

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 January 2017

Public Authority: Whittington Health NHS Trust

Address: Magdala Avenue

London

N19 5NF

Decision (including any steps ordered)

1. The complainant has requested correspondence relating to a particular clinic run by the Trust, sent, or received by the office of two named doctors. The Trust provided some of the requested information but refused to provide the remainder under the exemptions provided by section 36(2) – prejudice to the conduct of public affairs, section 40(2) – personal data and section 41 – information provided in confidence.
2. The Commissioner's decision is that section 36 can only be relied on in respect of some of the information to which it has been applied; similarly sections 41 and 40(2) can only be relied on in respect of some of the information to which they have been applied.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the information which is not protected by any of the exemptions cited as identified in the confidential annex which has been provided to the Trust.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 26 November 2015 the complainant wrote to the Trust and requested information in the following terms:

*"All correspondence on the LUTs clinic to and from the offices of (**named doctor 1**) and (**named doctor 2**). I'll change the time period to start from **March 2015 onwards**."*

6. The Trust responded on 10 February 2016. It provided some of the requested information but withheld other information under the exemptions provided by section 36(2)(b)(i) & (ii), section 40(2) and section 41.
7. Following an internal review the Trust wrote to the complainant on 22 June 2016 and disclosed further information. However it continued to withhold the remaining other information under the exemptions originally cited.

Scope of the case

8. The complainant originally contacted the Commissioner on 10 February 2016. However it was only after the Trust had eventually carried out its internal review and the complainant contacted the Commissioner again in August 2016 that the complaint became eligible for investigation.
9. The Commissioner considers that the matters to be decided is whether any of the exemptions provided by sections 36(2)(b), 40(2), or 41 can be relied on to withhold the information to which they have been applied.
10. As part of the Commissioner's investigation the Trust provided her with copies of all the information captured by the request, marked up to identify which pieces of information were being withheld under the different exemptions. The Commissioner notes that the information she has been provided with includes correspondence from December 2015 which postdates the request. FOIA allows a public authority to take account of any amendment that is made between the time a request is received and statutory time for complying with it (in this case twenty working days), providing that is an amendment that would have made regardless of the request being received. Therefore the Commissioner has proceeded on the basis that the Trust considers the additional correspondence to be, in effect, amendments which it considers to be captured by the request.

Reasons for decision

Section 36(2)(b)(i) & (ii) – prejudice to the conduct of public affairs

11. Section 36(2)(b) of FOIA states that information is exempt if in the reasonable opinion of a qualified person, disclosure of the information would or would be likely to inhibit:
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purpose of deliberation.
12. Although subparagraphs (i) and (ii) are each exemptions in their own right it makes sense, in this particular case, to consider them together to avoid unnecessary repetition of circumstances under which they were applied the reasons for their application.
13. Section 36 is unique in that its application depends on the opinion of the qualified person that the inhibition envisaged would, or would be likely to occur. In determining whether the exemption was correctly engaged by the Trust, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:
 - Ascertain who the qualified person is,
 - Establish that they gave an opinion,
 - Ascertain when the opinion was given, and
 - Consider whether the opinion was reasonable.
14. The qualified person for the Trust is its Chief Executive and the Trust has provided a copy of a form recording his opinion. Although this form is unsigned the Trust has advised the Commissioner that a copy was signed by the qualified person in February 2016. The form sets out arguments in favour of applying the exemptions and some limited arguments in favour of its disclosure. The form also indicates that the qualified person had access to the requested information when forming his opinion.
15. The exemption can be engaged on the basis that the inhibition to the free and frank provision of advice or exchange of views either 'would' or 'would be likely' to occur. It is clear from the form that the qualified person's opinion was that the inhibition was only 'likely' to occur. This is taken to mean that he considers the likelihood of the inhibition occurring to be more than a hypothetical possibility; that there is a real and significant risk.
16. It is now necessary to consider whether that opinion was reasonable. To do so the Commissioner relies on the Oxford English Dictionary's definition of reasonableness, that is, the opinion must be "in

accordance with reason; not irrational or absurd". There can be more than one reasonable opinion on a matter and it is not necessary for the Commissioner to agree with the qualified person's opinion. The qualified person's opinion can only be considered unreasonable if it is one that no reasonable person could hold.

