

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 14 April 2008**

**Public Authority:** The Department of Health  
**Address:** Richmond House  
79 Whitehall  
London  
SW1A 2NS

### Summary

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The complainant made a number of requests to the Department of Health (the "DoH") in connection with NHS Connecting for Health and the PACS (Picture Archiving and Communications System) procurement programme. These requests were made under the Freedom of Information Act 2000 (the "Act"). Whilst most of the information was disclosed the DoH withheld the PACS Additional Services Catalogue for the Southern Cluster (the "Catalogue") under sections 41 and 43. During the course of the investigation the DoH informed the Commissioner that it was now relying solely upon section 43. After considering the DoH's arguments the Commissioner is not persuaded that the disclosure of the Catalogue would prejudice the commercial interests of either the DoH or the IT provider. Therefore the Commissioner has decided that section 43 is not engaged. Therefore the Commissioner found that the DoH had acted in breach of section 1 in that it had wrongly relied upon section 43 to withhold this information. The Commissioner also decided that the DoH had acted in breach of section 17 as it took longer than 20 working days to issue a refusal notice. The Commissioner requires the Catalogue to be disclosed.

### The Commissioner's Role

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

### The Request

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2. The complainant wrote to the DoH on 4 November 2005 and requested, amongst other things, the following information under the Act:

“What price will my local NHS Trust, namely Oxford Radcliffe Hospitals, pay for CR [Computed Radiography] systems procured via Connecting for Health and could I have a catalogue of pricing which I am told is available?”

3. The DoH responded to this request in a letter dated 16 December 2005, and responded to the various requests he had made. In response to the above request the DoH informed the complainant that,

“...the price of a firm volume of CR readers is factored into the overall price negotiated for each Trust. It is not charged as a separate item. If a Trust requires additional CR readers these can be purchased through the cluster-level ‘Additional Services Catalogue’.”

The ‘Additional Services Catalogue’ referred to here was the PACS Catalogue for the Southern Cluster (the ‘Catalogue’). The DoH refused to disclose the Catalogue citing sections 41 and 43 of the Act. In relation to section 43 it stated that it believed that the public interest lay in maintaining the exemption. Finally the DoH informed the complainant of his right to appeal and his right to complain to the Commissioner.

4. In a letter dated 9 January 2006 the complainant requested an internal review of the decision to withhold the Catalogue.
5. In a letter dated 22 February 2006 the DoH informed the complainant that it upheld the decision to withhold the Catalogue stating,

“The key argument against disclosure therefore remains the application of Section 41 of the Act, i.e. that the information has been obtained from a third party on the strict condition that it not be shared with others without consent; that that consent (which had been sought) has not been granted; and that disclosure would constitute an actionable breach of confidence.”

The DoH did not make any reference to section 43. The DoH informed the complainant of his right to complain to the Commissioner.

## The Investigation

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### Scope of the case

6. On 13 March 2006 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 whether the refusal to disclose the Catalogue was appropriate.
7. Although not specifically requested to do so by the complainant, the Commissioner has also considered the procedural aspects of the DoH’s handling of the request.

