

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 11 August 2010

Public Authority: Barking, Havering & Redbridge University Hospitals
NHS Trust

Address: Trust Headquarters
Queen's Hospital
Rom Valley Way
Romford
Essex, RM7 0AG

Summary

The complainant requested a number of pieces of information about a named doctor. The Trust refused to provide this information, withholding some of it under section 31(2) and some of it under section 40(2). During the Commissioner's investigation the Trust confirmed that it was relying upon sections 40(2) and 40(3)(a)(i), as well as sections 31(1)(g) and 31(2)(c), (d) and (i). After investigating the case the Commissioner found that these exemptions did not apply to the information, and therefore the withheld information should be disclosed. In addition to this, the Commissioner found that the Trust did not meet the requirements of sections 10 and 17.

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

2. The complainant contacted Barking, Havering & Redbridge University Hospitals NHS Trust (the "Trust") on 20 March 2009 and requested the following information:
- (1) What date did [named doctor] begin working for the Trust?
 - (2) Did [named doctor] register as a professor when [he/she] joined?
 - (3) Has [named doctor] been suspended from the Trust – if so what were the dates and what were the reasons?
 - (4) Why did the Trust not take an independent governance review in response to concerns raised by the Royal National Orthopaedic Hospital about [his/her] care in some trauma cases?
 - (5) A review by the Orthopaedic Association into the working of the Trauma and Orthopaedic service at BHR cited concerns about the clinical practice of two consultants – one of which was [named doctor] and the other consultant who was sacked. Why was no action taken on [named doctor] and why was the other person sacked?
 - (6) Why has [named doctor] been told to drop the title of Professor and why is "discretion" important in this matter – as stated in an internal email sent by [xxx].
 - (7) Is the Trust aware [named doctor] is not a member of the Association of Professors of Orthopaedic Surgery?
 - (8) If so why has it only recently been decided [he/she] is no longer to be called professor?
 - (9) Has [named doctor] told patients they were getting an opinion from a professor?
 - (10) Has [named doctor] taught junior doctors?
 - (11) Is the Trust aware the GMC has imposed restrictions on [named doctor]'s work – including the temporary ban on performing surgery on children?
 - (12) Has [named doctor] now become part of the trauma team at Queen's Hospital and been given responsibility for the care of children?
 - (13) Did the Human Resources department thoroughly verify [his/her] qualifications?
 - (14) Has the medical director been made aware of concerns of [named doctor's] fitness to practice?
 - (15) The GMC has held several investigations into [named doctor's] fitness to practice – including sending [him/her] for retraining while working at the Royal London Hospital – and a review in 2008 that has probably led to the change in title. Was the 2008 review upon request of [Dr XXX]?

(16) Has the Trust been advised by the British Orthopaedic Associations to appoint extra consultants and not done so?

For ease of reference, these will be referred to as requests (1) to (16) throughout the rest of this Notice.

3. The Trust provided a response in an email dated 16 April 2009. It stated that it believed that all of the information that had been requested was exempt from disclosure under section 40(2). Specifically, it stated that it believed that the disclosure of this information would be in breach of the first principle of the Data Protection Act 1998 (the "DPA"). In addition it noted that that disclosure would also possibly be in breach of the second and sixth principles of the DPA.
4. The complainant requested an internal review of this decision in a letter dated 1 May 2009. He noted that the named doctor was under investigation by the General Medical Council (the "GMC"), and stated that he felt that disclosure would be in the public interest. In addition to this, he also noted that,

"The fact that the most basic questions such as when did [he/she] join the Trust, and if [he/she] joined as a professor were turned down...is very confusing and I do not believe that there are sufficient grounds for refusing my request."
5. The Trust carried out an internal review, and responded in a letter dated 16 June 2009. It provided substantive responses in relation to requests (1), (3), (6), (8), (10) and (16). However, it refused to provide any information in relation to the other requests, as it believed that the information was exempt under the following:
 - Request (2) – sections 31(2) and 40(2).
 - Request (4) – section 31(2).
 - Request (5) – section 31(2).
 - Request (7) – section 31(2).
 - Request (9) – section 31(2).
 - Request (11) – section 31(2).
 - Request (12) – section 31(2).
 - Request (13) – sections 31(2) and 40(2).
 - Request (14) – section 31(2).
 - Request (15) – section 31(2).

In regard to its use of section 31(2) the Trust noted that the named doctor was the subject of a GMC investigation, and stated that,

"The GMC have not limited [named doctor's] practicing privileges, and [he/she] remains fully registered to practice and continues to do so at the Trust. As the GMC investigations are at an early stage, it is felt to disclose the requested information would or would be likely to prejudice the exercise of any public authority of its functions by jeopardising or indeed harming the investigations."