17. Before considering the withheld information it will be helpful to briefly set out the context in which the request was made. The Trust ran a Lower Urinary Tract Syndrome(LUTS) clinic. The LUTS clinic was led by a prominent expert in this field. Towards the end of October 2015 the clinic was unexpectedly suspended. The following is based on documents that the Trust has provided to patients or as replies to press enquiries, from a letter sent to all patients of the clinic by the clinician who led it and from articles which the Commissioner has herself found on the internet. As such this can be considered to be already in the public domain. The treatment offered by the clinic involved the prolonged use of antibiotics. One patient who was being treated with a particular antibiotic became ill and this resulted in a review of the prescribing practise adopted by the clinic. This ultimately led to the clinic's suspension. Many patients were very concerned at the prospect of being unable to continue with the treatment which they had found very effective. A petition asking for the clinic to be resumed was signed by around 4,000 people. The issue attracted local and national media attention. After just over a month the clinic reopened on 23 November 2015.
18. The request was received just three days later.
19. The requested information captures communications relating to events leading up to concerns being raised over the clinic's prescribing practise, the decisions which ultimately led to the clinic having to be suspended, the steps that had to be put into place to deal with the consequences of its suspension, steps to resolve the problem and ultimately the resumption of the clinic.
20. It is clear from the context in which the request was made that the withheld information relates to a period when the Trust was faced with difficult decisions. The period prior to the clinic being suspended was not as challenging as the period which followed. However once the clinic was suspended the Trust had to react quickly to the problems this caused. These concerned both looking at ways to resolve the issues around the clinic's prescribing practise so that the clinic could resume and the provision of alternative care for patients in the interim. In such circumstances the Trust's staff exchanged many emails between themselves, the expert who had led the clinic, the relevant Clinical Commissioning Groups (CCGs) and others. The issues which arose had to be addressed urgently and with candour in order to put in place appropriate procedures. All of this occurred

against a background of media scrutiny and growing criticism and pressure from patients and their representatives.

21. The Commissioner has reviewed all the information marked up by the Trust as being withheld under section 36(2)(b). The information is very varied in its nature. It includes discussions on procedures and protocols which the Trust was planning to put into place prior to the clinic being suspended, email discussions of the strategies that needed to be rapidly developed for the continuing care of patients following the suspension of the clinic and how that strategy should be communicated to stakeholders such as GPs and Clinical Commissioning Groups. There are also exchanges about the immediate impact of the clinic's closure and emails in which individual members of staff ask senior colleagues how to proceed with particular issues while at the same time offering up views on the best way forward. As the situation develops there are discussions around how to resolve the problem and once resolved there are exchanges which deal with the consequences of the clinic having been suspended. The Commissioner is satisfied that much of this information records the process by which the Trust's senior staff sought advice and obtained the views of colleagues and external stakeholders in order to tackle the issues it faced. Some of the views provided are expressed with some urgency while others seem more neutral. Nevertheless the Commissioner is satisfied the qualified person's opinion that the disclosure of this information would inhibit either the exchange of views or provision of advice is a reasonable one.
22. There is however other information which the Commissioner does not accept engages the exemption. Some of the information which has been withheld under section 36(2)(c) may relate to the process by which procedures and strategies were developed, but does not in any way capture the actual advice or views that helped formulate those strategies and procedures. This includes information which simply asks for particular information to be circulated or asks for views on an attachment. Other correspondence simply concerns arranging meetings. The purpose behind the exemptions is to protect the safe space required by public authorities in which to develop policies, strategies or to protect any similar decision making process in the future. It allows people to contribute fully to such processes without fear that their views will later be made public. In this case the Commissioner considers it is not a reasonable opinion to consider that the disclosure of correspondence which does not in itself contain either views or advice would inhibit that process. The exemption is not engaged in respect of this information.
23. There are also examples of correspondence where purely factual information is exchanged relating to the number of patients being

treated, or prescribed a particular drug. Concern over such correspondence being disclosed could not impact on the quality of factual information nor would it lead to decision makers choosing to ignore relevant facts. The Commissioner therefore considers it is not a reasonable opinion to consider that the disclosure of factual information would either prohibit the provision of such information in the future or is likely to inhibit the provision of more subjective advice and opinions. The exemption is not engaged in respect of this factual information.

