

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 1 June 2010

Public Authority: General Medical Council (the 'GMC')
Address: 5th Floor
St James's Building
79 Oxford Street
Manchester
M1 6FQ

Summary

The complainant requested all the exhibits considered at Dr David Southall's Fitness to Practise Hearings. The public authority confirmed that it held such information and provided some information. It withheld the remainder by virtue of section 40(2) [third party personal data] and section 41(1) [confidentiality]. The complainant referred the case to the Commissioner.

The Commissioner has considered the case carefully and, during the course of his investigation, the Court of Appeal overturned the original decision of the Fitness to Practise Panel as the reasons provided were inadequate. The public authority explained that a new Fitness to Practise panel would be likely to be required and it would need to consider the same exhibits. It therefore asked the Commissioner to consider the late application of section 31(1)(g) by virtue of section 31(2)(d) [prejudice to the exercise of its functions in ascertaining a person's fitness or competence...in relation to any profession]. The Commissioner has allowed the late application of the exemption and upholds the application of section 31(1)(g) in this case as he has been satisfied that there would be prejudice to that purpose and the public interest in maintaining the exemption outweighs the public interest in disclosure.

He has found procedural breaches of sections 1(1)(b), 10(1), 17(1), 17(1)(b), 17(1)(c) and 17(3)(b) as the public authority issued its response late and failed to cite an exemption that it would later rely on at the time of its internal review. However, he requires no remedial steps to be taken.

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.

Background

2. Dr David Southall is a well known paediatrician.
3. At the time of the request, he had been subject to five different hearings that were dated:
 - 7-15 June and 5-6 August 2004;
 - 23 July 2007;
 - 13 November - 2 December 2006 and 5 November - 4 December 2007;
 - 8 May - 4 July 2008; and
 - 11 - 16 August and 20 - 21 September 2008.¹
4. The transcripts and verdicts are in the public domain. The request is for the exhibits that were considered in these panels. There are around 4000 pages of information and the Commissioner has determined that there are 1406 distinct sorts of information.
5. The decision of the last hearing was to strike Dr Southall off the medical register. At the date of the request, the High Court was considering whether the verdict was secure. It followed that at this time the case was still live and there was a possibility that an adverse verdict would require the public authority to reconsider the case. The High Court upheld the public authority's decision on 22 May 2009.
6. On 20 April 2010 the Court of Appeal in *Southall v General Medical Council* [2010] EWCA Civ 407 overturned both the public authority's and the High Court's decision. The contents of this decision will be considered further in the 'finding of fact' section of this notice below.

¹ The first one was a Professional Conduct Committee hearing and the last four were Fitness to Practice Hearings. The hearings serve the same purpose, which is to investigate complaints made about the doctor's conduct.

The Request

7. On 7 April 2009 the complainant requested the following information in accordance with section 1(1) of the Act²:

'Please provide details (minutes, transcripts and exhibits) of FTP panel / professional conduct committee cases heard against Dr David Southall.'

8. On 11 May 2009 the public authority issued a partial response. It explained that the request for the transcripts had been passed to the Fitness to Practise directorate. In respect of the minutes it was prepared to provide this information. It explained that it held a considerable amount of information concerning exhibits. It explained that there were a number of exhibits that it believed it was entitled to withhold. It explained that it was withholding this information because section 40(2) [by virtue of section 40(3)(a)(i)] applied. This was because it was personal information of a third party, that disclosure would be unfair to that third party and unlawful and that this would contravene the first data protection principle of the Data Protection Act (DPA). It also explained that the exemption was absolute and provided details of its internal review process.
9. Later, on 11 May 2009 the complainant wrote to the public authority to ask if the remaining exhibits could be provided in redacted form. The public authority acknowledged receipt and explained that it would regard this as a request for an internal review.
10. On 13 May 2009 and 19 May 2009 the transcripts were provided to the complainant.
11. On 24 June 2009 the complainant wrote to the public authority to request an internal review again. He explained that he had not had a response to his email dated 11 May 2009.
12. On 10 September 2009 the complainant sent a further reminder.
13. On 14 September 2009 the public authority explained the delay. It explained that it was considering the case alongside another two cases that were under consideration by the Commissioner. In addition, the information was very substantial. However, it explained that an internal review response would be completed in the near future.