It also provided further arguments as to why it felt that the public interest in maintaining this exemption outweighed the public interest in disclosure. In relation to section 40(2) it again stated that the disclosure of this information would be in breach of the first principle of the DPA, and also possibly the second and sixth principles.

The Investigation

Scope of the case

6. On 9 July 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. Following an initial email from the Commissioner on 7 December 2009, the complainant confirmed that he only wished to complain about the Trust's response to requests (2), (7), (9), (11), (12) and (13).
7. Therefore the case has focused on the Trust's handling of requests (2), (7), (9), (11), (12) and (13).
8. Although not referred to by the complainant, the Commissioner has also considered whether the Trust met the requirements of sections 10 and 17.

Chronology

9. The Trust provided initial submissions, along with a copy of some of the withheld information, in a letter dated 10 September 2009.
10. The Commissioner wrote to the Trust on 21 January 2010, and asked it to provide further submissions to support its use of sections 31 and 40. In addition to this, he also asked the Trust to provide him with a copy of the withheld information. He asked for a response within 20 working days.

11. The Trust contacted the Commissioner by way of a telephone call on 26 January 2010 and informed him that it had already provided him with a copy of the withheld information.
12. The Trust wrote to the Commissioner on 15 February 2010. It noted that there was a delay in providing him with a substantive response to his letter of 21 January 2010, and noted that, "Although I am not in a position to give a timeframe, I can advise you will receive a response as soon as possible."
13. The Commissioner wrote to the Trust on 4 March 2010. He noted the contents of the Trust's previous letter to him and asked it to provide a substantive response by no later than 22 March 2010. If he did not receive a response within this time, he would consider issuing an Information Notice under section 51 of the Act. In addition to this, he noted that although the Trust had stated that it had already provided him with a copy of the withheld information, having considered the information that it had supplied, he was not convinced that it had actually provided the withheld information in relation to some of the requests. Again, he asked that this information be provided by no later than 22 March 2010.
14. The Trust wrote to the Commissioner on 10 March 2010 and provided further submissions to support its use of sections 31 and 40. In this letter it clarified that it was relying upon sections 31(1)(g) and 31(2)(c), (d) and (i). Further to this, in a letter dated 11 March 2010 the Trust provided more details relating to the withheld information.
15. The Commissioner wrote to the Trust again on 7 May 2010. He stated that after considering the arguments it had made in support of its use of the exemptions he was not at that time persuaded that it was correct to withhold the information in question. Therefore he asked the Trust for further submissions to support its use of these exemptions. He asked for a response by no later than 24 May 2010.
16. Following an exchange of telephone calls the Commissioner agreed to extend the deadline for a response until 7 June 2010.
17. The Trust provided a substantive response in a letter dated 3 June 2010. It provided further submissions to support its use of sections 31 and 40. It also provided further details of the withheld information. Finally, it informed the Commissioner that it no longer objected to the release of the withheld information in relation to request (2).
18. The Commissioner contacted the Trust again in an email dated 14 June 2010. He noted that although the Trust had provided him with further

clarification in relation to the withheld information, he was still unsure as to the information that was being withheld in relation to requests (2), (7) and (12). Therefore he asked the Trust for further clarification in regard to these requests. He asked for a response by no later than 21 June 2010. He again drew the Trust's attention to his powers to issue an Information Notice under section 51 of the Act.

19. Following a telephone call on 24 June 2010, the Trust provided a response in a letter dated 29 June 2010. This letter provided the further clarification that the Commissioner had requested.

Analysis

Exemptions

Section 31

20. The Trust has relied upon sections 31(1)(g) and 31(2)(c), (d) and (i) in order to withhold all of the information in question.

21. Section 31(1)(g) states 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 –

[...]

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

22. The relevant parts of section 31(2) state that,

"The purposes referred to in subsection (1)(g) to (i) are –

[...]

- (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,

[...]

- (i) the purpose of securing the health, safety and welfare of persons at work..."

23. The full text of section 31 can be found in the Legal Annex at the end of this Notice.

Would the release of this information prejudice, or be likely to prejudice, any of the purposes listed at section 31(2)(c), (d) or (i)?