24. The information withheld under section 36 also includes action points from meetings; these meetings become far more frequent as the situation develops and is ultimately resolved. They clearly reflect a very fluid situation. The Commissioner recognises an argument that notes of meetings may relate to the decision making process which in turn requires the input of free and frank advice and the exchange of views. However having viewed the action points in question the Commissioner finds that they do not in themselves record any of the debate which led to the action points being agreed. Therefore the Commissioner is not satisfied that it is reasonable to consider that the disclosure of these action points would inhibit the free and frank exchange of views or advice. The exemption is not engaged in respect of this information.
25. The Commissioner will provide the Trust with a confidential annex identifying the information which does not engage the exemption.
26. Before it can be decided whether the information which does attract the exemption can be withheld it is necessary to consider the public interest test.

Public interest test

27. Section 2 of FOIA provides that even where certain specified exemptions, including section 36, are engaged, the information can only be withheld if, in all the circumstances of the case the public interest in favour of maintaining the exemption outweighs the public interest in disclosing the information.
28. The Commissioner's approach to the competing public interest arguments in this case draws heavily upon the Information Tribunal's Decision in the case of *Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)*¹. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would be likely, to inhibit the free and frank exchange of views for the purposes of

¹ EA/2006/0011; EA/2006/0013

deliberation and the free and frank provision of advice, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest.

29. Therefore although the Commissioner has accepted the qualified person's opinion to be a reasonable one in respect of the information now under consideration, and will give some weight to that opinion, she will reach her own view on the severity, extent and frequency of that inhibition to the decision making process occurring. The Commissioner will also take in to account the fact that it was the qualified person's opinion that the inhibition is only 'likely' to occur.
30. The Trust's public interest arguments are very limited. The public interest in maintaining the exemption relate to the harm that would result in the information being disclosed. When expressing his opinion the qualified person explained that in order to improve the Trust's processes and ensure patient care was maintained it was necessary for senior employees of the Trust to provide advice and express their views in a free and frank manner. If they believed that their views and advice would be disclosed at a later date it is likely that they would have been far more restrained in offering such views and advice. The implication being, that this would have hampered the Trust's ability to deal with the issues it faced in an effective manner. Furthermore senior employees would be reluctant to contribute to the problem solving and decision making processes in the future if this information was disclosed.
31. The Commissioner considers that the impact of disclosing the information will depend on its actual contents. The Commissioner finds that the character of the information exempt under section 36 varies. She accepts that some of it is frank and occasionally expressed robustly. Some of the information records the senior staff grappling with particularly sensitive problems. To disclose this information at the time of the request would have had a significant impact on the Trust's ability to deal with ongoing issues relating to the resumption of the LUTS clinic. As such the disclosure of the information would significantly erode the safe space in which to consider options and to facilitate the rebuilding of relationships with patients as well as with some staff. This impact would have been compounded by the media interest.
32. As a consequence the Commissioner agrees that the senior employees are likely to be far more guarded when offering advice or expressing views in the future. Although the circumstances that led to the suspension of the clinic may be rare, the Commissioner recognises that senior employees within any hospital trust are likely to face difficult management decisions on a not uncommon basis. Furthermore, the performance of the health service often attracts

controversy and that some of those issues may become high profile. Therefore the Commissioner considers that the chilling effect on the willingness of staff to contribute to the decision making process in the future could be felt on a fairly frequent basis.