² All sections of the Act that are quoted in this Notice can be found in the legal annex attached to the bottom of it.

14. On 30 September 2009 the results of the internal review were communicated to the complainant. The public authority apologised for the delay which it explained was caused by volume of work and the complexity of this case. It explained that it held no recorded information except an exhibit list for the first hearing. For the others it provided a redacted copy of the exhibits list along with some of the exhibits that were appropriate to disclose. It explained that it was withholding the other information because it believed that exemptions applied to them. It said that section 40(2) applied because processing would not accord with the first data protection principle. It believed this because none of the conditions in Schedule 2 of the Act applied and processing would only be allowed had one of those conditions been satisfied. It also believed that section 41(1) [information provided in confidence] applied to the information. It stated that the release of these exhibits was likely to amount to an actionable breach of confidence. It explained that the complainant had a further right of appeal to the Commissioner.

The Investigation

Scope of the case

15. On 14 September 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
- That he had not received a response to his request for an internal review.
16. On 21 October 2009 the complainant explained to the Commissioner that he wanted to know whether redacted versions of the exhibits could be disclosed.
17. On 10 November 2009 the complainant agreed that the scope of this case would concern whether the following was withheld correctly and/or whether it would be possible to provide redacted versions:
- 1. Exhibits for hearing dated 23 July 2007:*
 - a. Item 1 on the list of exhibits (pages 1 – 7 [all numbers are inclusive]).*
 - b. Item 2 on that list (page 8).*

- c. *Items 4 – 15 on that list (pages 35-51).*
- d. *Part of item 16 on that list (pages 57-60).*
- e. *Items 18-26 on that list (pages 63-72).*

2. Exhibits for Fitness to Practise Panel - 13 November - 2 December 2006 and 5 November - 4 December 2007:

- a. *Items C1 –C14 on the list of exhibits.*
- b. *Items C16 – C27 on that list.*
- c. *Items D1 – D9 on that list.*
- d. *Items D11 – D22 on that list.*
- e. *Items D25 – D26 on that list.*

3. Exhibits for Fitness to Practise Panel 8 May - 4 July 2008

- a. *Items C1 and C2 on the list of exhibits.*
- b. *Items C6 to C15 on that list.*
- c. *Items C17 to C19 on that list.*
- d. *Items D1A to D1C on that list.*
- e. *Items D2 to D5 on that list.*
- f. *Items D7 to D9 on that list.*
- g. *Items D11 to D13 on that list.*
- h. *Item D15 on that list.*
- i. *Items D17 to D18 on that list.*
- j. *Item D20 to D22 on that list.*

4. Exhibits for Fitness to Practise Panel 11 – 16 August and 20 – 21 September 2008

- a. *Items C1 to C3 on the list of exhibits.*
- b. *Item C6 on that list.*
- c. *Item C8 on that list.*
- d. *Item C10 on that list.*
- e. *Items D1 to D6A on that list.*
- f. *Items D8 to D12 on that list.'*

18. Items C23, D19 and D20 of category 2 above had been provided to the public and the Commissioner regards these elements as being informally resolved. He will not consider them further.

Chronology

19. 7 October 2009: The Commissioner wrote to the public authority to explain that he had received an eligible complaint. He also asked for the withheld information to be provided.

