Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 28 September 2009

Public Authority: National Offender Management Service (part of the Ministry of Justice)

Address: Data Access and Compliance Unit
Information Directorate
Ministry of Justice
First Floor – Zone C
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London
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Summary

The complainant made two requests for information concerning a medical examination on his late son on 13 August 1999, including the doctor's name who conducted it. The public authority responded that it held no recorded information. The Commissioner determined that it was incorrect in this determination and therefore breached sections 1(1)(a) and (1)(1)(b) of the Freedom of Information Act 2000 ('the Act') in relation to the first request. It also breached sections 10(1) and 17(1) in relation to both of the requests. He also found a procedural breach of section 17(1)(a), (b) and (c) in relation to the first request. The public authority released all the outstanding recorded information except for the name of the doctor, which it withheld by reference to section 40(2). The Commissioner has found that the public authority was correct in its application of this exemption. The Commissioner requires no remedial steps to be taken.

The Commissioner's Role

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

The Request

2. The Commissioner notes that the National Offender Management Service (NOMS) is not a public authority itself, but is part of the Ministry of Justice. Therefore the public authority in this case is actually the Ministry of Justice not

NOMS. However, for the sake of clarity, this Decision Notice refers to NOMS as if it were the public authority.

3. In this complaint the Commissioner has opted to look at two requests for very similar information together.

Request one

4. On 16 January 2006 the complainant requested the following information in accordance with section 1(1) of the Act:

'I'll ask again, why was **[Person A redacted]** *was past [sic] fit in Hindley Prison? (in Aug 1999)'.*

This was written on a copy of a letter he had previously received from the Prisons and Probation Ombudsman.

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5. On 20 January 2006 the public authority acknowledged receiving the request for information and said that it would endeavour to provide a full response within twenty working days.

6. On 13 February 2006 the public authority (which was at that time part of the Home Office) responded with the following:

'Under the Freedom of Information Act you asked about your late son, **[Person A Redacted]** *and why he was passed fit in HMP Hindley in August 1999.*

There is nothing in his record to explain what happened. Additionally I checked the Governor's Journal at HMYOI Hindley for the time in question and there is nothing reported there about this matter. The information is not held.

Early in 2000 you wrote to HM the Queen about your son's condition, a letter that was passed on to the Prison Service along with **[Doctor B Redacted]** *statement on your son's bad health.* **[Person C redacted]** *of the Deputy Director- General's Briefing and Casework Unit investigated the matter, and as a result we minimised the number of stairs he had to use. This was explained in a letter to you from* **[Person C redacted]** *of 22 May 2000. I enclose a copy of a letter from HMP Blakenhurst about your son.*

I am sorry that we were not able to help, and sympathise with you over the loss of your son. I also checked with HMP Blundeston and can confirm that your son was not held there.'

It also provided its internal review procedure details.

7. On 17 February 2006 the complainant requested an internal review from the public authority. On 14 March 2006 the public authority acknowledged receiving the request for internal review and set a target response date of 10 May 2006. The complainant received this letter on 16 March 2006.

8. On 25 January 2008 the public authority provided a response to the complainant's request for an internal review. It said:

'I would like to reiterate that we do not hold information as to why your son was passed fit in Hindley Prison in August 1999. It unfortunately appears that the records may have been inadvertently destroyed in the summer of 2005 at Blakenhurst Prison when a new filing system was installed. The other establishments in which your son was located have also searched for the records and they cannot be found. I should explain that a prisoner's record is transferred with him when he moves to a different establishment. So your son's record would normally be held at Blakenhurst. Blakenhurst have confirmed that the last record they hold for 2002 begins with Wa and it is highly unlikely that no other prisoner was in Blakenhurst in that year whose name began with Wa onwards. We do have the Prison Service Headquarters file relating to **[Person A redacted]** *but it does not contain the information that you requested.'*

It then apologised for not explaining its response previously and gave the complainant the Commissioner's address to make a further appeal.

Request two

9. The public authority continued to have correspondence with the complainant and as a result a new request was generated.

10. On 2 August 2008 the complainant wrote to the public authority. His second request was '*how and why was* **[Person A redacted]** *past [sic] fit at Hindley prison and tortured up and down the stairs. I would like the doctor's name who past [sic] him fit.'*

11. On 8 August 2008 the public authority informed the complainant that it had received his request and reworded it to *'how and why was [**Person A redacted**] past [sic] fit at Hindley Prison. I would like the doctor's name who past [sic] him fit.'* The Commissioner does not believe that the rewording of the request was either necessary or appropriate. Indeed the Information Tribunal in *Barber v Inland Revenue* (EA/2005/0004) has commented that such behaviour 'would make a mockery of the legislation'. However, the Commissioner notes that in this case it does not have any effect on the scope of the request being considered. It informed the complainant that it would aim to respond within twenty working days so by 4 September 2008.