33. However some of the information which engages the exemption is far more neutral. It addresses matters which one would expect the Trust to be looking at in such circumstances and does not appear to be particularly sensitive. Although the contents of the advice or the views expressed do not have to be particularly free and frank to have an impact on the decision making process, the more neutral the information is the less marked any impact would be. This information would have little impact on the Trust's safe space in which to deal with the ongoing problem. Its disclosure would do little to undermine the Trust's ability to deal with sensitive issues or rebuild relations. Nor would its disclosure have any profound effect on the willingness of staff to seek or provide advice and views when dealing with similar situations in the future. The public interest in withholding this information is much less than it is for the more sensitive information.
34. The public interest arguments in favour of disclosing the information are both general and specific. There is always a general public interest in promoting transparency and accountability of how public authorities perform.
35. In this particular case the Commissioner is aware from her on line searches that many of the patients who benefitted from the treatment they had received at the clinic had previously been very unwell and its unexpected suspension caused them genuine concern over their future health.
36. Both the clinician who led the clinic and the Trust itself took steps to inform patients why the clinic had closed. This included holding meetings. However there is still value in providing as full an account as is possible of the events that led up to the suspension of the clinic and reveal how the Trust responded to problems it was faced with and the roles played by those involved. Patients have a genuine interest in understanding on what basis decisions were taken which led to the clinic's suspension and in being able to hold the Trust to account for the decisions which impacted on their treatment.
37. In respect of the more neutral information the Commissioner finds that these public interest factors are sufficient to outweigh the public interest in maintaining the exemption. The Trust is required to disclose this information.
38. However in respect of the more sensitive information the Commissioner finds that disclosing the information at the time of the

request would seriously erode the safe space which the Trust needed to deal with live issues and would have a marked impact on employees' willingness to contribute to such processes in the future. Therefore the Commissioner finds that the public interest in favour of withholding this more sensitive information outweighs the public interest in favour of disclosure.

39. The Commissioner will identify the information which the Trust is required to disclose in the public interest in the confidential annexe to be provided to the Trust.

Section 41 – information provided in confidence

40. Section 41 provides that information is exempt if it has been obtained by the public authority from another body and its disclosure to the public would constitute an actionable breach of confidence.
41. The exemption has been applied to a limited amount of information. Having reviewed that information the Commissioner is satisfied that it has all been obtained from an external source. The majority of it is contained in documents that have been provided directly by third parties. The exemption has also been applied to one internal email which reports the concerns expressed by a third party. The Commissioner is satisfied that this too constitutes information provided by a third party.
42. When considering whether disclosing the information provided by a third party would constitute a breach of confidence, the Commissioner takes into account whether:
 - the information has the necessary quality of confidence
 - the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.
43. For information to have the necessary quality of confidence it must be more than trivial and not otherwise be accessible. The withheld information includes a copy of letter drafted by a third party which provides an explanation of some of the issues arising from the prescribing practises of the clinic. The Commissioner understands the letter as drafted, or a very similar version, was sent to a significant number of GPs. It seems likely that its contents would have been shared with patients. The contents of this letter have obviously been reused by a different third party when explaining the same issues to representatives of the patients; this second letter has also been withheld under section 41. Given the number of potential recipients

involved and the controversy over the clinic's suspension, the Commissioner considers it most likely that the letter had been circulated widely by the time of the request, to the extent that it could no longer be considered confidential in nature. The disclosure of these letters would no longer constitute an actionable breach of confidence. Section 41 is not engaged in respect of these letters. However the Trust has also applied section 40(2) to this information and the Commissioner will therefore go on to consider their disclosure under that exemption before making a decision as to whether the Trust is required to release them.