20. 14 October 2009: The public authority responded to the Commissioner. It explained that there were similar cases ongoing and suggested that this case might be able to wait until the previous decisions had been made.
21. 2 November 2009: The Commissioner wrote to the public authority. He explained that he was prepared to consider the validity of the previous arguments where they were appropriate. He also noted that one set of redacted exhibits was missing and asked that it was provided to him.
22. 3 November 2009: The public authority provided these redacted exhibits and explained that this set had not yet been disclosed to the complainant. The Commissioner responded and asked for this set to be disclosed to the complainant and this was done the same day.
23. 6 November 2009: The Commissioner asked for a full copy of the information referenced in paragraph 17 above. He also wrote to the complainant to confirm that he believed that the scope was to determine whether the information referenced above should be provided to the public either in complete or redacted form.
24. 10 November 2009: The complainant agreed the scope of the investigation.
25. 7 December 2009: The Commissioner received the withheld information from the public authority and wrote to the public authority to acknowledge its safe receipt.
26. 11 December 2009: The Commissioner wrote to the complainant. He explained that the information was very voluminous and contained a large amount of personal data. He asked whether there was any sort of information that he was particularly interested in.
27. On the same day, the complainant agreed that he did not want to receive the medical records of specified patients. He asked whether an index could be provided to help him narrow down his request further.
28. 24 December 2009: The Commissioner wrote to the complainant. He explained that he was creating a detailed index but that it was taking some time. He said that he would revert back to the complainant when there was progress to report.
29. 24 February 2010: The Commissioner wrote to the complainant to update him on the progress of making the index.

30. The Commissioner also wrote to the public authority to understand what was in the public domain. He received an appropriate response the same day.
31. 23 March 2010: The Commissioner wrote to the public authority attaching his index of withheld material. He asked whether the public authority was happy for him to disclose to the complainant his descriptions of the items of withheld information and for it to consider carefully some of the items that had been withheld. He also provided an update to the complainant to explain what he had done.
32. 9 April 2010: The public authority provided a response explaining its view at this stage. The Commissioner then telephoned the public authority and agreed how this case would be progressed.
33. 29 April 2010: The public authority provided a new response. It explained that it believed that the Court of Appeal case dated 20 April 2010 had changed the status of the information. This was because it would appear to make the information 'live' and this means that section 31(1)(g) by virtue of section 31(2)(d) may be appropriate and the considerations under section 40(2) would also change.
34. 30 April 2010: The Commissioner explained to the complainant that the public authority had applied section 31(1)(g) and, after the Court of Appeal decision, it was unlikely that he would order further information to be disclosed. He asked whether he wished for the case to continue.
35. On the same day the complainant explained that he wanted a decision notice as he believed that he could dispute that there was prejudice to the public authority's function in the Tribunal. The Commissioner telephoned the public authority and asked it to provide its detailed submissions about the operation of section 31(1)(g) by virtue of section 31(2)(d) and its public interest arguments.
36. 12 May 2010: The public authority provided its submissions. The contents of these submissions are considered in the analysis section below.

Findings of fact

37. On 20 April 2010 the Court of Appeal in *Southall v General Medical Council* [2010] EWCA Civ 407 overturned both the public authority's and the High Court's decision. It explained that the reasons provided by the Fitness to Practise panel were inadequate and that the verdict concerning the main issue as to why Dr Southall was struck off was

unsafe. Dr Southall was therefore restored to the medical register. However, it explained that this decision was not in respect to the other allegations found proven. It explained that the GMC should consider whether it was in the public interest to reconvene the panel to decide what penalty is appropriate for the other charges (at paragraph 71).³

Analysis

Exemption

Section 31(1)(g) by virtue of section 31(2)(d)

38. Section 31(1)(g) constitutes both a prejudice based and qualified exemption. Therefore for it to be applied correctly it is necessary for the public authority to be able to demonstrate both that there would or would be likely to be prejudice to one of the specified purposes (outlined in section 31(2)), and also that the public interest in maintaining the exemption outweighs the public interest in disclosure. The section states:

'Information which is not exempt by virtue of section 30 is exempt information if its disclosure 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)'

39. One of the purposes specified in subsection (2) is defined in 31(2)(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'

40. The public authority believes that after the Court of Appeal hearing it now needs to apply this exemption and that the public interest in maintaining it outweighs that of disclosure.

