



## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Dated 9 August 2006

**Public Authority:** The Newcastle upon Tyne Hospitals NHS Trust

**Address:** Freeman Hospital  
High Heaton  
Newcastle upon Tyne  
NE7 7DN

### Summary Decision

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1. The complainant sought disclosure of a report commissioned by the Newcastle upon Tyne Hospitals NHS Trust ("the Trust") as to the standard of clinical practice of a particular doctor. The Trust refused to disclose the information and upheld its decision on internal appeal, placing reliance upon the exemptions under sections 31, 36, 40 and 41 of the Freedom of Information Act 2000 ("the Act"). The Commissioner considered the correspondence exchanged between the parties, sought clarification as to the basis for the Trust's reliance upon the exemptions and inspected the information withheld. The Commissioner's decision is to uphold the decision of the Trust to withhold the information.

### The Commissioner's Role

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2. The Commissioner's role 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 Request

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3. Following judicial criticism of the expert evidence given in legal proceedings the Trust, commissioned a report from an external panel to assess the conduct and abilities of the doctor in question. The complainant made a written request for disclosure of the said report pursuant to section 1 of the Act on 24 May 2005.
  - 3.1 The Trust responded by letter dated 16 June 2005 stating that it had sought the views of the doctor, and panel of experts concerned and on the basis of their replies, and legal advice received, the report was withheld. The Trust sought to



place reliance upon the section 31 (law enforcement) and section 40 (personal information) exemptions under the Act.

- 3.2 On 22 June 2005 the complainant requested a review of the decision. The Trust replied by letter on 12 July 2005 stating:

*"I have considered your appeal against the Trust's decision not to disclose a report in regard to" (the named Doctor) "as set out in the Trust's letter of 16 June 2005.*

*In compliance with the trust's complaints procedure where a decision has been made not to release information, I have reconsidered your request and sought further legal advice. On the basis of that advice, I believe the freedom of Information Act does apply to your request and that the exemptions under the Act do apply notably section 31 and section 40 respectively.*

*In so far as section 40 is concerned, there is an absolute exemption and the Trust has also taken account of the views of" (the named Doctor) "in that respect, namely that the report should not be disclosed.*

*In so far as section 31 is concerned, the Trust has applied the public interest test and considers the balance of the public interest lies against disclosure.*

*Therefore your further request for disclosure under the Act is declined."*

## The Investigation

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4. On 9 August 2005 the complainant wrote to the Commissioner requesting a decision *"as to whether the Trust is entitled to refuse to disclose the report."*
- 4.1 The Commissioner acknowledged the complaint and sought copies of all correspondence passing between the complainant and the Trust. This was duly furnished and a subsequent request for clarification of the grounds relied upon by the public authority was made.
- 4.2 On 22 March 2006 the Trust replied to the Commissioner setting out its reliance upon the exemptions under sections 31 and 40 of the Act in detail. The Trust also considered in detail the exemptions within sections 41 and 36 and made referenced to further possible exemptions under sections 38 and 44 without specifically placing reliance upon them.
- 4.3 The Commissioner has also considered the deed entered into between the appropriate Royal College that provided the external panel of experts and the Trust indicating that it would be bound by a confidentiality clause. The Commissioner has also seen correspondence received by the Trust from the

panel expressing their objections to their report being disclosed and to copy correspondence from the solicitors of the doctor in question making clear their objections to the information being disclosed.

- 4.4 The Commissioner then requested sight of the report and considered the content before reaching his decision.

## Analysis

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### Section 31

5. Section 31 provides that information which is not exempt information by virtue of section 30 is exempt information if its disclosure would, or would be likely to, prejudice any of the specified law enforcement functions under subparagraphs (1) (a) to (f), (h) or (i), or under subparagraph 1(g) the exercise by any public authority of its functions for any of the purposes specified in section 31 (2).

