

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 7 July 2008

**Public Authority:** Legal Services Commission  
**Address:** 85 Gray's Inn Road  
London  
WC1X 8TX

### Summary

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The complainant wrote to the Legal Services Commission to request a copy of a report it had received in connection with an application for legal aid. The public authority refused the request under section 44 of the Act which provides for an exemption where disclosure is prohibited under any other law or enactment. The public authority said that the relevant statutory prohibitions were section 38 of the Legal Aid Act 1998 and section 20 of the Access to Justice Act 1999. The Commissioner has considered the complaint and has found that section 38 of the Legal Aid Act does apply to the requested information and that therefore it is exempt from disclosure under section 44 of the Act. The Commissioner requires no steps to be taken.

### 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. On 13 September 2007 the complainant wrote to the public authority to request the following information:

*'I am writing to request, under FOIA, a copy of the report submitted to the Legal Services Commission in 1999, as described by Dr Andrew Wakefield in this statement in the Lancet in 2004. For your convenience I have copied the appropriate piece where Dr Wakefield refers to his submission to the LSC.'*

3. The report which the complainant referred to in the request was supplied to the public authority by Dr Andrew Wakefield in relation to research he had published in the Lancet journal in 1998 regarding the measles, mumps and rubella vaccine (MMR).
3. The public authority responded to the request on 25 September 2007 by means of a refusal notice. It explained that it had previously received a similar request by another applicant and that request had been refused. It said that the decision to refuse the request had been reviewed internally within the public authority and by the Information Commissioner after the applicant had complained to him under section 50 of the Act. The public authority said that on both occasions the decision to refuse the request had been upheld.
4. The public authority went on to outline the reasons behind the decision to refuse the earlier request. It said that information which it has been provided with in connection with a case is exempt from disclosure under section 20 of the Access to Justice Act (or section 38 of the Legal Aid Act 1988 for cases granted legal aid under that Act). As such, it said that any reports it received in connection with MMR litigation will fall within this statutory prohibition and would therefore be exempt from disclosure under section 44(1)(a) of the Act. It went on to say that, under section 44(2) of the Act, the duty to confirm or deny whether it holds the information does not arise.
5. It added that the reasons for refusing the earlier request applied equally to the complainant's request. It informed the complainant that if she was unhappy with the use of exemptions then she could request an internal review.
6. On 29 September 2007 the complainant wrote to the public authority to ask that it carry out an internal review of its decision to refuse her request under section 44 of the Act.
7. On 30 November 2007 the public authority presented the complainant with the findings of its internal review. It said that under the Act there are a number of exemptions to its general principle of disclosure. It explained that section 44 of the Act provides for an absolute exemption for information where disclosure would be prohibited by or under any enactment. If another law prohibits disclosure of the information then it cannot be released under the Act, it said.
8. The public authority said that the Legal Aid Act 1988 (LAA) and the Access to Justice Act 1999 (AJA) govern its work and that of its predecessor organisation, the Legal Aid Board. It said that it had received the report the complainant had requested in 1999 and that therefore the Legal Aid Act applied at this time. It appears that at this point the public authority was now confirming that the information was held whereas in its initial response it had indicated that it was not obliged to confirm or deny whether it held the requested information under section 44(2) of the Act. The public authority went on to say that section 38 LAA provides that the public authority cannot release information it holds in connection with an individual or individuals seeking or receiving services funded by the public authority. The report requested by the complainant had been provided to the

public authority in connection with proposed MMR litigation and therefore it said that this falls within the category of information which cannot be disclosed.

9. The public authority informed the complainant that there is a provision in section 38 LAA that allows for the disclosure of information where the consent of the individuals concerned has been given. However, it said that in this case, authority to release the report had not been given. It said that in the circumstances of this case the LAA prohibits disclosure of the requested information and added that any individual that discloses information in contravention of this legislation would be guilty of a criminal offence.
10. The public authority concluded that the information requested by the complainant could not be disclosed and therefore its original decision to refuse the request under section 44 of the Act was correct.

## **The Investigation**

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### **Scope of the case**

11. On 10 December 2007 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the public authority's decision to refuse her request under section 44 of the Act.

### **Chronology**

12. On 21 February 2008 the Commissioner contacted the complainant and explained that he had already issued a Decision Notice in a previous case where the complainant in that case had requested a copy of the same report she had requested. The Commissioner explained that in that case he had decided that the information was exempt from disclosure under section 44 of the Act by virtue of section 38 of the Legal Aid Act 1988.
13. The complainant said that she was aware that the Commissioner had issued a Decision Notice in a similar complaint but confirmed that she wanted to pursue her complaint and she wanted the Commissioner to issue a Decision Notice specific to her case.
14. The Commissioner contacted the public authority and invited it to make representations in response to the complaint. The Commissioner corresponded with the public authority to clarify the grounds on which it had refused the complainant's request.