³ A transcript of the judgment can be found here (the link works on 25 May 2010): <http://www.bailii.org/ew/cases/EWCA/Civ/2010/407.html>

41. The Commissioner has accepted the late application of the exemption although he believes that it was known at the time of the request that the case was being appealed to the High Court, and while the outcome was not known, it was foreseeable that it could lead to the Fitness to Practise hearing being reconvened. As it happened, the High Court found in the public authority's favour, but the Court of Appeal then overturned this decision. The Commissioner is of the view that it cannot have been said that the case was concluded until the full set of appeals were completed. He nevertheless considers it appropriate to consider arguments about this exemption given the current situation. This is because he believes that there are considerable risks associated with disclosure including the topic of the information, its profile, its sensitivity and the impact of release (which may lead to the potential of compromising Dr Southall's right to a fair hearing). He believes that the weight of those arguments should be considered at the date of the request on the understanding that there was potential for the case to need to be reconsidered.
42. The complainant has argued that it is contentious whether the disclosure of this information would prejudice the functions of the public authority.
43. The Commissioner will first consider whether he believes the disclosure of the information would cause a prejudice to the public authority exercising its functions specified in section 31(2)(d). If he is satisfied that it does so, he will then move on to consider the public interest test.

Would the release of this information be likely to prejudice the exercise of its functions for the purpose of ascertaining a person's fitness to practice?

44. In *Hogan v the ICO and Oxford City Council* [EA/2005/0026 and EA/20005/0030] the Information Tribunal stated that "The application of the 'prejudice' test should be considered as involving a number of 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." (paragraphs 28 to 34).
45. The relevant applicable interest in this exemption is the prejudice to the exercise of the public authority's functions for the purposes of ascertaining Dr Southall's Fitness to Practise and the Commissioner accepts that the arguments made by the public authority directly address this potential prejudice.

46. When considering the second step as set out in the *Hogan* case, 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.
47. The public authority has explained that at the time of the request there was a possibility that the case was to be reconsidered and that the exhibits would become live. The Court of Appeal judgment has made it highly likely that the original Fitness to Practise Panel will be reconvened to consider the evidence that constitutes the withheld information again. The nature of the prejudice argued by the public authority is that the disclosure of the withheld information 'would be likely to' prejudice the proceedings of this hearing. The question is one of timing as the information now constitutes the evidence that will be considered in a live hearing. The public authority explained that the opening of the documents to public scrutiny prematurely could lead to adverse publicity which could result in either additional pressure for those deciding the case or place undue influence on the parties involved in the hearing. In its view the unfairness could extend to Doctor Southall as he has already been subject to vociferous campaigns against his work and he deserves a full, fair and impartial hearing. Putting the proceedings of the hearing in doubt would directly inhibit the exercise of its functions in ascertaining Dr Southall's Fitness to Practice.
48. It explained that its policy was not to disclose the evidence that is to be considered before a hearing even if it could not evidence categorically that the release of the exhibits would lead to prejudice to its functions. However, it would appear that the exemption was drafted with this kind of circumstance in mind.
49. The Commissioner has considered carefully the situation. He is of the view that it is highly likely that the Fitness to Practise panel will be reconvened to consider the remaining charges against Dr Southall. He believes this because the outstanding concerns are real and multi-faceted and the GMC has a statutory obligation to ensure that the public continues to have faith in the medical profession. He is of the view that the public authority is likely to believe that it is in the public interest for it to reconvene the panel. He is also of the view that that the vast majority of the withheld information will need to be considered again. The information that relates to the issue that the Court of Appeal considered to not require further investigation, may in the Commissioner's view, also be required in making a judgment on the other issues.

50. The Commissioner is satisfied that the public authority has adequately demonstrated a causal link between the disclosure of the exhibits and a prejudice to the exercise of its functions in ascertaining Dr Southall's Fitness to Practice, and that the nature of the prejudice is 'real and of substance'. He therefore finds that the second stage of the test from *Hogan* is satisfied.
51. When considering the third step as set out in *Hogan*, the Commissioner notes that the public authority has claimed that the stated prejudice 'would be likely to' occur. The Commissioner considers that this means that it is necessary for the public authority to persuade him that there is a 'real and significant' risk of prejudice in this case.
52. The public authority has argued that the risk of an adverse effect to the exercise of its functions in ascertaining Dr Southall's Fitness to Practice was 'real and significant'. The Commissioner has considered the evidence that he has been provided with and accepts that this is so. He believes that the provision of the evidence to be considered could harm both the impartiality of the hearing and could mean that its functions in gathering appropriate evidence to protect the public would be inhibited too. The public authority has therefore satisfied all three stages of the prejudice test as set out in *Hogan*, and the Commissioner therefore finds that the exemption has been engaged.