- 5.1 The Commissioner accepts the argument advanced by the Trust, that in the discharge of its common law duty of care to patients the trust was exercising a 'function.' Furthermore, the Commissioner considers that the discharge of the Trust's statutory duties would also amount to the exercise of a 'function.' In particular, the Commissioner has regard to the following statutory duties:

- 5.1.1 The duty upon all NHS bodies under section 45 (1) of the Health and Social Care (Community Health and Standards) Act 2003;

*".. to put and keep in place arrangements for the purpose of monitoring and improving the quality of health care provided by and for that body."*

- 5.1.2 The duty imposed upon every employer under section 3(1) of the Health and Safety at Work Act 1974;

*".. to conduct his undertaking in such a way as to ensure, so far as reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health and safety."*

- 5.2 The exemption under section 31 (1) (g) will only be engaged however where the disclosure would, or would be likely to prejudice the exercise by any public body of its functions '*...for any of the purposes specified in subsection (2)*'

- 5.2.1 The distinction made as between 'functions' and their 'purposes,' is key to the application of the exemption. The Trust appears to have used the terms interchangeably in its letter to the commissioner dated 22<sup>nd</sup> March 2006, stating:

*"..S31 applies to the report because its release would, or would be likely to prejudice the Trust's purposes, particularly those set out in paragraphs (b), (c), (d) and (j) above as the Trust believes on the balance of evidence it has received that it is more probable than not that I would lose the co-operation of experts in preparing similar reports in the future..." and that, "...the legal basis for the functions in those paragraphs is that the Trust has a well-established, common law duty of care to its patients."*

5.2.2 The scope of the exemption in its application to the specified law enforcement functions under subparagraphs 31(1) (a) to (f) is clear. However the ambit of the residual 'functions' falling under section 31(1) (g) is restricted by the requirement that the function is exercised for one or more of the law enforcement 'purposes' specified under the subsection. This restriction of the exemption under subparagraph (g) is in keeping with both the law enforcement aims of the section and of the wider promotion of disclosure within the Act.

5.2.3 Whilst the Commissioner considers the performance of legal duties to be a 'function' of public authorities. The Commissioner does not accept that the discharge of the Trust's common law (or indeed statutory) duties to patients, can be said to have been exercised for the 'purposes' specified of:

*"ascertaining whether any person is responsible for any conduct which is improper" under subsection (b);*

*"..ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise" subsection (c); nor that 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" subsection (d).*

5.2.4 However the Commissioner does consider that the discharge of the Trust's common law and statutory duties identified above, can be said to be a function exercised 'for the purpose of protecting persons other than persons at work against the risk to health and safety arising out of or in connection with the actions of persons at work,' in accordance with subsection (2) (j).

5.2.5 The Commissioner also considers that the exercise of this function for the purpose of "protecting persons other than those at work" would, or would be likely to be 'prejudiced,' in so far as there would be a significant risk in future that the convening of similar expert panels, would prove impossible or at least extremely difficult, having regard to a joint letter of 16<sup>th</sup> March 2006 received from the panel of experts addressed to the Trust, in which they state that:

*"It would be impossible to find members for panels such as this one in the future, if this report was put in the public domain..."*

5.3 The Commissioner therefore considers that the exemption under section 31(1) (g) is engaged.

### **The Public Interest Test**

5.4 Section 31(1) (g) is a qualified exemption and therefore it is necessary to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information under section 2 (2) (b) of the Act.

5.4.1 The Commissioner considers that disclosure of the information would not add significantly to public debate, as there is already a significant source of information as to the particular Doctor's competence to practice, available from the records of the General Medical Council investigation conducted in 2005, and the public interest in disclosing this additional information is outweighed by the adverse effect that disclosure could have upon the ability of this and other NHS Trusts to readily call upon the best possible expertise to advise on matters having a direct bearing upon the safety and wellbeing of patient's in their care.

5.4.2 For the above reasons the public authority's decision to withhold the information is upheld under Section 31(1) (g).

### **Section 36 exemption**

5.5 Section 36 (2) applies inter alia, to information which (if disclosed), in the reasonable opinion of a qualified person:

“(b) 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 purposes of deliberation, or  
(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

5.5.1 Section 36 requires that the exemption be applied by a qualified person expressing a reasonable opinion. The exemption is also a qualified exemption and is therefore subject to the public interest test under section 2 (2) (b) of the Act which favours disclosure, unless:

“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

### **The reasonable opinion of a qualified person**

5.5.2 The Commissioner is satisfied that the person making the decision was a 'qualified person,' in this case the Chief Executive of an NHS Trust established under section 5 of the National Health Service and Community Care Act 1990 and therefore an employee of the public authority authorized for the purposes of

the section by a Minister of the Crown in accordance with section 36 (5) (o) (iii) of the Act.

5.5.3 The exemption can only be engaged if it is a 'reasonable' opinion. The Commissioner considers a reasonable opinion to be one which lies within the bounds of reasonableness or a range of reasonable opinions capable of being supported by evidence.