## Chronology

8. The Commissioner wrote to the complainant on 3 July 2007 and informed him that he was focusing his investigation on the DoH's refusal to disclose the Catalogue. The Commissioner noted that the complainant had also made several other requests to the DoH at the same time, and asked him to inform him if he also wished to complain about the handling of any of these other requests. The complainant responded in a letter dated 10 July 2007, and confirmed that the scope of the Commissioner's investigation was correct. The complainant also provided further arguments in support of his request.
9. The Commissioner wrote to the DoH on 3 July 2007 and asked for a copy of the withheld information. He asked the DoH to clarify whether it was seeking to rely solely on section 41 or whether it also sought to rely upon section 43 (and if so, its reasoning for the use of this exemption). In relation to section 41 the Commissioner informed the DoH that he had some concerns over the application of this exemption, and drew its attention to the Tribunal decision in *Derry City Council V The Information Commissioner*.<sup>1</sup> This stated that in the Tribunal's view information contained in a contract entered into between a public authority and a third party would not fulfil the requirements of section 41, as such information would not be information provided to the authority by that third party, and would instead be a result of negotiations between the authority and the third party. He asked the DoH to confirm whether there had been any negotiations between the DoH and the third party in regard to the contents of the Catalogue and the prices contained therein, or whether the Catalogue was solely provided to the DoH by the third party, without any input from the DoH.
10. The Commissioner did not receive a response and on 8 August 2007 he wrote to the DoH again, and asked for a response to his earlier letter. He also drew the DoH's attention to his power to issue an Information Notice under section 51 of the Act.
11. The DoH responded in a letter dated 6 September 2007, and provided a copy of the Catalogue. It explained that NHS PACS system was part of the national programme for IT in the NHS, and was being delivered throughout England within local regions or 'clusters', each working with a local service provider (LSP). It went on to state that LSP's were private businesses under contract to supply all of the requirements of the programme within the cluster. LSP's in turn sub-contact to an established PACS supplier, who would then work with individual NHS Trusts to install PACS at their hospital locations. The DoH informed the Commissioner that the LSP for the Southern Cluster was Fujitsu.
12. In this letter the DoH informed the Commissioner that it was relying upon sections 41 and 43 to withhold the information in question. In regard to section 41 the DoH stated that it believed that this exemption applied and that the information was provided by a third party:

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<sup>1</sup> EA/2006/0014.

“Whilst the level and quality of service proposed by Fujitsu, including the range and pricing of PACS items to be offered to the NHS, were naturally a matter central to the negotiation and completion of the contract between the [DoH] and Fujitsu, I can confirm that in their final form these aspects of the Catalogue were proposed (‘provided’) to us by Fujitsu, and the [DoH] accepted them.”

The DoH also confirmed that it sought to rely upon section 43(2) to withhold the information, and provided further arguments to support its use of this exemption.

13. The Commissioner contacted the DoH again on 28 September 2007. In regard to section 41 he informed the DoH that he did not find its arguments compelling, as it appeared that the contents of the Catalogue were a result of negotiations between the DoH and Fujitsu. The Commissioner again drew the DoH’s attention to the Tribunal decision in *Derry City Council V The Information Commissioner*, and asked it to reconsider its application of this exemption. The Commissioner also asked further questions regarding the DoH’s use of section 43.
14. The Commissioner also informed the DoH that he had some concerns about the applicability of sections 41 and 43 in relation to the parts of the Catalogue which listed what products were available for purchase by NHS Trusts (as opposed to the price schedule). He drew the DoH’s attention to publicly available information on the website of the NHS Purchasing and Supply Agency, such as the document, “Report 06033 Computed Radiography (CR) Systems for General Radiography. A Comparative Report June 2006,” which discussed the merits (including costing) of various Computed Radiography equipment for the NHS.<sup>2</sup> The Commissioner asked the DoH to confirm whether it was citing these exemptions to the whole of the Catalogue, or whether it only sought to withhold the schedule of prices.
15. The DoH contacted the Commissioner by way of a telephone call on 19 October 2007, and requested an extension to the deadline for response. It was agreed that the DoH would respond by 31 October 2007.
16. The DoH contacted the Commissioner again on 30 October 2007 and informed him that it was unable to provide a substantive response. It again asked for an extension to the deadline for its response, and a new deadline of 23 November 2007 was agreed.
17. The DoH replied in a letter dated 23 November 2007 and informed the Commissioner that it no longer sought to rely upon section 41. It went on to state that it now only sought to rely upon section 43 in relation to the price schedule, and that it was prepared to disclose the remaining parts of the Catalogue to the complainant. It also provided further arguments in regard to its use of section 43.
18. The Commissioner contacted the DoH by way of a telephone call on 29 November 2007 to request some further information. This information was provided on the same day.

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<sup>2</sup> [www.pasa.nhs.uk](http://www.pasa.nhs.uk)

## Analysis

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### Procedural matters

#### Section 17

19. The Commissioner has considered whether the DoH has complied with its obligations under section 17(1) of the Act.
20. This section requires a public authority to issue a refusal notice, "within the time for complying with section 1(1)." This time limit is set in section 10 of the Act as twenty working days.
21. The DoH did not respond to the complainant's request of 4 November 2005 until 16 December 2005.
22. The full text of section 17 can be found in the Legal Annex at the end of this Notice.