## Background to the request

### Legal Aid and the Legal Services Commission

15. Until the passing of the AJA in 1999, responsibility for legal aid lay with the Legal Aid Board. The Legal Services Commission was established by that legislation and its primary function is the regulation of funding for legal services in England and Wales.

### The 'MMR Litigation'

16. Since 1992 the public authority and formerly the LAB has provided funding for litigation which relates to the controversy surrounding the MMR vaccine. MMR is a triple vaccine against measles, mumps and rubella. Concerns were raised about MMR and its connection to autism in the mid 1990's and following the publication of research in the Lancet in 1998 there had been much public speculation following from the research findings. The publicity surrounding the paper centred on a purported link between inflammable bowel disease (IBD) and autism. Following the paper's publication and the ensuing media coverage there followed a drop in children's' vaccination rates. Some parents opted to give their children single jabs or to avoid the vaccination altogether. In the wake of this publicity, many parents of autistic children commenced proceedings against the drug companies manufacturing the MMR vaccines (the 'MMR litigation').

### Findings of fact

17. Section 38 LAA was repealed by the Access to Justice Act 1999.
18. In the Review of Statutory Prohibitions on Disclosure produced by the then Department for Constitutional Affairs, section 38 LAA is described as having been 'wholly repealed'.
19. The *Access to Justice Act 1999 (Commencement Order No.3, Transitional Provisions and Savings) Order 2000* brought the Access to Justice Act 1999 into force.
20. The report requested by the complainant was provided to the Legal Aid Board in 1999 to support an application for legal aid.
21. The Commissioner has previously considered a complaint under reference FS50072941 in which the complainant had made a request to the public authority for a copy of the report by Dr Andrew Wakefield in relation to MMR litigation. In this case the Commissioner decided that the report was exempt from disclosure under section 44 of the Act by virtue of section 38 LAA.

## Analysis

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22. A full text of the relevant statutes referred to in this section is contained within the legal annex.

## Exemption

23. The public authority has said that the information requested by the complainant is exempt from disclosure under section 44 of the Act. Section 44 of the Act provides that information is exempt if its disclosure is prohibited under any other law or enactment. The public authority has said that the relevant statutory prohibitions are section 38 LAA and section 20 AJA.
24. Section 38 LAA provides that, subject to certain 'gateways' on disclosure, information that has been 'furnished', for the purposes of that Act, to the Legal Aid Board shall not be disclosed.
25. Section 106 AJA states that those provisions referred to in schedule 15 of that Act are repealed. Schedule 15 of the AJA sets out a number of provisions to be repealed including sections 34 to 43 of the LAA. Therefore section 38 LAA has been repealed and it would appear that this statutory prohibition is no longer in force.
26. However, in reaching a decision on whether or not this statutory prohibition applies the Commissioner must also consider the effect of the *Access to Justice Act 1999 (Commencement Order No.3, Transitional Provisions and Savings) Order 2000*. Article 5(1)(c) of this order sets out the circumstances where the provisions commenced by the order shall not take effect. The result of this is that the repeal of section 38 LAA, as provided for in section 106 AJA and as commenced in this order, does not take effect in cases where legal aid has been granted under the provisions of the Legal Aid Act and the application is signed before 1 April 2000 and received by the Legal Aid Board before 2 May 2000.
27. The withheld information was provided to the public authority in 1999 in relation to an application for legal aid and therefore the Commissioner is of the view that section 38 LAA would still apply if the information was furnished to the Legal Aid Board (the statutory predecessor to the public authority) for the purposes of the LAA. Future references to the 'public authority' in this decision notice are references to the Legal Services Commission and its predecessor organisation, the Legal Aid Board.
28. The Commissioner believes that in this case the key to application of section 38 LAA is the meaning of the word 'furnish'. It is not defined in the legislation and there is little case law on its statutory interpretation. However the Commissioner notes that the Oxford English Dictionary defines this word as meaning 'to be the source of something'. The Commissioner has also gone on to consider the ordinary, natural meaning of the word 'furnish' in the context of the LAA. He considers 'furnish' in this context to cover information which is provided, supplied

- or rendered from its source for the purposes of the legislative provision of the LAA.
29. In his previous decision the Commissioner concluded that in the context of the relevant provisions of the LAA, the word 'furnish' will cover all information provided to the public authority by or on behalf of the individuals who are seeking or who are receiving services funded by the public authority. The Commissioner's conclusion is the same in this case. The Commissioner is satisfied that the report requested by the complainant was provided in this way and therefore is satisfied that section 38 LAA applies.
  30. As mentioned above, there are a number of gateways to disclosure within section 38 LAA. These gateways set out the circumstances when disclosure is permitted and the statutory prohibition within section 38 does not apply.
  31. Disclosure would be permitted, by virtue of section 38(3) LAA, if the person who provided the information to the public authority had provided his consent. The public authority has confirmed that Dr Wakefield has not given his consent for the requested information to be disclosed and therefore there are no grounds for the information to be disclosed under this particular 'gateway'.
  32. The Commissioner has considered the remaining gateways and has concluded that none would allow for disclosure in this case.
  33. The Commissioner is satisfied that the information requested by the complainant is exempt from disclosure under section 44 of the Act by virtue of section 38 LAA. In light of this, the Commissioner has not gone on to consider whether the statutory prohibition in section 20 AJA would apply.
  34. Section 44 of the Act is an absolute exemption and therefore the Commissioner has not undertaken an assessment of the public interest test.