24. In *Hogan v ICO & Oxford City Council* [EA/2005/0026 & EA/20005/0030] the Tribunal stated that the application of the prejudice test involves three steps,

"First there is a need to identify the applicable interest(s) within the relevant exemption....Second, the nature of the 'prejudice' being claimed must be consideredA third step for the decision-maker concerns the likelihood of occurrence of the prejudice."¹

The Commissioner has considered each of these steps in turn.

25. The relevant applicable interests in this exemption are as detailed in paragraph 22 above.

The Trust's Position

26. At internal review the Trust cited section 31(2) and argued that the disclosure of the withheld information would, or would be likely to, prejudice the GMC's investigation into the named doctor, stating,

"The GMC have not limited [named doctor's] practicing privileges, and [he/she] remains fully registered to practice and continues to do so at the Trust. As the GMC investigations are at an early stage, it is felt to disclose the requested information would or would be likely to prejudice the exercise of any public authority of its functions by jeopardising or indeed harming the investigations."

¹ EA/2005/0026 & EA/20005/0030, paras 28 to 34.

27. In its letter to the Commissioner dated 10 March 2010 the Trust stated that it believed that the functions set out at sections 31(2)(c) and (d) related directly to the GMC's investigation, and section 31(2)(i) "is to support this investigation." In response to the Commissioner's request to provide further submissions to support its use of this exemption the Trust stated that,

"At the time that not only the employee is collating their defence evidence, but the GMC investigation is being undertaken, it was felt to release data into the public domain could prejudice both the employee's defence and by creating negative media surrounding the case, the investigation and future hearing. It is considered important that such investigations are undertaken fairly and without prejudice."

The Trust confirmed that it had not contacted the GMC directly about this request.

28. The Trust also argued that given the nature of some of the requests, if it were to disclose the withheld information this would lead to an increased media interest in the GMC's investigation. It argued that as an employer it had a duty of care to the named doctor, and it felt that the release of some of the withheld information could affect his or her wellbeing. It went on to state that it considered that this would be jeopardised by disclosure, "...until such a time that the investigation and hearing is completed."

29. In response the Commissioner wrote to the Trust again, stating that although he took the matter of a GMC investigation and the sensitivities surrounding such an investigation seriously, he was not persuaded that disclosure of the withheld information would, or would be likely to, cause the prejudice it had argued. In addition to this, he also asked how the GMC's investigation related to the purpose listed at section 31(2)(i). He asked the Trust to provide further submissions to support its use of this exemption.

30. In its letter to the Commissioner dated 3 June 2010 the Trust provided further submissions. In relation to the Commissioner's questions about section 31(2)(i) it stated that,

"This was particularly significant when the [GMC's] investigation was ongoing. However, although this is now concluded, we still have a duty of care to our employee. It is his ... health ... and wellbeing of this continued pursuit, we were, and are concerned about."

31. The Commissioner is unable to quote the other submissions provided by the Trust in relation to its use of section 31, as they directly relate to the withheld information. However, after considering these submissions he believes that they were factual in nature and related more to the withheld information itself, rather than the application of section 31. In the Commissioner's opinion these submissions add little to the Trust's arguments as to why sections 31(1)(g) and 31(2)(c), (d) and (i) are engaged.

The Commissioner's position

32. The Commissioner has found the Trust's arguments to support its use of this exemption somewhat tenuous and limited. However, having considered its submissions at length he believes that it has argued that the disclosure of the withheld information would, or would be likely to, prejudice the GMC's regulatory functions as set out in sections 31(2)(c), (d) and (i). In addition to this, the Trust has presented arguments which attempt to demonstrate that disclosure of the withheld information would, or would be likely to, prejudice the Trust's function as set out in section 31(2)(i).
33. In relation to sections 31(2)(c) and (d) the Commissioner notes that the named doctor was under investigation at the time of the request, and had already has restrictions placed on his or her registration by the GMC's Interim Orders Panel, pending the outcome of a full investigation by the GMC. Given the nature of the GMC's functions, the Commissioner is satisfied that the potential prejudices identified by the Trust would directly relate to:
- the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise (section 31(2)(c)); or
 - 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 (section 31(2)(d)).
34. However, in relation to section 31(2)(i) and its applicability in relation to the GMC's investigation the Commissioner has had some difficulty in seeing how, in the circumstances of this case, the potential prejudices identified by the Trust would directly relate to:
- the purpose of securing the health, safety and welfare of persons at work.