### Exemption

#### Section 43

23. Section 43(2) provides an exemption from disclosure for information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
24. The full text of section 43 can be found in the Legal Annex at the end of this Notice.
25. Although the DoH initially sought to withhold the entire Catalogue, during the course of the investigation it informed the Commissioner that it now only sought to withhold the price schedule, and that it was prepared to release the rest of the document. Therefore in considering the applicability of this exemption the Commissioner has only considered the price schedule.
26. The Commissioner accepts that the Catalogue relates to the commercial interests of both the DoH and Fujitsu. Therefore he believes that the information in question falls within the scope of the exemption.
27. However, for this exemption to be engaged disclosure would have to prejudice, or be likely to prejudice, the commercial interests of either of these parties.
28. The DoH has argued that the disclosure of the Catalogue will prejudice the commercial interests of both itself and Fujitsu. Therefore the Commissioner has initially considered whether the disclosure of this information would prejudice, or

be likely to prejudice, the commercial interests of either or both of these parties. He has considered the potential prejudice to each party in turn.

29. In reaching a decision on the question of prejudice the Commissioner has been mindful of the test of 'likely to prejudice' as enunciated by Mr Justice Mundy in the case of *R (on the application of Lord) V Secretary of State for the Home Office [2003] EWHC 2073*, and followed by the Information Tribunal in the case of *John Connor Press Associates Limited V The Information Commissioner*, where the Tribunal interpreted the expression 'likely to prejudice' within the context of the section 43 exemption as meaning that the chance of prejudice being suffered should be more than hypothetical or a remote possibility, that there must have been a real and significant risk. The Tribunal in that case indicated that the degree of risk must be such that there 'may very well' be prejudice.<sup>3</sup>

### **Prejudice to the DoH**

30. The DoH has argued that disclosure would prejudice its commercial interests as it may cause prospective contractors in the future to be, "dissuaded from bidding for projects on the basis that whatever financial concessions they make as part of a negotiation process would ultimately be revealed to competitors together with associated commercially sensitive information." This in turn would hinder the DoH from seeking best value for money in future procurement exercises, damaging its commercial interests. The DoH has not provided any further evidence to support these comments.
31. The Commissioner is not persuaded by this argument. He considers that contracts of this nature are highly lucrative to the successful contractors, and it is therefore unlikely that they would willingly exclude themselves from tendering for contracts in the public sector because of the provisions of the Act.
32. Further to this the Commissioner believes that the implementation of rights under the Act has already indicated to businesses the possibility that information they provide when bidding for a contract offered by a public authority could be disclosed as a result of a request under the Act. He has previously expressed the view that, "those who engage in commercial activity with the public sector must expect that there may be a greater degree of openness about the details of those activities than had previously been the case prior to the Act coming into force."<sup>4</sup>
33. The Commissioner believes that this view is in line with that expressed by the Information Tribunal in *Derry City Council V The Information Commissioner (EA/2006/0014)*. In this hearing the Tribunal discussed whether the disclosure of commercial information provided to a publicly owned Airport by a private company would be damaging to the commercial reputation of the Airport. The Tribunal stated, "We do not accept that...disclosure...would have caused the Airport to gain a reputation as an untrustworthy counterparty in commercial transactions; one that would disclose, or be forced to disclose, the contents of agreements in which it enters. Any person or organisation contracting with it

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<sup>3</sup> EA/2005/0005.

<sup>4</sup> FS50063478.



would already know that it was publicly owned and that its commercial dealings would therefore be subjected to greater public scrutiny than those of a private company.”<sup>5</sup>

34. The Commissioner acknowledges that private businesses may have genuine concerns about the detrimental effect the release of sensitive commercial information related to a contract could have on them. However, and as stated above, he believes that those doing business with the public sector should be aware of the assumption in favour of the disclosure of information provided for by the Act. At the same time, they will recognise that the Act contains provisions which will allow public authorities to withhold truly commercially sensitive information which is likely to cause harm to their commercial interests, if the public interest lies in maintaining the exemption. He therefore sees no reason why the disclosure of the information should prevent private businesses from bidding for future contracts offered by the DoH. The Commissioner has gone on to consider the commercial sensitivity of the Catalogue at paragraphs 46 to 54 below.
35. The DoH has also argued that the disclosure of this information may damage its relationship with the other LSP's who hold contracts for NHS Connecting for Health.
36. It has stated that the Catalogue forms part of a larger contract negotiated by itself with Fujitsu, which is the LSP for NHS Connecting for Health for the Southern Cluster. It has argued that the disclosure of any part of this larger contract may damage its relations with the other LSP's who are contracted to provide the NHS PACS programme in other parts of the country, as,