12. On 4 September 2008 the public authority sent a letter to the complainant to inform him that it would require a time extension in this case. It said it now intended to respond by 1 November 2008. Unfortunately, it cited the complainant's name incorrectly in this letter.

13. On 29 October 2008 the public authority provided a response in accordance with the Act. It said:

'*After an extensive and thorough search, I regret to inform you that the Ministry of Justice does not hold the information about the doctor who carried* [out] *the*

examination of your son at Hindley Prison you have requested. We keep prisoner's records for a limited period once a sentence has been completed and it is likely given the passage of time involved that your sons [sic] *file will have been destroyed as part of this routine procedure.'*

It informed the complainant of its internal review procedure.

14. On 1 November 2008, the complainant indicated to the public authority that he was not satisfied that the public authority did not hold any relevant information in relation to this request. The public authority correctly saw this expression of dissatisfaction as a request for an internal review.

15. On 1 December 2008 the public authority conducted an internal review in relation to this request. It informed the complainant that actually it did hold relevant recorded information that related to both the requests and was prepared to provide a copy of it without the doctor's name. This was a document that was found in **[Person Redacted A]**'s medical record that contained the results of doctor's appointments with him. It said that it believed that section 40(2) of the Act applied to the name. It informed the complainant that this was the personal information of the doctor and that the release of the information would contravene the first data protection principle.

The Investigation

Scope of the case

16. On 26 January 2008 the complainant contacted the Commissioner to complain about the way his first request for information had been handled. The complainant specifically asked the Commissioner to determine if there was recorded information held about this matter.

17. On 5 August 2008 the complainant contacted the Commissioner to complain about the way his second request for information was being handled. He asked the Commissioner to ensure that he would receive a timely response to this request for information. The Commissioner has also considered whether the name of the doctor can be disclosed and the issue of timeliness has been considered in the procedural breaches section of the Notice below.

18. The Commissioner recognises that there is a considerable volume of correspondence between the complainant and the public authority on this issue. However, the Commissioner's investigation is restricted to the public authority's response to the complainant's requests for information.

19. For the sake of clarity the scope of this case is the two requests worded as follows:

    1. *'I'll ask again, why was* **[Person A redacted]** *was past [sic] fit in Hindley Prison? (in Aug 1999)' (*'Request one' dated 16 January 2006).

2. '*How and why was* **[Person A redacted]** *past [sic] fit at Hindley prison and tortured up and down the stairs. I would like the doctor's name who past [sic] him fit' (*'Request two' dated 2 August 2008).

20. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. In particular, it is not the Commissioner's role to determine whether or not the subject of the request had to use flights of stairs at Hindley Prison. He can only look at what relevant recorded information was held by the public authority at the date of the request.

Chronology

21. On 9 September 2008 the Commissioner contacted the public authority to enquire about its position in relation to the second request for information. The public authority responded indicating that it was allocated to a case officer and the second response needed to be cleared by senior staff.

22. Having heard nothing further from the public authority in relation to the second request for information, the Commissioner contacted the public authority on 14 October 2008 for a response. On 29 October 2008 this response was provided.

23. On 31 October 2008 the Commissioner wrote to the complainant concerning the complaint about the first request to set the scope of this part of his investigation. He informed the complainant that he should request an internal review in relation to the second request before the Commissioner would accept it for investigation.

24. On 2 November 2008 the complainant sent further documentation to the Commissioner where he expressed his dissatisfaction at the public authority's handling of his requests for information. On 4 November 2008 the Commissioner wrote to the complainant to reiterate what he could do within his powers.

25. On 5 November 2008 the Commissioner received another letter from the complainant expressing concern at the public authority's handling of the request. He also provided a copy of a letter dated 21 June 2006 that had been sent to his MP on his behalf, which he believed was strong evidence that the public authority held relevant recorded information relating to the first and second requests. It stated the following:

'I am now in receipt of [**Person A Redacted**]*'s Continuous Medical Record that I have obtained from HMP Blakenhurst and I have also contacted* [**Doctor B redacted**] *who was at that time Head of Healthcare at HMP/YOI Hindley.*

[**Person A redacted**] *was transferred to Hindley on the 12th August 1999 from HMP Brinsford. The doctor assessed him the following day on the 13th August and noted his cardiac condition. He was assessed to be labour category 2 (which at that time I believe was to be fit to attend education) and not to attend gym.*