5.5.4 The Chief Executive has stated that if the information is disclosed, it is likely that the Trust would face *"severe and perhaps insurmountable difficulties in engaging independent experts to provide free and frank advice to the Trust in the future."*

5.5.5 The Commissioner considers that this opinion falls within the band of reasonable opinions and that it took into account relevant factors namely the professed experience of the Chief Executive and the unanimous views of the panel of expert doctors as set out in their letter of 16 March 2006 in which they state that:

*"We would not have agreed to participate if we had believed that the report would be put in the public domain..... It would be impossible to find members for panels, such as this one, in the future if this report was put in the public domain."*

5.5.6 The Commissioner is therefore satisfied that in the reasonable opinion of a qualified person, disclosure of the information would, or would be likely to inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation. The exemption is therefore engaged.

### **The Public Interest Test**

5.6 Section 36 (2) (b) is a qualified exemption and therefore it is necessary to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information under section 2 (2) (b) of the Act.

5.6.1 The Commissioner has taken into account the following public interest considerations in favour of disclosing the information:

5.6.2 Promoting public confidence in the competence of the Doctor concerned and other clinical staff employed by the Trust and in its ability to ensure that allegations of incompetence are rigorously investigated;

5.6.3 Promoting accountability and transparency for the decisions taken by the Trust in the discharge of its duty of care to patients;

5.6.4 Bringing to light information affecting public health and safety.

5.6.5 The Commissioner has also taken into account the following public interest considerations in favour of withholding the information:

- 5.6.6 Disclosure would not materially contribute to the public debate, having regard to the information already in the public domain and in particular the availability of the GMC findings of 2005 as to the fitness of the particular Doctor to practice;
- 5.6.7 Disclosure would be likely to adversely affect the ability of the Trust to fulfill its duty of care by prejudicing the ability of the Trust's to call upon clinical expertise to assess the competence of its medical practitioners;
- 5.6.8 Disclosure would amount to a breach of confidence and would also be a breach of the first data protection principle, for the reasons stated above.
- 5.6.9 In balancing the competing public interests, the commissioner considers that in all the circumstances of the case, the public interest in maintaining the exemption under section 36 outweighs the public interest in disclosing the information. The Commissioner therefore upholds the decision by the Trust to withhold the information on the basis of the exemption under section 36 of the Act.

## Section 40

- 5.7 The Commissioner is satisfied that the information requested constitutes manual unstructured personal data, in that it contains biographical information comprising of professional opinion expressed as to the capabilities and conduct of a living individual who can be identified from it, namely the clinician concerned.
  - 5.7.1 As the request relates to personal data relating to a third party, the information will constitute exempt information if either of the conditions referred to in section 40(2) are satisfied.
  - 5.7.2 In considering whether the first condition is satisfied, the Commissioner has had regard to whether any of the data protection principles have been breached. The first data protection principle requires that the personal data should be processed "fairly" and "lawfully."
  - 5.7.3 The Commissioner takes into account that save for the authority given to 'the panel' to disclose to the GMC any information that might occasion regulatory action, the cooperation of the doctor concerned had been secured on the basis of assurances that the report would remain confidential.
  - 5.7.4 The Commissioner also considers that it would be unfair to the panel members who have also indicated that they would not have participated had they not been assured that their findings would be placed in the public domain.
  - 5.7.5 The Commissioner further considers that the release of the information requested would be unlawful in that the Trust would be acting in breach of the prior confidentiality agreement contained in the deed entered into with the appropriate Royal College that provided the expert panel, and in the circumstances would be

in breach of the first data protection principle and the Commissioner accordingly considers that the exemption is engaged.

5.7.6 The exemption relied upon under section 40 (3) (a) (i) provides an absolute exemption and the public interest does not therefore fall to be considered. In all the circumstances the Commissioner upholds the decision of the Trust to withhold the information requested.

### **Section 41 exemption.**

5.8 Section 41 (1) provides that: -

(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.

5.8.1 The report commissioned by the Trust as to the conduct and abilities of a particular doctor was obtained from 'any other person' in that it was obtained from the panel of experts provided by the appropriate Royal College.

5.8.2 In considering whether disclosure of the information would amount to a breach of confidence, the Commissioner has had regard to the question of whether the report would have the "necessary quality of confidence."

5.8.3 The Commissioner considers that the opinion of the panel appointed by the Trust to assess the clinical practice of the doctor concerned can not be said to constitute trivial information and, in contrast to the findings of the subsequent General Medical Council panel, is not information that is already in the public domain. Furthermore, the findings of the panel appointed by the Trust are subject to a confidentiality clause. In all the circumstances the Commissioner considers the information to have the necessary 'quality of confidence.'