“...although there is broad consistency of approach between the terms and conditions, services, responsibilities, and risk profile associated with each of the separately negotiated LSP contracts, there are also individual considerations for each contract, secured separately via a highly competitive procurement process. The contestable framework, which is the core of the National Programme's commercial approach would be significantly impaired if details of the contractual positions and deliverables (of which the [Catalogue] is one) of individual parties in that framework were disclosed. It is critical to ensuring continual commercial tension between NHS Connecting for Health and its service providers that the content of each of the separate contracts that have been awarded are kept secret so that no other service provider can use this to their advantage to undermine the robust arrangements that NHS Connecting for Health has so far negotiated.”

37. Therefore the Commissioner believes that the DoH has argued that, should some small part of one of the contracts it holds with one of the LSP's be disclosed, this would be likely to prejudice its commercial relationship with the other LSP's, who have negotiated separate contracts with it.

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<sup>5</sup> EA/2006/0014, page 12.

38. Whilst considering this argument the Commissioner has noted that the DoH has not provided any further information to support this argument. In particular it has not demonstrated how the disclosure of the price schedule in the PACS Additional Services Catalogue could be used to 'undermine the robust arrangements that NHS Connecting for Health has so far negotiated'. If the disclosure were to damage relations between the DoH and the other LSP's, the DoH has not demonstrated to the Commissioner how this would in turn prejudice the commercial interests of the DoH.
39. Furthermore the Commissioner believes that the price schedule contained in the Catalogue forms only a small part of the overall contract between the DoH and Fujitsu, and does not contain any details of the negotiations as to how those prices were arrived at. Given this, the nature of the withheld information and the lack of further arguments by the DoH, the Commissioner is not persuaded that any damage to the relationship between the DoH and the other LSP's would be sufficient to prejudice the commercial interests of the DoH.
40. Taking into account the arguments provided by the DoH and all the circumstances of the case, the Commissioner is not persuaded that the disclosure of the Catalogue would, or would be likely to, prejudice the DoH's commercial interests.

### **Prejudice to Fujitsu**

41. The Commissioner has gone on to consider the DoH's arguments regarding the potential prejudice to the commercial interests of Fujitsu.
42. In its initial refusal notice the DoH argued that disclosure of this information might, "dissuade potential contractors from participating in Government-funded enterprises in the knowledge that their commercially and market-sensitive information could be disclosed." This would prejudice the commercial interests of Fujitsu by dissuading them from bidding for potentially lucrative contracts. However, as noted above, the Commissioner is not persuaded by the argument that the disclosure of this information would dissuade private businesses from bidding for contracts (see paragraphs 30 – 34 above).
43. The DoH has also argued that disclosure of the Catalogue would be likely to provide an unwarranted commercial advantage to competitors of Fujitsu and their sub-contractors. It has commented that even the slightest competitive advantage granted to another party would be detrimental to contractors by jeopardising their position on future negotiations, ongoing projects, and potentially even their long term financial viability.
44. The DoH has also argued that disclosure would prejudice Fujitsu's commercial interests as the provision of PACS Additional Services is an open and competitive market, and the disclosure of this information would give Fujitsu's competitors an unwarranted commercial advantage in the provision of these services. In its letter to the Commissioner dated 23 November 2007 the DoH informed him that, "In respect of PACS services, LSP's are entitled to provide the [Catalogue] to NHS Trusts and receive orders from them, but this is a non-exclusive arrangement and



Trusts are entitled to procure the service from another cluster or third party. There is no exclusivity of provision of PACS Additional Services within the cluster area.” In order to further support this argument the DoH informed the Commissioner that some Trusts had obtained PACS Additional Services from third parties, rather than their LSP, and pointed out that Fujitsu had itself provided PACS services as additional services in three Trusts outside the Southern Cluster area.<sup>6</sup>