The Commissioner accepts that in certain circumstances, for example where the fitness to practice of a doctor is under investigation by the GMC for health reasons, a potential prejudice to that investigation may relate to the above purpose. However, in this case he has not been provided with any evidence by the Trust as to how this would apply in this case. As noted at paragraph 29 above, the Commissioner identified this during the investigation of this case, and asked the Trust for further submissions to support this argument. The Trust's response is detailed at paragraph 30 above. The Commissioner does not find these additional submissions persuasive. Therefore, in relation to the Trust's argument that the disclosure of the withheld information would, or would be likely, to prejudice the GMC's function as set out in section 31(2)(i), the Commissioner is not persuaded that the potential prejudices identified by the Trust would directly relate to this function.

35. Finally, the Trust has also argued that the disclosure of the withheld information would, or would be likely to, prejudice its own function as set out in section 31(2)(i). In relation to this argument it has argued that as an employer it has a duty of care if it feels that the release of data could affect one of its employee's well being.
36. In order for this argued prejudice to engage with section 31(2)(i) it would have to affect the exercise by the Trust of its functions for the purpose of securing the health, safety and welfare of persons at work. The Commissioner considers that a public authority's functions will include:
 - The performance of any statutory duty that a public authority has the power and responsibility to perform, by virtue of an enactment or subordinate legislation.
 - The performance of duties which are not set out in statute, but which nonetheless comprise a formal part of the public authority's core business or purpose. This will be function of a public nature and is exercised in the public interest.

Subsidiary actions or support services (such as HR services) will not normally be considered as the functions of a public authority, unless this is provided in statute.

37. In relation to section 31(1)(g), the Commissioner considers that in order for a public authority to have a 'function' for one of the purposes listed under section 31(2), that public authority must have sufficient legal basis for the specified purpose they wish to cite.
38. In this instance the Trust has argued that it has a duty of care to its employees, and that this relates to a function for the purpose of

securing the health, safety and welfare of persons at work. However, having considered the arguments that it has made to support this position (as set out at paragraph 30 above) the Commissioner is not satisfied that the Trust's duty of care constitutes a function for the purposes of this section. Therefore, in relation to the Trust's argument that the disclosure of the withheld information would, or would be likely, to prejudice it's function as set out in section 31(2)(i), the Commissioner is not persuaded that the potential prejudices identified by the Trust would directly relate to this function.

39. Therefore after carrying out the first step of the prejudice test (as set out at paragraph 24 above) the Commissioner does not accept that sections 31(1)(g) and 31(2)(i) are engaged in relation to the withheld information.
40. The Commissioner has gone on to consider the second step of the prejudice test in relation to the Trust's use of sections 31(1)(g) and 31(2)(c) and (d).
41. When considering the second step as set out in paragraph 30 above, the Commissioner must be persuaded that the nature of the prejudice that has been argued is 'real, actual or of substance' and not trivial nor insignificant. He must also be satisfied that some causal relationship exists between the potential disclosure and the stated prejudice.
42. As noted above, the Commissioner has found the Trust's arguments somewhat tenuous in relation to the application of this exemption. However, in general the nature of the prejudice argued by the Trust is that the withheld information related to a doctor who was currently under investigation by the GMC, and disclosure of this information would potentially prejudice that investigation.
43. Given the nature of GMC investigations, where doctors fitness to practice medicine is considered, the Commissioner is satisfied that if the prejudice argued by the Trust were to occur this would be real and of substance, and not trivial or insignificant. He therefore finds that the second stage of the test is satisfied.
44. The Commissioner has gone on to consider the likelihood of the prejudice as argued by the public authority. In this case the Trust has not clarified whether it believes that prejudice would, or would be likely to, occur were the withheld information to be disclosed.
45. In cases where a public authority has not specified whether it believes that prejudice would, or would be likely to, occur, the Commissioner is

guided by the views of the Tribunal in *McIntyre v ICO & the Ministry of Defence* [EA/2007/0068].

46. In that case the public authority had claimed section 36(2) but had not specified whether the Qualified Person's opinion was that prejudice would occur or would be likely to occur. The Tribunal commented that,

"We consider that where the qualified person does not designate the level of prejudice, that Parliament still intended that the reasonableness of the opinion should be assessed by the Commissioner but in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level."²

The Commissioner's position is that in cases such as this, where a public authority has failed to specify the level of prejudice at which an exemption has been engaged the lower threshold of "likely to prejudice" should be applied, unless there is clear evidence that it should be the higher level.