The next documentation in [**Person Redacted A**]*'s medical records was on the afternoon of the 24 August 1999 when he was feeling short of breath and was*

seen by [**Doctor B redacted**]. [**Doctor B Redacted**] *prescribed Aspirin 75mg once daily, which* [**Person A Redacted**] *had previously refused to take. He also contacted the sister in charge at Brinsford prison to expedite* **[Person A redacted]** *return, in order to keep his medical appointments and treatment as planned at Dudley Road Hospital.*

*As you will note [***Person A Redacted**] *was held at Hindley for a very short period at [sic] time and therefore there are only two written entries in his medical record as explained above.'*

26. On 11 November 2008 the Commissioner wrote a detailed letter to the public authority in order to ascertain whether it held relevant recorded information.

27. On 20 November 2008 the public authority informed the Commissioner that his letter was being treated as a request for information under the Act and that it would provide a response within twenty working days. This letter was clearly sent erroneously by the public authority.

28. On 1 December 2008 the public authority advised the Commissioner that it was conducting an internal review into the second request and as a result of the Commissioner's correspondence had now found recorded information relevant to both requests. It informed him that it was likely that it would be relying on section 40(2) in relation to the name of the doctor.

29. On 2 December 2008 the public authority provided the Commissioner with the internal review response to the second request and the relevant recorded information which it had now located. It indicated that it was prepared to release all the information that it had found (i.e. the information referred to in the letter to the MP dated 21 June 2006), except for the doctor's name which it was exempting under section 40(2) of the Act.

30. On 4 December 2008 the Commissioner spoke to the public authority to inform it that he would require the other parts of his letter to be answered. He followed this up with a letter to the public authority the purpose of which was to obtain clarification on the outstanding enquiries he made in his first letter.

31. On 13 January 2009 the Commissioner was called by the Headquarters of the Prison Service who informed him that they would respond to his enquiries as soon as possible. On 15 January 2009 the public authority called the Commissioner and informed him that it was very difficult to coordinate many different prisons into providing a response in this case. The Commissioner allowed an extension to reflect the complexity of the enquiries.

32. Also on 15 January 2009 the complainant wrote to the Commissioner to indicate that he was dissatisfied with the public authority. On 16 January 2009 the Commissioner responded and ensured that the scope of his investigation was clear.

33. After further correspondence, on 12 February 2009 the Commissioner received a response to his outstanding enquiries. He obtained further comments on 23 February 2009.

Analysis

Substantive Procedural Matters – What recorded information is held that is relevant to the requests?

34. Prior to the Commissioner's investigation, the public authority contended that it held no relevant recorded information in relation to either request.

35. Using his knowledge of the public authority and from examining the previous correspondence the Commissioner was satisfied that the public authority had previously held potentially relevant information in six areas.

    1. [**Person A redacted**]'s prisoner record.

    2. [**Person A redacted**]'s continuous medical record.

    3. Documentation about the investigation of [**Employee C redacted**] of the Deputy General's Briefing and Casework Unit's into the treatment of [**Person A redacted**].

    4. [**Person A redacted**]'s Prison Service Headquarters file.

    5. Recorded information held at HMP Hindley, about which doctors were on duty on 13 August 1999.

    6. Guidelines used by the doctors to assess labour categories in the Hindley Prison on 13 August 1999.

36. In the Commissioner's first letter of 11 November 2008 he invited the public authority to conduct detailed searches in these six areas and to identify any further recorded information that it held either within these six areas or elsewhere.

37. On 2 December 2008 the public authority forwarded a letter to the Commissioner which indicated the scope of searches conducted at Hindley Prison. It found relevant recorded information in relation to area 2 (above) and informed the Commissioner that all the relevant recorded information in relation to area 5 was destroyed in accordance with its retention and disposal schedule.

38. On 9 February 2009 the public authority responded in relation to areas 1, 3, 4 and 6. It also informed the Commissioner that after considerable further searching, it was unable to find further recorded information.

39. In order to make a determination about whether the Act was applied correctly the Commissioner must consider whether the public authority held any recorded

information that is relevant to either request for information at the date of the individual requests. In doing so, the Commissioner has been guided by the approach adopted by the Information Tribunal in the case of *Linda Bromley & Others and Information Commissioner v Environment Agency* (EA/2006/0072). In this case the Tribunal indicated that the test for establishing whether information was held by a public authority was not one of certainty, but rather the balance of probabilities.

40. The Commissioner has applied this standard of proof to each of the six areas identified above.

*1. [**Person A redacted**]'s prisoner record.*

41. The prisoner's core record is held securely within the establishment that the prisoner is accommodated in. It travels with the prisoner as they move institutions. It is held separately from the prisoner's continuous medical record. When the prisoner is released, the documentation is stored within the prison that they were released from. The records are then destroyed in accordance with Prison Service Orders (PSO) that concern the application of the Data Protection Act.

42. In this case the relevant retention and disposal instruction is found in the PSO 9020. This states that the information for prisoners sentenced to a term of imprisonment of over three months should be kept for six years from the date of discharge. In this case, the time when the information should have been destroyed and the Commissioner's investigation overlap. PSO 9020 further states that the relevant prison ought to keep a record of all records sent for destruction and if this information is personal information, the data subject's name should be noted.

43. The Commissioner therefore asked the public authority to inform him of the steps taken to search the prison from which the prisoner was released. The public authority informed the Commissioner that it had made considerable efforts to trace the relevant information and its explanation about the new filing system being installed in 2005 is the only thing that can account for the early destruction of it. It also informed the Commissioner that it had checked the other relevant prisons to ensure the information was not there. It confirmed it held no record of its destruction.

44. Having regard to these answers and the steps the public authority has informed him it has taken, the Commissioner believes that on the balance of probabilities there is no longer any relevant recorded information held in relation to this area of investigation.

*2. [**Person A redacted**]'s continuous medical record.*

45. The prisoner's continuous medical record is held separately from the main core record. It also travels with the prisoner as they move institutions. This documentation is also stored within the prison that they were released from. The records are then destroyed in accordance with PSO 9020, which stipulates that

they should be kept for ten years after the date of discharge or until the prisoner's death, whichever is sooner. Additionally, within the PSO there is a requirement that only a medical member of staff is allowed to destroy a prisoner's medical record.

46. In this case the continuous medical record was requested by Hindley Prison from Blakenhurst Prison in order for its Head of Healthcare to answer questions from the complainant's MP in June 2006.

47. Hindley Prison copied the relevant sections that related to the prisoner's time at Hindley Prison and then returned the continuous medical record to Blakenhurst Prison.

48. The entirety of this copy of the information is relevant recorded information for both requests for information. As the dates that the prisoner was in Hindley Prison are known, the Commissioner is satisfied that the information found is all the recorded information within the continuous medical record that is relevant to the request.

49. The Commissioner is satisfied that on the balance of probabilities there is no further relevant recorded information held in relation to this area of investigation.

*3. Documentation about the investigation of the Deputy General's Briefing and Casework Unit into the treatment of [**Person A redacted**].*

50. The Commissioner identified the possibility of further recorded information being available through this source from the response provided to the complainant on 13 February 2006. The investigation itself was conducted in 2000 and the results were communicated to the complainant on 22 May 2000. The result was that the prison agreed to minimise the number of stairs the prisoner was to use.

51. Information in this category is also destroyed in accordance with PSO 9020, which indicates that it should be kept for six years from the date of discharge.

52. The Commissioner asked for the public authority to conduct detailed searches for the information. The public authority informed the Commissioner that after an extensive search of its records it was unable to find any documentation about this investigation.

53. The Commissioner has determined, having regard to these answers and the steps the public authority have informed him they have taken, that on the balance of probabilities there is no longer any relevant recorded information held in this area of investigation.

*4. [**Person A redacted**]'s Prison Service Headquarters file.*

54. Prison Service Headquarters is the central point which deals with General Enquiries that are made about the Prison Service and its users.

55. Prisoner Headquarters files normally contain requests from prisoners and complaints that are made by them and are kept in a central depository in Branston.

56. In this case the relevant retention and disposal instruction is found in the PSO 9020. This states that the information for prisoners sentenced to a term of imprisonment of over three months should be kept for six years from the date of discharge. It further states that the relevant facility ought to keep a record of all records sent for destruction and if this information is personal information, the data subject's name should be noted.

57. The public authority's response dated 13 January 2008 indicated that it had recovered this file from Branston and having examined it felt that it contained no recorded information that was relevant to responding to the initial request for information.

58. For the purposes of this investigation, the Commissioner wanted to ensure that this was the case and asked for the public authority to provide him with a copy of the file on 11 November 2008.

59. On 9 February 2009 the public authority responded that it was unable to provide this file. It told him that it:

'may have been destroyed on return to Branston at end of FOI process as timescale for retention passed. Unfortunately there is no record of destruction but equally, there is no trace of the file despite extensive searches at DACU and Branston.'

60. The Commissioner asked further questions about what the public authority meant by DACU given that the public authority had undergone structural changes over recent years. It replied:

'As you are aware the Access Rights Unit (ARU) and the Open Government Unit (OGU) were merged last year to form the Data Access and Compliance Unit (DACU) - because Mr Wright's request was made in 2006 it was handled by the OGU. As you are also aware the OGU and the ARU were based in different buildings at the time of Mr Wright's request, and only moved into our current premises following last years merger. All files would have been sent to Branston Registry Office for storage when the request was completed and it is our belief that it was destroyed as part of the retention schedule laid out in Prison Service Order 9020.'

61. The Commissioner has determined, having regard to these answers and the steps the public authority have informed him they have taken, that on the balance of probabilities there is no longer any relevant recorded information held in this area of investigation.

62. However, the Commissioner is dissatisfied with the public authority's compliance with its own retention and disposal instruction. He has chosen to make further comments in the 'Other Matters' section below.

5. *Recorded information held at HMP Hindley, about which doctors were on duty on 13 August 1999.*

63. Prior to the public authority discovering the information contained in the prisoner's continuous medical record, the Commissioner asked a number of questions about what other information is held at HMP Hindley that may be able to provide relevant recorded information for the complainant by indirect means.

64. The Commissioner enquired whether there was a record of the doctors that were responsible for HMP Hindley on 13 August 1999. Alternatively he asked if the prison was able to compare the Human Resources record of who was employed at that time, against the relevant gate log (or gate book) of the prison in order to determine who the doctor may be.

65. While the alternative route to the information was superfluous in this case, as the name was identified through the continuous medical record, the Commissioner has investigated whether there is further relevant recorded information in this case at HMP Hindley.

66. On 27 November 2008 Hindley Prison responded to the Commissioner. It told the Commissioner that it held no further details about the doctors from 1999 and it also informed the Commissioner that it was not possible to obtain further information from the gate log as it had been destroyed, in accordance with its retention and disposal schedule. This states that such logs are to be kept for only five years.

67. The Commissioner has determined, having regard to these answers and the steps the public authority have informed him they have taken, that on the balance of probabilities there is no longer any relevant recorded information held in this area of investigation. In addition he is satisfied that the only possible information that could have been obtained by indirect means, is the information that has already been uncovered within the prisoner's continuous medical record.

6. Guidelines used by the doctors to assess labour categories in the Hindley Prison on 13 August 1999.

68. This was the last area of investigation where the Commissioner felt there could be relevant recorded information that had not been provided. From his understanding of the case documents, he was clear that labour categories were ascribed to prisoners upon their entry into prison and relevant information would be the guidelines that led to ascribing of those categories. This information would have the additional benefit of helping the complainant to understand the system.

69. On 11 November 2008 the Commissioner wrote to the public authority and asked for it to provide him with the relevant guidelines, if it held them. He also asked a number of detailed questions about them.

70. On 27 November 2008 Hindley Prison responded to the Commissioner. It informed him that, while Hindley no longer had the relevant guidelines it used in

1999, it could provide some advice about their nature. It said that it believed that the categories were nationally recognised and that this information was recorded in a Standing Order that was no longer in use. It said that Prison Service Headquarters may be of some assistance in retrieving a copy of the relevant Standing Order. It then referred to the content of the letter dated 21 June 2006 (referred to in this Notice at paragraph 25 above).

71. On 9 February 2009 the public authority responded that it was unable to provide the Commissioner with a copy of the guidelines. It informed him that 'extensive enquiries' have not yet produced the criteria used to assess labour categories in prisons on 13 August 1999. It could, however, provide some further information about the nature of the categories:

'From what I am told it would appear that the prison doctor assesses each work area and decides if it fits into the Labour 1, 2 and 3 categories. The doctor then assesses individual prisoners and records the outcome on the LIDS system – and local managers would then place prisoners in workshops that matched their allocated category. I can't see anything written down anywhere though, although the 3 tier category levels seem to be widely acknowledged.'

72. It confirmed that it would continue to make further enquiries to locate the guidelines and would forward them to the Commissioner, should it find them.

73. The Commissioner asked the public authority to detail its extensive enquiries and to tell him where it had checked and why. The public authority responded that it had made further enquiries with colleagues in the Department of Health, the Primary Care Trust for the prisons, Her Majesty's Prison Service headquarters, and the prisons themselves to find out what the categories of labour stood for.

74. The Commissioner, having regard to these answers and the steps the public authority have informed him they have taken, has determined that on the balance of probabilities there is no longer any relevant recorded information held in this area of investigation.

Any other relevant recorded information

75. In his letter dated 11 November 2008 the Commissioner invited the public authority to provide him with any additional information that was relevant to either of the requests that he was investigating.

76. On 9 February 2009 the public authority responded to his invitation. It informed him that:

'considerable effort has been made to trace information to assist you in this case but that no further information has been found.'

77. The Commissioner has determined, having regard to the depth of previous questions and the steps the public authority have informed him they have taken,

that on the balance of probabilities there is no further relevant recorded information held in this case.

Exemption

Section 40(2)

78. Section 40(2) provides an exemption for information which is the personal data of a third party. The public authority has informed the Commissioner that it is relying on the section 40(2) exemption in relation to the name of the doctor in this case.

79. Section 40(2) is contingent on two conditions that are found in sections 40(3) and 40(4) of the Act. For clarity, the technical position of the public authority is that it was withholding the name of the doctor under section 40(2) by virtue of section 40(3)(a)(i) of the Act. This condition requires, firstly, the information to be personal information under the Data Protection Act 1998 (the DPA); and, secondly, that the disclosure of it would contravene at least one of the data protection principles as set out in Schedule 1 of the DPA.

Is the information 'personal data'?

80. In order to rely on the exemption provided by section 40, the information being requested must therefore constitute personal data as defined by the DPA. The DPA defines personal information as:

> *'…data which relate to a living individual who can be identified*
> *a) from those data, or*
> *b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*
>
> *and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'*

81. The Commissioner has viewed the documentation held by the public authority and notes that only one name has not been released. This is the name that the complainant requested of the doctor who conducted the examination of his late son.

82. In this case, the Commissioner is satisfied that a living individual can be identified by the information requested. The Commissioner accepts that the name of the individual in the context of this request is their personal data as defined by the DPA.

Does the disclosure of the information contravene any data protection principles?

83. Having concluded that the information does fall within the definition of 'personal data', the Commissioner has also considered whether disclosure of the information breaches any of the eight data protection principles as set out in schedule 1 of the DPA.

84. The Commissioner agrees with the public authority that the relevant principle in relation to this request is the first data protection principle. It has two components, which need to be satisfied together for the principle not to be contravened. These are outlined below:

    1. the personal data should be processed fairly and lawfully; and

    2. one of the conditions in Schedule 2 of the DPA must be met.

85. In considering whether or not the disclosure of the individual's name would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:

    - the individual's reasonable expectations of what would happen to their personal data;
    - the seniority of the individual;
    - the nature of the workplace;
    - whether disclosure would cause any unnecessary or unjustified damage to the individual; and
    - the legitimate interests of the public in knowing the name of the individual, against the effects of disclosure of their name.

86. The public authority stated that disclosure of the individual's name would be unfair on the individual given the subjective, and by inference, critical, phrasing of the request. The public authority explained that the individual was a locum General Practitioner with an inward facing role in their work in assessing the health of prisoners in prison. In addition, the individual no longer works with the prison and they do not have sufficient details to ask for their consent to disclosure.

87. The Commissioner's guidance on the application of section 40 that was issued on 11 November 2008 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private lives. Although the guidance acknowledges that there are no hard and fast rules it states, on page 8, that:

    'Information about an individual's private life will deserve more protection that information about them acting in an official or work capacity. You should also consider the seniority of their position, and whether they have a public facing role. The more senior a person is, the less likely that disclosing information about their public duties will be unwarranted or unfair. Information about a senior official's public life should generally be disclosed unless it would put them at risk, or unless it also reveals details of the private lives of other people.'

88. On the basis of this guidance the Commissioner considers that public sector employees should expect some information about their roles and the decisions they take to be disclosed under the Act.

89. This approach is supported by the Information Tribunal decision in *House of Commons v Information Commissioner and Norman Baker MP* EA2006/0015 and 0016. This decision involved a request for information about the details of the travel allowances claimed by MPs. In its decision the Tribunal noted that:

'where data subjects carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives'. (at paragraph 78).

90. The Commissioner also believes that a distinction can be drawn between the levels of information which junior staff should expect to have disclosed about them compared to what senior staff should expect. This is because the more senior a member of staff is the more likely it is that they will be responsible for making influential policy decisions and/or decisions related to the expenditure of significant amounts of public funds. In this case the Commissioner notes that the public authority has disclosed the name of the person in charge of the section to the complainant.

91. The Commissioner recognises that the doctor concerned was a relatively junior member of staff who would not have expected his name to be disclosed in relation to any work he undertook in this area. In addition it is likely that the person would expect that, due to the nature of the workplace (a prison), his name would be protected from public disclosure for his safety. He also accepts that based on the above this expectation would have been a reasonable one.

92. The Commissioner has finally considered the legitimate interests of the public in knowing the name of the individual against the effects of disclosure of their name. The Commissioner does not feel that there is any great legitimate interest for the public in this case. The Commissioner notes that the senior doctor in charge has been named so there is accountability and any complaints about performance can be made accordingly. The Commissioner believes that the legitimate interests of the public lie in ensuring the safety of junior doctors in these circumstances and therefore in withholding the information.

93. Whilst the Commissioner makes no comment about the intentions of the complainant in this particular case, he accepts that section 40 is engaged as disclosure of the individual's name would breach the first data protection principle. As the Commissioner has found that disclosure would be unfair and therefore in breach of the first data protection principle there is no need to consider if the processing of the personal data would meet one of the conditions of Schedule 2.

94. Accordingly, the Commissioner believes that disclosure of this information would contravene the first data protection principle, and therefore the public authority applied the exemption at section 40(2) by virtue of section 40(3)(a)(i) of the Act appropriately.

Procedural matters

95. As the two requests were dealt with in very different time scales the Commissioner has split them up and considered the procedural breaches in relation to each.

Section 1(1)(a)

96. Section 1(1)(a) of the Act (full wording in the legal annex) requires a public authority to confirm or deny whether requested information is held.

97. In light of the Information Tribunal Decision in *McIntyre v Information Commissioner & Ministry of Defence* [EA/2007/0068] the Commissioner determines whether there have been procedural breaches at the time of the internal review and, if there has been no review, then at 20 working days from the date of the request.

Request one

98. In relation to the first request, the public authority did respond within twenty working days and informed the complainant that it did not hold any recorded information.

99. It confirmed that this was the case almost two years later in its internal review. The Commissioner managed to locate some relevant recorded information in his investigation that was held by the public authority at the time of the request. Unfortunately, due to an administrative error the relevant information was transferred from Blakenhurst to Hindley prison to answer an MP's letter and this transfer was not recorded at Blakenhurst. The result, however, is that the public authority incorrectly denied holding recorded information.

100. The Commissioner therefore finds a breach of section 1(1)(a) of the Act as the public authority incorrectly denied that it held information falling within the scope of the request.

Request two

101. In relation to the second request, the public authority found relevant information in its internal review and therefore the Commissioner finds that the public authority did not breach section 1(1)(a) in this case.

Section 1(1)(b)

102. Section 1(1)(b) (full wording in the legal annex) requires that if the requested information is held by the public authority it must be disclosed to the complainant unless a valid refusal notice has been issued within twenty working days of receiving the request.

Request one

103. In this case the public authority failed to realise that it held relevant recorded information for almost three years. It subsequently released most of this information.

104. The Commissioner therefore finds the public authority in breach of section 1(1)(b) of the Act as it has failed to either provide either a valid refusal notice or the relevant recorded information that it held within the statutory time limits.

Request two

105. In this case the public authority correctly specified that the information was exempt at the time of internal review.

106. The Commissioner therefore does not find the public authority in breach of section 1(1)(b) of the Act.

Section 10(1)

107. Section 10(1) states:

> *'… a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.'*

Request one

108. The information request in this case was made on 16 January 2006. Although the public authority responded within 20 working days, it did not provide a valid response compliant with section 1(1) until 1 December 2008. It therefore breached section 10(1).

Request two

109. The information request in this case was received on 8 August 2008. The public authority failed to comply with section 1(1) until 1 December 2008. In failing to provide a response compliant with section 1(1) within 20 working days of receipt of the request, the public authority breached section 10(1).

Section 17(1)

110. In *Bowbrick v Information Commissioner* [EA/2005/2006] at paragraph 69, the Information Tribunal confirmed that failing to issue a refusal notice within twenty working days is a breach of section 17(1) of the Act. It stated in relation to the case it was looking at that:

> *"the* [public authority] *failed to identify within 20 working days of the request the exemptions upon which it relied in respect of certain documents falling within the scope of [the] request. It therefore failed to comply within its duty under s17(1) of FOIA within the time limit prescribed by that section."*

111. Section 17(1) provides that:

> "*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."*

Request one

112. In this case the public authority failed to recognise that it had relevant recorded information until almost three years after receiving the request. It then moved to issue a refusal notice relying on section 40(2). The three years taken to issue a refusal notice exceeds the statutory deadline of twenty working days. The late issue of the refusal notice is a breach of section 17(1) of the Act.

Request two

113. In this case the public authority received the request on 8 August 2008 and failed to provide any response until 29 October 2008. The 55 working days taken to issue a refusal notice exceeds the statutory deadline of 20 working days. The Commissioner therefore finds that, in exceeding this statutory time limit, the public authority again breached section 17(1) of the Act.