The public interest test

53. The public interest test requires determining whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The strength of the competing interests must be assessed on a case-by-case basis not least because section 2(2)(b) requires the balance to be considered "in all the circumstances of the case".
54. The Commissioner will first consider the public interest factors that favour the maintenance of the exemption, before considering those that favour disclosure and finally explaining where he believes the balance lies.
55. When considering the public interest arguments in maintaining the exemption the Commissioner can only consider those factors that are inherent within that exemption (so here relate directly to the prejudice of the exercise of the GMC's functions in ascertaining Dr Southall's Fitness to Practice). This is in contrast to the factors that favour disclosure which only need to relate to the information and are not inherent to the exemption.

56. It is also important to note from the outset that the Act is worded to embrace a presumption favouring disclosure. Therefore in the event that the public interest factors are of equal weight the information should be communicated. It is also important to note that the “public interest” signifies something that is in the interests of the public as distinct from matters which are of interest to the public⁴.

Public interest arguments in favour of maintaining the exemption

57. The Commissioner has looked at the public interest factors in favour of maintaining the exemption and notes that there is an inherent strong public interest in avoiding likely prejudice of the exercise of the public authority’s functions in ascertaining Dr Southall’s Fitness to Practice. He reiterates his arguments in paragraphs 43 to 49 above that there was a significant risk of prejudice occurring to the public authority’s functions.
58. The Commissioner agrees that there is an overwhelming public interest in ensuring that the public authority as the regulatory authority is allowed to carry out its adjudication function without the risk of premature disclosure in any way influencing that process.
59. He accepts that the disclosure of the evidence before the process is completed would risk a outcome prejudicial to either party. He notes that the procedure is particularly important as it concerns the right of an individual to have a fair hearing and/or practice his profession and serves to ensure that the public have confidence in the profession. The Commissioner notes that Parliament decided to give the right to adjudicate these matters to the public authority and that the space to exercise its functions should be respected for live cases. He believes that a failure to provide this space would be likely to inhibit the public authority’s future ability to conduct investigations.
60. The Commissioner also believes that it is important that confidence in the integrity of the public authority’s hearings is maintained and that principles of natural justice are applied. This means that evidence should not be placed in the public domain before the defendant has had the chance to defend himself appropriately. It is important both that the process is fair and that justice is seen to be done. He notes that the public authority on conclusion of hearings is open and transparent where possible. The verdicts provide analysis of the exact accusations that have been made and what the decision is. The minutes and transcripts are also often available when the hearings occur in public.

⁴ *Department of Trade and Industry v Information Commissioner (EA/2006/0007)* at paragraph 50.

Public interest arguments in favour of disclosing the requested information

61. The Commissioner recognises that disclosure of information by public authorities on request is in the public interest in order to promote transparency and accountability in relation to the activities of public authorities. In this case he notes that Dr Southall's case is one that has led to a great deal of public debate, both for those that support him such as Professional's Against Child Abuse⁵ and those that do not such as the Daily Mail⁶. He notes that there is a public interest in transparency and that the disclosure of all the evidence considered would enable interested parties to make a judgment themselves on all of the facts. He has also noted that the Court of Appeal has criticised the findings of the Panel. However as this happened after the date of the request, it cannot be considered in this notice.
62. The public authority has explained that it is as open and transparent as possible. It has provided considerable detail in its public verdicts, along with the transcripts and minutes. The Commissioner's view is that the disclosure of the exhibits would add to the accountability of the public authority in relation to this case. He does not however accept that the public interest in transparency and accountability can be fully addressed via the release of other related information. He supports the Information Tribunal's view in *Cabinet Office v Lamb and the Information Commissioner* [EA/2008/0024 & 0029] that "Disclosure under FOIA should be regarded as a means of promoting accountability in its own right and a way of supporting the other mechanisms of scrutiny, for example, by providing a flow of information which a free press could use." However, he does believe that accountability needs to be proportionate when cases have not yet been heard.
63. The Commissioner also appreciates that the disclosure of the withheld information may enhance public debate. He notes that the role of any paediatrician in child protection work is likely to involve making unpopular and difficult decisions that have to be made on a precautionary basis. He believes that the information may therefore lead to debate about what is expected from paediatricians, how they conduct their job and what sort of protection from complaints should be offered. He believes that the disclosure of the information could add to that debate, but that this factor has only limited weight in this case.

⁵ Such as in the link: <http://paca.org.uk/2010/05/10/failure-of-medical-regulation-time-for-an-inquiry-into-the-integrity-of-the-gmc-after-david-southall%E2%80%99s-appeal-win/>

⁶ Such as in the article: <http://www.dailymail.co.uk/news/article-490025/Is-doctor-responsible-parents-falsely-branded-child-abusers.html>

Balance of the public interest arguments

64. The Commissioner has considered where the balance lies in this case. He believes that the public interest is compellingly in favour of maintaining the exemption in this case. He believes this is so because he considers it is of primary importance that the public authority can undertake its statutory functions and that the independence and impartiality of its hearings should not be undermined. He believes that the disclosure of the withheld information would not accord with natural justice. He has considered the public interests in transparency and believes that their weight is insufficient in this case.
65. The Commissioner therefore believes that the public authority was correct in determining that the public interest lay in maintaining the exemption and upholds its application of section 31(1)(g), by virtue of section 31(2)(d).
66. For clarity, the Commissioner has considered every line of the withheld information and believes that there is not a single item where the public interest lies in disclosing the information. The Commissioner has carefully considered, as stated in the scope section of this Notice, whether it would be possible to provide the public with any redacted versions of the documentation. He has concluded that it would not be.

Procedural Requirements

67. There have been a number of procedural deficiencies in this case. A number of them are due to its unusual circumstances and the Commissioner will conclude this notice by noting each in turn:

Section 1(1)(b)

68. Section 1(1)(b) requires that a public authority communicates information that it is not withholding correctly under any exemption. The public authority failed to provide one set of exhibits to the complainant until the Commissioner's involvement and therefore breached section 1(1)(b). As this information has been provided to the complainant, he requires no remedial steps in this case.

Section 10(1)

69. Section 10(1) requires a public authority to comply with sections 1(1)(a) and 1(1)(b) within twenty working days of receiving the request. The public authority took twenty one, twenty three and twenty seven days to answer different parts of the original request. It therefore failed to comply with either section 1(1)(a) or section 1(1)(b) within the statutory timescales and breached section 10(1) twice. As a

response has been provided, he requires no remedial steps to be taken.

Section 17(1)

70. Section 17(1) requires that any refusal notice is issued within twenty working days. The public authority took twenty one working days to issue its first refusal notice and therefore breached section 17(1). As a compliant refusal notice has been provided, he requires no remedial steps to be taken.

Section 17(1)(b) and (c)

71. Section 17(1)(b) and (c) requires that a refusal notice should cite the exemption that the public authority relies on and explain why it is relying on this exemption where it is not readily apparent. In this case the public authority failed to rely on section 31(1)(g), by virtue of section 31(2)(d), until 29 April 2010. It therefore breached sections 17(1)(b) and (c) in this case. As this notice provides the appropriate clarification, the Commissioner requires no remedial steps to be taken in this case.

Section 17(3)(b)

72. Section 17(3)(b) requires where a public authority is relying on a qualified exemption it states in its refusal notice (or internal review) why the public interest in maintaining the exemption outweighs that in disclosure. In this case the public authority failed to rely on section 31(1)(g), by virtue of section 31(2)(d) in time and therefore did not conduct a public interest test. It therefore also breached section 17(3)(b). As this notice provides the appropriate clarification, the Commissioner requires no remedial steps to be taken in this case.

The Decision

73. 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:
- *It has applied section 31(1)(g), by virtue of 31(2)(d) appropriately to all the relevant recorded information embraced by the scope of the request.*

74. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- *It breached section 1(1)(b) as it failed to provide information that it did not wish to withhold until the Commissioner's involvement.*
 - *It breached section 10(1) twice as it failed to issue an appropriate refusal notice within twenty working days.*
 - *It breached section 17(1) as it failed to issue an appropriate refusal notice within twenty working days.*
 - *It breached section 17(1)(b) as it failed to specify in either its refusal notice or its internal review that it was relying on a particular exemption [31(1)(g), by virtue of 31(2)(d)].*
 - *It breached section 17(1)(c) as it failed to explain in either its refusal notice or its internal review why it was relying on this exemption [31(1)(g), by virtue of 31(2)(d)] when it was not totally apparent.*
 - *It breached section 17(3)(b) as it failed to conduct a public interest test in either its refusal notice or internal review.*

Steps Required

75. The Commissioner requires no steps to be taken.

Other matters

76. There is no timescale laid down in the Act for a public authority to complete an internal review. However, as he has made clear in his 'Good Practice Guidance No 5'⁷, the Commissioner considers that these internal reviews should be completed as promptly as possible. In the absence of exceptional circumstances, a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer, but the total time taken should not exceed 40 working

⁷ This guidance is called 'Time limits on carrying out internal reviews following requests for information under the Freedom of Information Act 2000 and can be found at the following link:
http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_5.pdf

days, and as a matter of good practice the public authority should explain to the requester why more time is needed.

77. In this case the complainant's internal review request was made on 11 May 2009 and the public authority communicated its decision on 30 September 2009. The public authority therefore took more than four months to complete the review. The Commissioner does believe that the extent of this case meant that it would have been reasonable to have extended the deadline to forty working days. However, he notes that the complainant was not notified about why there was a delay and that it took more than forty working days. The Commissioner wishes to register his view that the public authority fell short of the standards of good practice in failing to complete its internal review within a reasonable timescale in this case.

Right of Appeal

78. 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 1st day of June 2010

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

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

(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

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

(3) Where a public authority—

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

(b) has informed the applicant of that requirement,

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

Section 2 - Effect of the exemptions in Part II

(1) 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 where 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.

(2) 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.

(3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—

(a) section 21,

- (b) section 23,
- (c) section 32,
- (d) section 34,
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords,
- (f) in section 40—
- (i) subsection (1), and
- (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
- (g) section 41, and
- (h) section 44.

Section 10 - Time for compliance with request

(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 is paid 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.

...

Section 17 - Refusal of request

(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 subsection (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 - Law enforcement

(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 [1976 c. 14.] 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 – Personal information

- (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 [1998 c. 29.] 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 [1998 c. 29.] 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 [1998 c. 29.] 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) the 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 [1998 c. 29.] 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 [1998 c. 29.] 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 [1998 c. 29.] 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 [1998 c. 29.] 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.

Section 41 – Information provided in confidence

(1) Information is exempt information if-

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

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

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

Data Protection Act 1998

Section 1 - Basic interpretative provisions

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

- “data” means information which—
 - (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
 - (b) is recorded with the intention that it should be processed by means of such equipment,
 - (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or
 - (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;
- “data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;
- “data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;
- “data subject” means an individual who is the subject of personal data;
- “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;

- “processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—

(a)

organisation, adaptation or alteration of the information or data,

(b)

retrieval, consultation or use of the information or data,

(c)

disclosure of the information or data by transmission, dissemination or otherwise making available, or

(d)

alignment, combination, blocking, erasure or destruction of the information or data;

- “relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

(2) In this Act, unless the context otherwise requires—

(a) “obtaining” or “recording”, in relation to personal data, includes obtaining or recording the information to be contained in the data, and

(b) “using” or “disclosing”, in relation to personal data, includes using or disclosing the information contained in the data.

(3) In determining for the purposes of this Act whether any information is recorded with the intention—

(a) that it should be processed by means of equipment operating automatically in response to instructions given for that purpose, or

(b) that it should form part of a relevant filing system,

it is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.

(4) Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.