44. A couple of the emails which have been withheld under the exemption are simply covering emails informing the recipient that a paper is attached. Others simply ask the Trust about its progress with a particular piece of work. Neither the cover emails, nor the chasers, in themselves, contain anything that could be considered sensitive. Although it might not be correct to describe their contents as trivial, the Commissioner would not accept that someone sending such emails would have any reasonable expectation that the contents would be treated as confidential by the Trust. Furthermore, the Commissioner does not consider there would be any meaningful detriment for those providing this information if it was disclosed. It should be noted that those sending the emails are themselves public authorities and so would be familiar with the idea that information relating to their work could be disclosed under the FOIA. Therefore the Commissioner is satisfied that the disclosure of this information would not constitute an actionable breach of confidence. Section 41 is not engaged. Again the Trust has also applied section 40(2) to this information and the Commissioner will therefore go on to consider their disclosure under that exemption before making a decision as to whether the Trust is required to release them.
45. There are two remaining emails containing information that have been withheld under section 41. The first is a response from a health professional to an enquiry about the treatment of a patient. It contains confidential information about the treatment of the patient's condition and provides the health professional's professional opinion on the proposed treatment. The information is not trivial and is not accessible through other means. The patient is clearly owed a duty of confidence. Furthermore, given the context in which the opinion was provided, the Commissioner is also satisfied that both the sender and recipient would have understood it to be protected by an implicit duty of confidence.
46. Disclosing the information would be detrimental to the patient as it would be a gross invasion of their privacy. The Commissioner also considers it likely that the disclosure would be detrimental to the

interests of the health professional in so far as it could hinder their working relationships with other professionals.

47. The final piece of information to which section 41 has been applied to is contained in the email between the Trust's staff which relays concerns expressed by an external party. The email is brief and the concerns are reported in a frank manner. The Commissioner accepts that issues raised are not trivial and that the external third party who originally conveyed their concerns would have no expectation of them being made public. Although it is arguable whether that party would suffer some tangible detriment as a result of the information being disclosed, the Commissioner recognises the potential for its disclosure to get in the way of the development of strong working relations. She is therefore satisfied that the three tests set out in paragraph 42 are met.
48. However before deciding whether this information, or that contained in the letter about a patient's treatment, engages section 41 it is necessary to consider whether any action for breach of confidence is likely to be successful. This involves taking account of whether the Trust would have a public interest defence against such an action. Although the public interest defence against a breach of confidence considers similar factors to those considered under the public interest test in FOIA, it is weighted in favour of maintaining the duty of confidence. That is there is an assumption that the public interest in maintaining the confidence will prevail unless the public interest in disclosure outweighs the public interest in maintaining the confidence.
49. The Trust did not tackle the public interest defence when providing its submission to the Commissioner. However the public interest in disclosure takes account of similar factors as those considered under section 36. These include the value in greater transparency of, and accountability for, actions by the Trust which have clearly caused some controversy and anxiety amongst patients. There is clearly a value in those served by the Trust in having access to information revealing how it managed a difficult situation so that they can either be reassured by the Trust's performance or alternatively understand what lessons if any can be learnt. This helps build confidence in the Trust.
50. Balanced against this is the public interest in maintaining the duty of confidence. In respect of the correspondence concerning the treatment of a particular patient, it is important to recognise the fundamental principle that patients' health records should remain private. In addition to this is the public interest in the health professional who provided their opinion on the patient's condition feeling able to contribute to the treatment of that individual without

any concerns that doing so would compromise the patient's privacy of their own working relations.

51. In respect of the remaining information the Commissioner finds that there is a public interest in third party stakeholders being able to air their concerns in a free and frank manner so that those concerns can be addressed swiftly.
52. In both cases the Commissioner finds that the public interest in favour of maintaining the duty of confidence significantly outweighs the public interest in disclosure. The Commissioner is satisfied that in respect of these two pieces of information the Trust is entitled to rely on section 41 to withhold the information.
53. The information which does not attract the exemption will be identified in the confidential annex.