45. During the course of the investigation the Commissioner asked the DoH whether the comments about the potential prejudice to Fujitsu were the DoH's comments, or whether the DoH had sought the opinion of Fujitsu before providing this submission to the Commissioner. The DoH confirmed that it had been in communication with Fujitsu in regard to this request, and these comments reflected that company's views.
46. In order to assess the likelihood of prejudice to Fujitsu's commercial interests, if the Catalogue were to be disclosed, the Commissioner has considered the nature and sensitivity of the withheld information. The Commissioner also believes that the nature and sensitivity of the information is an important factor in considering the severity of damage disclosure could cause to the relationship between the DoH and the LSP's, and whether this would prejudice the commercial interests of the DoH.
47. In reaching a view on this the Commissioner has referred to a similar case by the Scottish Information Commissioner which concerned tenders for an IT contract with Fife Council, and dealt with a request for pricing information (Decision 180/2006). Although there are differences between the different pieces of legislation, having considered the withheld information and the individual circumstances of this case, the Commissioner is satisfied that many of the arguments put forward by the Scottish Information Commissioner are relevant in this case. It should be noted that a decision taken by the Scottish Information Commissioner is not binding on the Information Commissioner.
48. Whilst considering his case the Scottish Commissioner commented on concerns raised by some of the companies (whose information had been requested) that this information might be of use to their competitors. He stated,

“...the elements they have described, such as response times, references, costs, and hardware and software support, all appear to relate to the supply of standard products and it is my view that the disclosure of such information in this instance would not cause real or actual harm to any company's ability to do business. In relation to pricing structures, it is the methodologies and computational processes involved in working out the pricing structures which are of value rather than the pricing structures themselves.”<sup>7</sup>

The Commissioner finds these comments compelling.

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<sup>6</sup> See, 'Transforming Patient Diagnostic Services', page 3. This booklet can be viewed at:

[www.fujitsu.com/downloads/EU/uk/industries/healthcare/fujitsu-healthcare-pacs-brochure.pdf](http://www.fujitsu.com/downloads/EU/uk/industries/healthcare/fujitsu-healthcare-pacs-brochure.pdf).

<sup>7</sup> [www.itspubliknowledge.info/applicationsanddecisions/Decisions/2006/200501049.asp](http://www.itspubliknowledge.info/applicationsanddecisions/Decisions/2006/200501049.asp), page 10.

49. Turning to this case the information in question is a price schedule for the costs of hardware and software, and the installation of both. The information does not contain any details of the negotiations or the pricing mechanisms which led to these prices being set. Further to this the Commissioner does not believe that the information contains any trade secrets, and he has noted that this is not an argument that has been advanced by the DoH. The Commissioner has also noted that the DoH is prepared to disclose the range of hardware/software on offer– it only seeks to withhold the prices of these items. Finally, the Commissioner has noted the level of information about some of the hardware that is already in the public domain through the website of the NHS Purchasing and Supply Agency (see paragraph 14 above).
50. The Commissioner notes that the DoH has not made any arguments surrounding the timing of the request, or that the contract was under negotiation at the time of the request. Therefore he has considered the sensitivity of this information on the basis that negotiations had been completed.
51. Before reaching a view on the sensitivity of the withheld information the Commissioner has also considered the dissemination of the Catalogue within the NHS. During the course of the investigation he asked the DoH the following questions:
- How many health authorities in the Southern Cluster have access to the Catalogue?
  - Is the Catalogue available to a large number of staff within these authorities, or is access limited to a small number of staff?
  - Has the DoH issued any guidelines for its dissemination and access by health authority staff?
52. In response the DoH informed the Commissioner:
- “On the issue of dissemination, the contract requires Fujitsu to distribute the [Catalogue] to those NHS bodies (i.e. acute trusts) entitled to raise orders against its contents. Fujitsu distribute the [Catalogue] to Trusts as part of a deployment pack on CD to the Trust PACS Project Manager.”
  - “Documents on the CD are used by Trust personnel to assist in the management of PACS deployment, including the ordering of additional PACS equipment from the [Catalogue].”
  - “As ‘authorised service recipients’ Trusts are obligated to respect the clear confidentiality statement on the [Catalogue].”
  - “NHS Connecting for Health plays no part in that distribution process, and has issued no guidelines in relation to dissemination of the [Catalogue].”
53. After considering this response the Commissioner is satisfied that the Catalogue has been widely disseminated to the Trusts in the Southern Cluster, and that the DoH has issued no specific guidance as to how the Catalogue should be handled, or distributed, within these Trusts.
54. Having considered all of the above points the Commissioner is not persuaded by the DoH’s arguments about the commercial sensitivity of the information in the