47. In this case there is no clear evidence that the higher level threshold should be applied, and therefore the Commissioner has gone on to consider whether the disclosure of the withheld information would be likely to prejudice the functions of the GMC, as described in sections 31(2)(c) and (d).
48. In reaching a decision on the question of the likelihood of prejudice the Commissioner is mindful of the test of 'likely to prejudice' as enunciated by Mr Justice Mundy in the case of *R (on the application of Lord) V Secretary of State for the Home Office* [2003] EWHC 2073, and followed by the Tribunal in the case of *John Connor Press Associates Limited v ICO* [EA/2005/0005], where the Tribunal interpreted the expression 'likely to prejudice' within the context of the section 43 exemption as meaning that, "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk."³
49. In reaching a decision on the likelihood of prejudice the Commissioner also believes that the public authority should be able show some causal link between the potential disclosure of the withheld information and the prejudice it has argued is likely to occur.

² EA/2007/0068, para 45.

³ EA/2005/0005, para 15.

50. The Commissioner has again considered the Trust's arguments and the contents of the withheld information.
51. The Commissioner is mindful of the comments made by the Trust in regard to the GMC's investigation, and he does not seek to order steps that may prejudice the regulatory functions of that body. To this end he has sought further submissions from the Trust on more than one occasion during the investigation of this case.
52. Whilst he recognises the potential sensitivities surrounding information which focuses on an issue currently under investigation by another regulatory authority, the Commissioner is still under a duty to consider the application of the Act to the facts of this case. In particular he has considered the nature of the information that has been requested, and has noted the seemingly innocuous nature of much of this information. In addition, he also believes that some of these requests relate to information which he believes may, in other ways, already be in the public domain. He has raised these points with the Trust during the investigation of this case, and has sought from it further explanations as to how the release of the withheld information would be likely to prejudice the functions of the GMC as detailed in sections 31(2)(c) and (d). However, despite the Trust providing further submissions he remains unconvinced that the disclosure of this information would be likely to cause the prejudicial effects to the GMC's investigation that it has argued. In reaching this view the Commissioner has in particular noted the nature of the information that has been requested, and the fact that the Trust has not contacted the GMC about the potential disclosure of the information requested in this case. In addition, it has not explained how the information requested at requests (2), (7), (9), (11), (12) and (13) links in with the GMC's investigation. For these reasons the Commissioner is not persuaded that the prejudice test (as set out at paragraph 48 above) is satisfied. Therefore he does not believe that the disclosure of the withheld information would be likely to cause the prejudice as set out in sections 31(2)(c) and (d).
53. Therefore, the Commissioner does not believe that sections 31(1)(g) and 31(2)(c), (d) and (i) are engaged in relation to the withheld information. As he has found that this exemption is not engaged, he has not gone on to consider the public interest test in relation to this exemption.

Section 40

54. In this case the Trust sought to rely upon sections 40(2) and 40(3)(a)(i) in relation to requests (2) and (13). However, due to the nature of the information requested at requests (7), (9), (11), and (12)

the Commissioner has also considered whether this exemption applies to this information as well. The Commissioner believes that this is appropriate, given the personal nature of some of the information requested, and because of his dual role as regulator of the DPA.

55. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in sections 40(3) or 40(4) is satisfied.
56. In this case the condition in question is contained in section 40(3)(a)(i), which applies where the disclosure of the information to any member of the public would contravene any of the data protection principles. As stated above, in this case the Trust has stated that the disclosure of the withheld information would be in breach of the first principle of the DPA. In addition to this, it has also stated that disclosure would also possibly be in breach of the second and sixth principles.
57. In order to establish whether this exemption has been applied correctly the Commissioner has first looked at whether the withheld information constitutes the personal data of a third party.

Is the information personal data?

58. Section 1 of the DPA defines personal data as data which relate to a living individual, who can be identified:
 - from that data, or
 - from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
59. The Commissioner has first considered whether the requested information compromises the personal data of the named doctor. The Commissioner notes that because of the nature of the requests the named doctor is identifiable from the withheld information, and he or she is obviously the focus of this information. Therefore the Commissioner is satisfied that the withheld information compromises the personal data of the named doctor.

Would disclosure contravene any of the data protection principles?

60. The Trust has stated that the disclosure of the withheld information would be in breach of the first principle of the DPA. In addition to this, it has also stated that disclosure would also possibly be in breach of the second and sixth principles. The Commissioner has first considered

whether the disclosure of the withheld information would be in breach of the first principle.

First data protection principle

61. The first principle provides 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.”

In this case the withheld information does not involve the sensitive personal data of the named doctor. Therefore the Commissioner has first considered whether the disclosure of the withheld information would be fair. He has then gone on to consider whether disclosure would be lawful. Finally, he has gone on to consider whether any of the conditions in Schedule 2 of the DPA are met.

Would it be unfair to disclose the information?