5.8.4 In considering whether disclosure of the report would amount to an 'actionable' breach of duty, the Commissioner notes the terms of a confidentiality clause at paragraph 6 ii) of the deed entered into between the Royal College in question and the Trust on 12<sup>th</sup> December 2002.

5.8.5 The said clause expressly enjoins the Trust to maintain the confidentiality of the report unless the '*prior written approval*' of the advisors is granted. The advisors have been consulted by the Trust and have unanimously declined to give such approval and in the course of a joint letter dated 16 March 2006 state that they



would not have agreed to participate had they believed that the report would have been placed in the public domain.

- 5.8.6 The advisors also say that the report was prepared on the basis of assuring the various professionals who had worked with the Doctor in question that the information they had given would be treated in strict confidence. The panel members also state that their enquiries included an audit of cases and that although the cases were anonyms, some of the details could conceivably have meant that a patient could be identified by someone knowing some of the information about the case already.
- 5.8.7 In the circumstances the Commissioner considers that the release of the information requested would constitute an actionable breach of confidence on the part of the Trust and accordingly considers the exemption under section 41 to be engaged. Section 41 provides an absolute exemption and the public interest does not therefore fall to be considered. The Commissioner therefore upholds the decision by the Trust to withhold the information under section 41 of the Act.

### **Other exemptions**

- 5.9 The Trust has made reference in its correspondence to the Commissioner to the exemptions under section 38 - health and safety and section 44 - prohibitions on disclosure (in this case a reference to a possible breach of section 6 The Human Rights Act 1998 that could otherwise occur in relation to the doctor's 'right to respect for private and family life....' pursuant to Article 8 ECHR) without specifically placing reliance upon them. However the Commissioner considers that the complaint should not be upheld, in view of the application of the exemptions under sections 31, 36, 40 and 41 of the Act for the reasons stated above.

### **Redaction**

- 5.10 The Commissioner has considered the information requested and considers that it could not be meaningfully redacted.

### **The Commissioner's Decision**

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6. The Commissioner's decision in this matter is that the Public Authority was entitled to withhold the information requested as exempt information for the purposes of the Complainant's request, having regard to the exemptions under sections 31, 36, 40 and 41 of the 'Act.'



## Action Required

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7. The Commissioner considers that the Trust has dealt with the Complainant's request in accordance with Part 1 of the Act and therefore does not require any further action to be taken.

## Right of Appeal

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

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

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

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

**Dated the 9th day of August 2006**

**Signed .....**

**Phil Boyd**  
**Assistant Commissioner**

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

## Legal Materials Annex

### Relevant Statutory Obligations under the Freedom of Information Act 2000

#### Section 1(1) provides that –

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

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

#### Section 2 (2) provides that –

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

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

#### Section 31

Section 31-(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice -

- (c) the prevention or detection of crime,
- (d) the apprehension or prosecution of offenders,
- (e) the administration of justice,
- (f) the assessment or collection of any tax or duty or of any imposition of a similar nature.
- (g) the operation of the immigration controls,
- (h) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (i) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (j) 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 any enactment, or
- (k) any enquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her

Majesty's prerogative or by virtue of powers conferred by or under an enactment.

- (l) The purpose of protecting persons other than persons at work against the risk to health or safety arising out of or in connection with the actions of persons at work.

(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 exists 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 , authorized to carry on,
- (e) the purpose of ascertaining the cause of the accident
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of recovering the property of charities,
- (h) the purpose of securing the health, safety and welfare of persons at work, and
- (i) 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 36 (2)** provides that-

Information to which this section applies is exempt information if in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would or would be likely to, prejudice –
  - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown
  - (ii) the work of the Executive Committee of the northern Ireland Assembly, or
  - (iii) the work of the Executive Committee of the National Assembly for Wales,

- (b) would, or would be likely, to inhibit –
  - (j) the free and frank provision of advice, or
  - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

**Section 40** provides that: –

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject
- (2) Any information to which a request for information relates is also exempt information if-
  - (a) it constitutes personal data which do not fall within subsection(1), and
  - (b) either the first or the second condition below is satisfied.
- (3) The first condition is –
  - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
    - (i) any of the data protection principles, or
    - (ii) section 10 of the Act (right to prevent processing likely to cause damage or distress), and
  - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A (1) of the Data Protection Act 1998 (which relate to manual data held by public authorities).

**Section 41** provides that: -

- (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.