price schedule. Whilst he is aware that the prices in the schedule are the result of negotiations between the DoH and Fujitsu, he believes that these negotiations formed part of a much larger tendering process, which took place in the unique circumstances of setting up the new PACS system for the NHS. In this case it is merely the prices themselves which are contained in the withheld information. Details of any concessions made by either party as part of the larger tendering process, or how the prices were computed or arrived at, are not included in the withheld information – instead the information is the prices for the provision and installation of standard products. For these reasons the Commissioner is not persuaded by the DoH's arguments that the disclosure of the Catalogue would jeopardise Fujitsu's position on future negotiations and, potentially, even their long term financial viability.

55. In reaching a view on whether the disclosure of this information would prejudice the commercial interests of Fujitsu he has been mindful of the prejudice test as set out in paragraph 28 above. Whilst he acknowledges that Fujitsu was operating in an open and competitive market, where other companies could provide Trusts with PACS Additional Services, he has also noted the lack of sensitivity of the information – especially due to the fact that it is merely a price list of standard products and their installation, together with the wide dissemination of the Catalogue, and the lack of any guidelines issued by the DoH in regard to the handling and sensitivity of the Catalogue. Further to this he has noted that the price schedule in the Catalogue forms only a small part of the overall contract between the DoH and Fujitsu, and does not contain any details as to the pricing mechanism or negotiations, which would show how these prices were arrived at.
56. In relation to the argument that Fujitsu was operating in an open and competitive market for the provision of the PACS Additional Services, the Commissioner is not persuaded by the DoH's arguments. In reaching this view he has noted his comments above about the sensitivity of this information. Additionally, he believes that pricing information on its own would not be the only consideration in choosing a supplier for additional services, and there would be many other factors taken into consideration, such as the reputation and reliability of the provider, and the suitability of the software and hardware, before such a choice was made.
57. Taking into account the arguments provided by the DoH and all the circumstances of the case, the Commissioner does not believe that it has provided him with compelling arguments that the disclosure of the Catalogue would, or would be likely to, prejudice the commercial interests of Fujitsu.
58. Therefore the Commissioner does not believe that the disclosure of the Catalogue would be likely to prejudice the commercial interests of the DoH and Fujitsu, and as such he does not believe that the exemption is engaged.
59. As the Commissioner has formed the view that the exemption is not engaged, he has not gone on to consider the public interest.

## **The Decision**

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60. The Commissioner's decision is that the DoH did not deal with the request for information in accordance with section 1 of the Act in that it inappropriately relied on section 43 to withhold the Catalogue.
61. The DoH also acted in breach of section 17 in that it did not issue a refusal notice within twenty working days.

## **Steps Required**

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62. The Commissioner requires the DoH to take the following steps to ensure compliance with the Act:

A full and unredacted copy of the Catalogue should be disclosed to the complainant within 35 calendar days of receipt of this Notice.

## **Failure to comply**

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

## Right of Appeal

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

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

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

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

**Dated the 14<sup>th</sup> day of April 2008**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

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

## Legal Annex

### Section 17

- (1)** A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -
- (a) states that fact,
  - (b) specifies the exemption in question, and
  - (c) states (if that would not otherwise be apparent) why the exemption applies.
- (2)** Where—
- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
    - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
    - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
  - (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,
- the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.
- (3)** A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -
- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
  - (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- (4)** A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.



- (5)** A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
- (6)** Subsection (5) does not apply where –

  - (a) the public authority is relying on a claim that section 14 applies,
  - (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
  - (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7)** A notice under section (1), (3) or (5) must –

  - (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
  - (b) contain particulars of the right conferred by section 50.

### **Section 43**

- (1)** Information is exempt information if it constitutes a trade secret.
- (2)** Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
- (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 the interests mentioned in subsection (2).