62. In considering whether disclosure of the withheld information would be unfair and therefore contravene the requirements of the first principle, the Commissioner has taken the following factors into account:

- the individual’s reasonable expectations of what would happen to his or her information;
- the seniority of the individuals;
- whether disclosure would cause any unnecessary or unjustified damage to the individuals; and
- the legitimate interests of the public in seeing the withheld information.

63. The Trust has argued that the disclosure of the withheld information would not be within the reasonable expectations of the named doctor, and as such disclosure of this information would be unfair. It has argued that,

“We consider the employee’s expectation is not for such data to [be] released into the public domain while the [GMC] investigation is being undertaken. Once a decision has been reached, then the perception would alter, as it does for the outcome of other investigations and trials...”

64. In considering individuals' expectations the Commissioner has considered how senior the staff member was, whether they had a public profile and whether their role required a significant level of personal judgement and individual responsibility.
65. In this case the Commissioner has noted that the named doctor was a consultant and therefore a reasonably senior member of staff within the Trust. In addition to this, the Commissioner notes that the named doctor's role meant that he or she was public facing (in that they treated patients).
66. In considering the reasonable expectations of the named doctor the Commissioner has also considered the nature of the requested information. As noted at paragraph 52 above, the Commissioner has noted the apparently innocuous nature of much of this information, and that some of the requests relate to information which he believes may, in other ways, already be in the public domain. Lastly the Commissioner also notes that the fact that the named doctor was under investigation by the GMC was in the public domain, by way of a notification on the GMC's website that restrictions had been placed on his or her registration.
67. Given the seniority of the named doctor and the nature of the requested information in this case, the Commissioner is not persuaded by the Trust's arguments that disclosure would not be in his or her reasonable expectations.
68. In order to consider whether disclosure would cause any unnecessary or unjustified damage to the named doctor the Commissioner has again noted the nature of the requested information. The Commissioner has noted the Trust's comments that it believes that the disclosure of this information may cause the named doctor distress. However, in the absence of any further arguments, and given the nature of the information, the Commissioner is not persuaded that disclosure would cause unnecessary or unjustified damage or distress to the named doctor.
69. Finally, given the role and seniority of the named doctor, together with the fact that it was public domain knowledge that he or she was under investigation at the time of the request, the Commissioner is satisfied that the public have a legitimate interest in seeing the withheld information.
70. Therefore the Commissioner does not consider that it would be unfair to disclose the withheld information in this case.

Would it be unlawful to disclose the information?

71. Having decided that disclosure of the withheld information would not be unfair, the Commissioner has gone on to consider whether the processing would be lawful. In this case, the Commissioner is not aware of any duty of confidence or statutory bar protecting the information and he is satisfied that the disclosure would not be unlawful.

Schedule 2 conditions

72. The Commissioner has gone on to consider whether any of the conditions in schedule 2 of the DPA can be met.
73. The Commissioner considers that the most applicable condition in this case is likely to be condition 6 which gives a condition for processing personal data where:
- 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.
74. In order to consider whether this condition is met the Commissioner believes that disclosure must satisfy a three part test:
- there must be legitimate interests in disclosing the information,
 - the disclosure must be necessary for a legitimate interest of the public, and
 - even where the disclosure is necessary, it nevertheless must not cause unwarranted interference (or prejudice) to the rights, freedoms and legitimate interests of the data subject.
75. The Commissioner believes there is a legitimate interest in the Trust being as open and transparent as possible. In addition to this, given the fact that by the time of the request there was some information in the public domain that the named doctor was under investigation by the GMC, the Commissioner believes that the public had a legitimate interest in knowing some basic background information about the named doctor. The Commissioner is of the view that disclosure of the withheld information would be necessary to satisfy these legitimate interests.

76. Having already established that the processing is fair, the Commissioner is also satisfied that the release of the withheld information would not cause any unnecessary interference with the rights, freedoms and legitimate interests of the data subject (i.e. the named doctor). In reaching this view the Commissioner has again been mindful of the nature of the requested information, and the details of the submissions provided by the Trust.
77. Therefore the Commissioner is of the view that the disclosure of the withheld information would not be in breach of the first principle.