Section 40(2) – personal information

54. Section 40(2) of FOIA states that the personal data of someone other than the applicant can be withheld if its disclosure to the public would breach any of the data protection principles contained in the Data Protection Act 1998 (DPA).
55. Personal data is defined as information which both identifies a living individual and relates to that individual.
56. In its submission to the Commissioner the Trust provided her with a copy of the emails captured by the request. The withheld information was outlined in red. These red boxes were then highlighted in different colours to indicate whether it was being withheld under section 36 or section 41. The information outlined in red but not highlighted in any other colour was being withheld under section 40(2). This accounted for the vast majority of the withheld information.
57. Having read all the withheld information the Commissioner is satisfied that a significant amount of the withheld information neither identifies nor relates to a living individual. This information is not protected by section 40(2).
58. This includes the standard environmental protection statements at the end of emails which remind recipients not to print the email unless necessary. The Commissioner readily accepts that ordering the disclosure of such information will not add anything to the complainant's understanding of the issues, but there are occasions where the statement is duplicated so that the redactions run to more than one page creating the unnecessary impression that information of more substance has been redacted.

59. Information has also been withheld under section 40(2) which simply contains the arrangements for meetings. This is not personal data.
60. Section 40(2) has also been mis-applied to notes of meetings which do not identify any living individuals
61. Other information withheld under section 40(2) is personal data and the Trust has argued that its disclosure would contravene the first data protection principle. This states that personal data will only be processed fairly and lawfully, and in particular shall only be processed if a condition in Schedule 2 of the DPA can be met.
62. The Commissioner's approach when considering the first principle is to start by looking at whether the disclosure would be fair. Only if the Commissioner finds that it would be fair will she go on to look at lawfulness or whether a Schedule 2 condition can be satisfied.
63. 'Fairness' is a difficult concept to define. It involves consideration of:
 - The possible consequences of disclosure to the individual.
 - The reasonable expectations of the individual regarding how their personal data will be used.
 - The legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the particular individual.

Often these factors are interrelated.

64. There is a range of personal data that has been withheld under section 40(2). This includes the names of the authors of the emails in question and any personal data contained within the body of the emails. The Commissioner will first consider the names of authors and recipients.
65. Some authors and recipients are patients or their representatives; some are the representatives of CCGs and officials from other public authorities. The Commissioner recognises that the majority of these individuals would have had no expectation that they would be directly identified from the correspondence. In particular patients would not expect their names to be disclosed and simply being identified as such would in itself be an invasion of their privacy. Officials may have a greater expectation that their names could be released in connection with their professional life. However given the controversy which surrounded the clinic at the time of the request, the disclosure of their personal involvement in that matter could have had a detrimental impact on their working lives. The

Commissioner is satisfied that the disclosure of their names together with those of any patient, or their representative, would be unfair.

66. However the majority of those named in the correspondence are employees of the Trust. The information which the Trust has already disclosed includes the names of the two doctors identified in the request, but the Trust has withheld all the other names of its staff. Many of these also hold senior roles. The Commissioner considers that the more senior a person's position within a public authority, the more they should expect information about how they perform of their role to be released. Therefore the Commissioner considers that those of director level, or above should have had a reasonable expectation that their names would be disclosed. This includes any at the equivalent level of director, even if their actual job title does not refer to them as director. Disclosing such information at the time of the request may have been uncomfortable for some as they may have had concerns it could lead to unwarranted intrusion into their working lives by either the press or patients. However identifying who at a senior level participated in the decision making process would enable the public to better understand how the Trust dealt with the issues that arose. Therefore the Commissioner finds that it would be fair to disclose the names of those employees of the Trust at director level and above.
67. As to whether the disclosure of these names would be lawful the Commissioner does not consider there would any breach of confidence in disclosing this information and knows of no other reason why the disclosure would be unfair. The final issue that needs to be considered before requiring the Trust to disclose these names is whether any of the conditions in Schedule 2 of the DPA can be met. The sixth condition of Schedule 2 provides that personal data can be processed if it is necessary for the purposes of the legitimate interests of a third party to whom it is disclosed unless that processing is unwarranted by reason of prejudice to the rights and freedoms of the data subject. In essence this is the same test which forms part of the consideration of fairness as is set out in the third bullet point of paragraph 63. It balances the rights of the public to whom the information would be disclosed under FOIA, against the rights of the individual. As the Commissioner is satisfied that disclosing the names of these senior figures would be fair, it follows that she is satisfied that disclosure would also satisfy the sixth condition.
68. Clearly it makes sense for the job titles of these individuals to be disclosed together with details of which departments within the Trust they work. Direct phone numbers and emails can be withheld as the disclosure of these details could encourage direct contact with these individuals which may prove disruptive to their working lives.

