justice
 - (b) for the exercise of any functions conferred on any person by or under any enactment
 - (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department
 - (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.
6. — (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.