Second data protection principle

78. The Trust has argued that the disclosure of the withheld information would possibly also be in breach of the second principle of the DPA. Although it has not stated definitively whether it believes that this principle would be breached the Commissioner has nevertheless gone on to consider this point.
79. The second principle states that,
- “Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.”
80. During the investigation the Commissioner asked the Trust to provide further arguments as to why it believed that the disclosure of the withheld information would be in breach of this principle. However, the Trust did not provide any further submissions to support this point.
81. Bearing in mind the aim of the DPA, i.e. protecting the privacy of individuals, it would be a very odd result if, after being satisfied that a disclosure complied with the first principle and that therefore no privacy rights would be prejudiced, a disclosure could be blocked by the second principle because such disclosures had not been specified by the public authority or because the disclosure would somehow interfere with the business purposes of the data controller.
82. To allow these arguments would allow the second principle to become an artificial barrier to disclosures that do not unduly impact on the privacy of data subjects. It would allow public authorities to frustrate disclosures by omitting to specify such disclosures as a purpose for which information was obtained. Furthermore where a public authority is concerned that a disclosure is incompatible with their business purposes then this should be addressed through the application of one

of the other exemptions available under the Act, not by the use of an exemption designed to protect individual privacy.

83. The second principle provides that data controllers must specify the purposes for which they are processing personal data. This can be achieved either through a fair processing notice provided directly to data subjects or by including the purpose in its entry on the Register of Data Controllers, a public register available for inspection on the Commissioner's website. The Commissioner notes that in this case the Trust is notified as a public authority on the above register.⁴
84. Public authorities need to collect personal data in order to pursue their business objectives. It is only these purposes which the public authority has to specify. Public authorities do not obtain personal data so that they can then provide it in response to a request. This is not one of their business purposes. It follows that there is no requirement to specify that disclosures may be made under the Act in either a fair processing notice or the Register of Data Controllers.
85. Even though public authorities are not required to specify that they may disclose personal data under the Act, the second principle still prohibits them from further processing personal data (including in response to requests) in any manner that would be incompatible with the purposes it has specified, i.e. a disclosure in response to a request still needs to be compatible with the public authority's business purposes.
86. The Commissioner's view is that in order to consider this issue properly he has to take account of the ethos behind the Act which aims to promote the public's understanding of, and confidence in, the public authorities that serve them, which in turn will drive up standards within the public sector.
87. On this basis it is difficult to see how a disclosure of personal information which would not breach any of the remaining data protection principles, and would not involve the disclosure of information that is covered by another exemption, could possibly be incompatible with the public authority's business purposes. In fact such a disclosure should actually support the specified business purposes of the public authority by promoting confidence, driving up standards, etc.
88. Further support for this approach can be taken by consideration of the second principle in the broader context of the DPA, i.e. the protection

⁴ <http://www.ico.gov.uk/ESDWebPages/DoSearch.asp?reg=4474075>

of the privacy of individuals. The Commissioner recognises that there is an argument that he should interpret the second principle in a way that focuses on whether any further processing would be incompatible with the privacy rights of the data subject rather than on the business purposes of the data controller, despite this approach straying away from a strict interpretation of the principle. Such an approach would mean that if, in all other respects, the disclosure is compatible with the remaining data protection principles then it would not contravene the second principle.

89. Bearing these points in mind the Commissioner is of the view that the disclosure of the withheld information would not be in breach of the second principle.

Sixth data protection principle

90. The Trust has argued that the disclosure of the withheld information would possibly also be in breach of the sixth principle of the DPA. Although it has not stated definitively whether it believes that this principle would be breached the Commissioner has nevertheless gone on to consider this point.
91. The sixth principle states that personal data shall be processed in accordance with the rights of data subjects under the DPA. This principle refers to the rights of data subjects as given by the DPA, namely:
- Right of access to a copy of the information comprised in their personal data, i.e. the right of subject access (section 7 DPA).
 - Right to object to processing that is likely to cause or is causing damage or distress (section 10 DPA).
 - Right to prevent processing for direct marketing (section 11 DPA).
 - Right to object to decisions being taken by automated means (section 12 DPA).
 - Right in certain circumstances to have inaccurate personal data rectified, blocked, erased or destroyed (section 14 DPA).
 - Right to claim compensation for damages caused by a breach of the DPA (section 13 DPA).
92. During the investigation the Commissioner informed the Trust that he did not believe that the disclosure of the withheld information would be in breach of this principle. Bearing this in mind, he asked the Trust to provide further arguments as to why it believed that the disclosure of the withheld information would be in breach of this principle. However, the Trust did not provide any further submissions to support this point.

93. After considering the withheld information in this case the Commissioner is of the view that the disclosure of the withheld information would not be in breach of the sixth principle.
94. Therefore, the Commissioner believes that sections 40(2) and 40(3)(a)(i) are not engaged in relation to the withheld information.
95. The exemption listed at section 40(2) and section 40(3)(a)(i) is an absolute exemption, and therefore is not subject to a public interest test.
96. The full text of section 40 can be found in the Legal Annex at the end of this Notice.

Procedural Requirements

97. Section 1(1) states 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.”
98. Section 10(1) states that:

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”
99. As the Commissioner has decided that the withheld information is not exempt from disclosure under any of the exemptions cited by the Trust, he believes that this information should have been provided to the complainant in line with the duty at section 1(1)(b). The Trust’s failure to do so therefore constitutes a breach of section 1(1)(b). Furthermore, by failing to provide this information within 20 working days of the request the Trust also breached section 10(1).
100. In addition to this, during the course of the investigation the Trust informed the Commissioner that it no longer sought to rely upon any exemption in relation to the withheld information relating to request (2). As this information was not disclosed within 20 working days of

the request the Commissioner believes that this is also in breach of sections 1(1)(b) and 10(1).

101. The Commissioner has also considered whether the Trust has complied with its obligations under section 17(1).
102. Section 17(1) requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal 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.
103. In the refusal notice and internal review the Trust stated that it was relying upon "section 40(2)" and "section 31(2)". However, the Trust did not fully specify which parts of these exemptions it was seeking to rely upon. For this reason the Commissioner believes that the Trust did not comply with the requirements of section 17(1)(b).
104. The full texts of sections 1, 10 and 17 can be found in the Legal Annex at the end of this Notice.

The Decision

105. The Commissioner's decision is that the Trust did not deal with the request for information in accordance with the Act in that:
 - The Trust did not deal with the request for information in accordance with section 1(1)(b) insofar as it inappropriately relied upon sections 31(1)(g), 31(2)(c), 31(2)(d), 31(2)(i), 40(2) and 40(3)(a)(i) to withhold the information requested at requests (2), (7), (9), (11), (12) and (13). In failing to comply with the requirements of section 1(1)(b) within 20 working days it also breached section 10(1).
 - As noted above, during the course of the investigation the Trust stated that it no longer sought to rely upon any exemption in relation to the withheld information relating to request (2). As this information was not disclosed within 20 working days of the request the Commissioner believes that this is also in breach of sections 1(1)(b) and 10(1).

- The Trust also failed to meet the requirements of section 17(1) in that it failed to fully specify which parts of sections 31 and 40 it was seeking to rely upon to withhold the requested information.

Steps Required

106. The Commissioner requires the Trust to take the following steps to ensure compliance with the Act:

The Trust should disclose the withheld information as set out in the Confidential Annex attached to this Notice

107. The Trust must take the steps required by this Notice within 35 calendar days of the date of this Notice.

Failure to comply

108. 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.

Other matters

109. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

During the course of his investigation, the Commissioner has encountered considerable delay on account of the Trust's reluctance to meet the timescales for response set out in his letters. Furthermore, the Commissioner has been met with resistance in his attempts to understand the Trust's reasons for invoking particular exemptions.

Accordingly the Commissioner does not consider the Trust's approach to this case to be particularly co-operative, or within the spirit of the Act. As such he will be monitoring the Trust's future engagement with the ICO and would expect to see improvements in this regard.

Right of Appeal

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

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

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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

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

Dated the 11th day of August 2010

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

Section 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.
- (2) Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
- (3) Where a public authority –
 - (a) reasonably requires further information in order to identify and locate the information requested, and
 - (b) has informed the applicant of that requirement,the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.
- (4) The information –
 - (a) in respect of which the applicant is to be informed under subsection (1)(a), or
 - (b) which is to be communicated under subsection (1)(b),is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.
- (5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).
- (6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

Section 10

- (1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
- (2) Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.
- (3) If, and to the extent that –
 - (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
 - (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

- (4) The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.
- (5) Regulations under subsection (4) may –
 - (a) prescribe different days in relation to different cases, and
 - (b) confer a discretion on the Commissioner.
- (6) In this section –

“the date of receipt” means –

 - (a) the day on which the public authority receives the request for information, or
 - (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

Section 17

- (1) 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.
- (2) 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.
- (3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -
- (a) that, 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 authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- (4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.
- (5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
- (6) Subsection (5) does not apply where –
- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7) A notice under section (1), (3) or (5) must –
- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.

Section 31

- (1) 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.
- (2) 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.
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

Section 40

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (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.
- (4) 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).
- (5) The duty to confirm or deny-
 - (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
 - (b) does not arise in relation to other information if or to the extent that either-
 - (i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data

- Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
- (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).
- (6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

- (7) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.