69. Finally in respect of these senior figures within the Trust, where the names of the those at director level and above appear in the body of an email the names should be released.
70. Although the Trust is required to disclose the names of directors and above from the correspondence, the Commissioner finds that those below this level would have a much lower expectation of being named. Also those in more junior roles have less influence over, and certainly less responsibility for, the decision making process. The Commissioner finds that it would be unfair to disclose their names.
71. Even though it is not appropriate to disclose the names of the Trust's more junior members of staff, or those of officials from other public authorities there is still a value in disclosing whether correspondence was internal or with other bodies. This would help the complainant and wider public make sense of the content of the email where it is released, or simply understand the range of public authorities who were involved in the issues around the clinic and what their respective roles were. The Trust has withheld these details, however once the actual names of authors and recipients has been redacted they can be released without raising any data protection issues. This only applies to details relating to staff of public authorities.
72. The recipients' details are listed at the top of the email, often the organisation they work for appears after their name, on other occasions it is shown as the last part of their email address. In line with the finding above this information can be disclosed.
73. The details of the author appear at the foot of the email. Typically they include the job title, the department or policy area they work in and the name of the public authority. These details can be released, apart from where a job title only applies to one specific employee and so would allow their identification. Direct phone numbers and full email addresses can be withheld. The Commissioner has provided examples in the confidential annex to help the Trust identify the information to be disclosed.
74. The Commissioner shall now consider the contents of the emails. The Commissioner will start by looking at the personal data of patients. This is contained in a range of emails including those that discuss the patient who became ill following their treatment at the clinic as discussed in paragraph 17, those which discuss the treatment of specific patients during the clinic's closure and in letters from the patients themselves complaining about the clinic's closure. These emails very clearly contain personal data about the patients' conditions and treatment. It is a well understood and a fundamental principle of the doctor/patient relationship that such information is kept confidential. To disclose any of this information in light of such

expectations would clearly be unfair. The Trust is entitled to withhold this information under section 40(2).

75. The withheld information also contains statistics regarding how many of the clinic's patients were treated in particular ways and then later, once the clinic had reopened, how the patients had fared during its suspension, for example how many had had their condition reviewed and how many had deteriorated or not. These figures do not identify the patients themselves and cannot be considered to be their personal data. Nor does the Commissioner consider the information is the personal data of the clinician who led the clinic. The Commissioner will consider this information further later.
76. There is also an email chain relating to extending the contract of one employee and similar staffing issues. These have no bearing on the issues surrounding the closure of the clinic but nevertheless are captured by the scope of the request because of the way it is worded. The Commissioner is satisfied that the staff discussed in those emails would have no reasonable expectation that the terms of their employment would be made public. The disclosure of such information would be unfair and the Trust is entitled to withhold this information under section 40(2).
77. In addition to the issues already dealt with, the Trust has argued that the clinician who ran the clinic is central to the entire issue and that therefore much of the information constitutes the personal data of the clinician. Much of the discussion within the emails relates to the clinician's prescribing practices and these reflect their professional judgement. It follows that comments on those practices can be seen as being criticism of the clinician's professional judgement and is therefore personal data about the clinician (the Commissioner would wish to add at this stage that it is clear from the information already in the public domain that many of the clinic's patients clearly considered they were benefiting from the treatment they received and supported the practises adopted).
78. The Commissioner is satisfied that in light of the above disclosing some of the more significant exchanges between the Trust and either the clinician, or third parties would be unfair to the clinician. In reaching this decision the Commissioner has taken account of the content of the information itself and the consequences of disclosing it at the time of the request when the clinic had only just resumed following its closure and was still attracting press interest. Disclosing the details from the correspondence would have been unhelpful to the clinician and added to the pressure and problems arising out of the clinic's closure that the clinician would have been dealing with at that time.