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

Request one

114. The public authority failed to correctly specify an exemption that it was later to rely on [section 40(2) by virtue of section 40(3)(a)(i)] by the time of the internal review in relation to request one. In not doing so it has also breached section 17(1)(a), (b) and (c).

Request two

115. The public authority did correctly specify the exemption [section 40(2) by virtue of section 40(3)(a)(i)] at the time of the internal review. The Commissioner therefore does not find a further breach of sections 17(1)(a), (b) and (c).

The Decision

116. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act.

The application of section 40(2) by virtue of section 40(3)(a)(i) of the Act to the doctor's name.

However, the Commissioner has also decided that the public authority has contravened a number of procedural sections of the Act.

Section 1(1)(a) – the public authority incorrectly denied that it held relevant recorded information in relation to request one and therefore breached section 1(1)(a) of the Act.

Section 1(1)(b) – the public authority failed to provide a valid refusal notice or the relevant recorded information within the statutory time limits or by its internal review in relation to request one. It has therefore breached section 1(1)(b) of the Act.

Section 10(1) – the public authority failed to comply with section 1(1) within 20 working days for requests one and two. It has therefore breached section 10(1) of the Act in relation to both of the requests.

Section 17(1) - the public authority took three years in relation to request one and 55 working days in relation to request two to issue a refusal notice. Its failure to issue a refusal notice within the statutory date of compliance means that it has breached section 17(1) in relation to both of the requests.

Section 17(1)(a), (b) and (c) – the public authority failed to specify an exemption that it was later to rely on by the time of its internal review in relation to the first request. In failing to do so it has breached section 17(1)(a)(b) and (c).

The Commissioner does not require any remedial steps in relation to the procedural breaches above.

Steps Required

117. The Commissioner requires no steps to be taken.

Other matters

118. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the delays in providing an internal review in relation to the first case that are of great concern. Part VI of the section 45 Code of Practice makes it

desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. Whilst he recognises that, in this case, the delay occurred before the publication of his guidance on the matter, the Commissioner remains concerned that it took over 22 months for an internal review to be completed. The Freedom of Information complaints procedure at NOMS was one of the matters raised in a Practice Recommendation issued to the authority on 10 March 2008. As a result of this, the Commissioner has ongoing enforcement activities with the public authority concerned.

119. The Commissioner is also concerned that the public authority is not succeeding in implementing its retention and disposal scheme found in Prison Service Order 9020. In particular, in relation to this case it has failed to keep records of a number of items that have been destroyed and further has moved to destroy a number of records prior to the time that its policy suggests. In doing this the public authority is losing the benefit of having such a scheme, as it cannot report with any level of certainty what information it holds and what it has destroyed. The Commissioner would take this opportunity to remind NOMS of the advice on record disposal provided at section 9 of the section 46 Code of Practice on the Management of Records.

Right of Appeal

120. 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.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 28th day of September 2009

Signed ……

David Smith
Deputy Commissioner

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

Legal Annex

Freedom of Information Act 2000

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

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

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

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

Section 10 - Time for compliance with request

(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

…

Section 17 – Refusal of request

Section 17(1) provides that -
"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."

Section 17(2) states –

"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 t 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."

Section 17(3) provides that -

"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."

Section 17(5) provides that –

"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."

Section 40 – Personal information

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.

(3) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the [1998 c. 29.] Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if

the exemptions in section 33A(1) of the [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

(5) The duty to confirm or deny—

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either—

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the [1998 c. 29.] Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the [1998 c. 29.] Data Protection Act 1998 shall be disregarded.

(7) In this section—

- "the data protection principles" means the principles set out in Part I of Schedule 1 to the [1998 c. 29.] Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
- "data subject" has the same meaning as in section 1(1) of that Act;
- "personal data" has the same meaning as in section 1(1) of that Act.

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Data Protection Act 1998

Section 1 - Basic interpretative provisions

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

- "data" means information which—

(a)
is being processed by means of equipment operating automatically in response to instructions given for that purpose,

(b)
is recorded with the intention that it should be processed by means of such equipment,

(c)
is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or

(d)

does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

- "data controller" means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;
- "data processor", in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;
- "data subject" means an individual who is the subject of personal data;
- "personal data" means data which relate to a living individual who can be identified—

  (a)
  from those data, or

  (b)
  from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

  and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;
- "processing", in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—

  (a)
  organisation, adaptation or alteration of the information or data,

  (b)
  retrieval, consultation or use of the information or data,

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

  (d)
  alignment, combination, blocking, erasure or destruction of the information or data;
- "relevant filing system" means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

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

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

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

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

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

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

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

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