## **The Decision**

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35. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act to the extent that it correctly withheld the requested information under section 44 of the Act.

## **Steps Required**

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36. The Commissioner requires no steps to be taken.

## Right of Appeal

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38. 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 7<sup>th</sup> day of July 2008

Signed .....

**Steve Wood**  
Assistant Commissioner

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

## **Legal Annex**

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### **Freedom of Information Act 2000**

#### **44 Prohibitions on disclosure**

- (1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-
- (a) is prohibited by or under any enactment,
  - (b) is incompatible with any Community obligation, or
  - (c) would constitute or be punishable as a contempt of court."

### **Legal Aid Act 1988**

#### **38 Restriction of disclosure of information**

- (1) Subject to the following provisions of this section, no information furnished for the purposes of this Act to the Board or any court or other person or body of persons upon whom functions are imposed or conferred by regulations and so furnished in connection with the case of a person seeking or receiving advice, assistance or representation shall be disclosed otherwise than—
- (a) for the purpose of enabling or assisting the Lord Chancellor to perform his functions under or in relation to this Act,
  - (b) for the purpose of enabling the Board to discharge its functions under this Act,
  - (c) for the purpose of facilitating the proper performance by any court, tribunal or other person or body of persons of functions under this Act,
  - (d) with a view to the institution of, or otherwise for the purposes of, any criminal proceedings for an offence under this Act,
  - (e) in connection with any other proceedings under this Act, or
  - (f) for the purpose of facilitating the proper performance by any tribunal of disciplinary functions as regards barristers or solicitors.
- (2) This section does not apply to information in the form of a summary or collection of information so framed as not to enable information relating to any particular person to be ascertained from it.
- (3) Subsection (1) above shall not prevent the disclosure of information for any purpose with the consent of the person in connection with whose case it was furnished and, where he did not furnish it himself, with that of the person or body of persons who did.
- (4) A person who, in contravention of this section, discloses any information furnished to the Board or any court or other person or body of persons for the



purposes of this Act shall be liable on summary conviction to a fine not exceeding level 4 on the standard scale.

- (5) Proceedings for an offence under this section shall not be brought without the written consent of the Attorney General.
- (6) For the avoidance of doubt it is hereby declared that information furnished to counsel or a solicitor as such by or on behalf of a person seeking or receiving advice, assistance or representation under this Act is not information furnished to the Board or a person upon whom functions are imposed or conferred as mentioned in subsection (1) above.

## **Access to Justice Act 1999**

### **20 Restriction of disclosure of information**

- (1) Subject to the following provisions of this section, information which is furnished—
  - (a) to the Commission or any court, tribunal or other person or body on whom functions are imposed or conferred by or under this Part, and
  - (b) in connection with the case of an individual seeking or receiving services funded by the Commission as part of the Community Legal Service or Criminal Defence Service,shall not be disclosed except as permitted by subsection (2).
- (2) Such information may be disclosed—
  - (a) for the purpose of enabling or assisting the Commission to discharge any functions imposed or conferred on it by or under this Part,
  - (b) for the purpose of enabling or assisting the Lord Chancellor to discharge any functions imposed or conferred on him by or under this Part,
  - (c) for the purpose of enabling or assisting any court, tribunal or other person or body to discharge any functions imposed or conferred on it by or under this Part,
  - (d) except where regulations otherwise provide, for the purpose of the investigation or prosecution of any offence (or suspected offence) under the law of England and Wales or any other jurisdiction,
  - (e) in connection with any proceedings relating to the Community Legal Service or Criminal Defence Service, or
  - (f) for the purpose of facilitating the proper performance by any tribunal of disciplinary functions.
- (3) Subsection (1) does not limit the disclosure of—
  - (a) information in the form of a summary or collection of information so framed as not to enable information relating to any individual to be ascertained from it, or

(b) information about the amount of any grant, loan or other payment made to any person or body by the Commission.

- (4) Subsection (1) does not prevent the disclosure of information for any purpose with the consent of the individual in connection with whose case it was furnished and, where he did not furnish it himself, with that of the person or body who did.
- (5) A person who discloses any information in contravention of this section shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 4 on the standard scale.
- (6) Proceedings for an offence under this section shall not be brought without the consent of the Director of Public Prosecutions.
- (7) Nothing in this section applies to information furnished to a person providing services funded as part of the Community Legal Service or the Criminal Defence Service by or on behalf of an individual seeking or receiving such services.