79. The Commissioner has also balanced the impact disclosing the information would have on the clinician against the public interest in having access to this information. These more significant exchanges record both the concerns around the clinic's approach to prescribing antibiotics and clearly sets out the clinic's justification for adopting these methods. Importantly they also reveal how the Trust managed the situation. Therefore they tell a very important part of the story and would allow interested parties to reach informed opinions on the issues and the performance of the relevant parties in a matter that impacted a large number of patients. However even having taken account of the very real value in disclosing this information the Commissioner considers the disclosure must be considered unfair due to the difficulties that it could have caused the clinician while the clinic was being re-established.
80. In addition the Commissioner finds that the broad outline of the issues which lead up to the clinic being suspended have already be disclosed by the Trust through its correspondence with the patients and the patient meetings that it arranged. The Commissioner notes that the clinician also wrote to the patients and explained the issues from that perspective. Clearly had the clinician wished to make more information available there was the opportunity to do so and he appears to have chosen not to.
81. In respect of other information within the bodies of the emails the Commissioner considers that although they relate to issues arising out of the prescribing practise adopted by the clinic or the clinic's suspension, the focus of the email is not on the clinician who led it. Instead the focus is on, for example, the development of new prescribing protocols, liaising with CCGs and GPs and arrangements for dealing with patients and communications with these and other interested parties. The Commissioner can see no grounds for withholding this information on the basis that it would breach the first data protection principle. The information itself contains no comments regarding the clinician's performance and as the broad outline of the events around the clinic's suspension are already known, its disclosure would not be unfair. Nor is the Commissioner aware of any grounds for thinking the disclosure would be unlawful and as the Commissioner finds the disclosure would be fair she is satisfied that a condition, the sixth condition, of Schedule 2 DPA can be satisfied.
82. Some of the emails which, taken in their entirety would constitute the personal data of living individuals, have been very heavily redacted with only the odd phrase or word being disclosed. Often this means that the email has lost all its meaning. However the Commissioner finds that with the disclosure of some very limited additional information the emails could convey some sense of what

the email was about without risking the disclosure of any information which would either identify the individuals concerned or reveal any material in breach of the data protection principles. If nothing else this may be sufficient to reassure the complainant or the wider public that the remainder of the email has been withheld for sound reasons.

83. Finally the Trust withheld some information under section 41 – information provided in confidence as well as section 40(2). As set out at paragraphs 43 and 44 the Commissioner found that letters drafted by a third parties and some other information including that in covering emails to attachments do not engage section 41. Therefore it is necessary to go on and consider whether any of this information can be withheld under section 40(2).
84. Regarding the letters drafted by third parties, the Commissioner found these letters could no longer be considered confidential because they had been widely distributed amongst those immediately concerned with the clinic. Nevertheless these letters do express views on the clinics prescribing practises and so reflect on the clinician who led the clinic. Even though the contents of the letters had been widely distributed by the time of the request the Commissioner finds it would still be unfair for that distribution to be accelerated by disclosing the letters to the world at large under the FOIA. This remains the case even though the letters set out some of the concerns around the clinic's procedures and so may assist those who opposed the clinic's suspension better understand the reasoning behind the Trust's actions. This information is exempt from disclosure under section 40(2).
85. The other information which failed to engage section 41 includes covering emails to attachments and requests for updates on the progress of certain pieces of work. Apart from the occasional first name referred to in the email, the Commissioner does not consider they contain personal data. Therefore once any references to staff from other as or the Trust's own staff below the grade of Director, the Trust is required to disclose these emails.
86. The Commissioner has compiled a confidential annexe to this notice which will be provided exclusively to the Trust setting out which of the information currently withheld under section 40(2) it is now required to release because it either does not constitute personal data, or that although it is personal data, its disclosure would not breach the first data protection principle.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

88. 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.
89. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Robert Mehan
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF