

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 11 August 2010

**Public Authority:** Department of Health, Social Services and  
Public Safety  
**Address:** Room A3.9, Castle Buildings  
Stormont, Belfast  
BT4 3SQ

### Summary

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The complainant requested information in relation to previously released abortion statistics for hospitals in Northern Ireland for the years 2003-2007. The DHSSPS refused to disclose some of this information, citing sections 38(1) (a) and (b) (endangerment to health and safety) and 40(2) and (3) (i)(a) (personal data of third parties) as a basis for non-disclosure. The Commissioner finds that these exemptions are not engaged and the DHSSPS is required to disclose the information in question. The Commissioner also finds that the DHSSPS has breached sections 1(1)(a), 1(1)(b), 10(1) and 17(1)(c) of the Act.

### 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.

### Background

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2. The law in Northern Ireland states that abortion cannot be carried out legally except in cases where continuance of the pregnancy threatens

the life of the mother<sup>1</sup> or would adversely affect her physical or mental health.<sup>2</sup>

3. In 1998 the Department for Health, Social Services and Public Safety Northern Ireland (the DHSSPS) published the first official statistics on abortions performed in Northern Ireland. No statistics are available to indicate the age of the women, the legal grounds, where the abortion was carried out, the stage of pregnancy or the type of abortion performed. There are also no available statistics to indicate which women have access to abortion, why, and at what stage of pregnancy.
4. The statistics concerned in the complainant's request relate only to "medical abortions," i.e. the interruption of pregnancy for legally acceptable and medically approved reasons.

## The Request

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5. On 16 December 2008 the complainant made the following request for information to the DHSSPS:

"I request the following information regarding abortions carried out in N Ireland. I refer to the recently disclosed figures for abortions in N Ireland below and seek information for each of the years listed.

<i>Year</i>	<i>Number of abortions</i>
2003	73
2004	59
2005	82
2006	69
2007	99

1. How many of these abortions were carried out on persons giving an address outside Northern Ireland?
2. How many of these abortions were carried out on persons giving an address in the Republic of Ireland?

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<sup>1</sup> Criminal Justice (Northern Ireland) Act 1945

<sup>2</sup> R v Bourne [1938] All ER 615 at 617

3. How many of these abortions were carried out as a result of a referral from the Republic of Ireland?
  4. For what reasons were these abortions carried out?
  5. How many of these abortions were carried out where the unborn child was over 21 weeks' gestation?
  6. How many of these abortions were carried out where the unborn child was over 27 weeks' gestation?
  7. How many of the unborn children aborted were diagnosed with a foetal abnormality?
  8. What specific foetal abnormalities were diagnosed, i.e. Down's syndrome etc.
  9. By what method were the abortions of unborn children over 21 weeks' gestation carried out?
6. On 8 January 2009 the DHSSPS issued a refusal notice to the complainant. This stated that the information requested in parts 1 and 2 of the complainant's request was held by the DHSSPS, however it was exempt from disclosure under sections 38(1)(b), 40(2), 40(3)(a)(i), 41 and 44(1)(a) of the Act. It further stated that the information requested in parts 3, 4, 5, 6, 8 and 9 of the request was not held by the DHSSPS. In relation to part 7 of the request the DHSSPS advised that it is unlawful to terminate a pregnancy in Northern Ireland because of a foetal abnormality.
7. On 3 February 2009 the complainant requested a review of the DHSSPS' decision. That request was acknowledged on 10 February 2009 and the result of the review was provided by letter to the complainant on 16 March 2009. The DHSSPS stated that it now considered that the exemptions under sections 41 and 44(1)(a) of the Act did not apply. However the DHSSPS remained of the view that the exemptions under sections 38(1)(b), 40(2) and 40(3)(a)(i) of the Act still applied to the withheld information. In addition the DHSSPS now sought to apply the exemption at section 38(1)(a) as well.

## The Investigation

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### Scope of the case

8. On 8 April 2009 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 whether the DHSSPS was correct to refuse to provide the information it held in relation to Parts 1 and 2 of her request. She did not ask the Commissioner to investigate the DHSSPS' claim that it did not hold information in relation to the other parts of her request, nor did she appear to have any issue with the DHSSPS' response to Part 7 of her request. Therefore, the Commissioner has only investigated the DHSSPS' refusal to provide the information as requested in Parts 1 and 2 of the complainant's request.
9. The complainant also expressed to the Commissioner her concern regarding the time taken to respond to her request for an internal review of the matter. The complainant pointed out that the DHSSPS had originally provided her with the date of 3 March 2009 as a target date for completion of the internal review. However, she was contacted on 2 March 2009 by the DHSSPS. The DHSSPS stated that, due to the complexity of the matter, the internal review would not be completed by 3 March 2009, however she would receive the review result on or before 16 March 2009. The Northern Ireland Executive had been due to discuss new abortion guidelines issued by the DHSSPS on 5 March 2009. These guidelines were released on 15 March 2009, and the complainant received her response the day after this. The complainant was of the view that the DHSSPS had delayed responding to her request in order to prevent her from complaining to the Northern Ireland Executive about the abortion statistics until after the new guidelines had been issued. However, the Commissioner finds that the time taken to complete the internal review was reasonable and has not further investigated that aspect of the case.

### Chronology

10. Unfortunately, owing to the number of complaints received by the Commissioner, this case was not allocated to a complaints officer until February 2010.
11. On 12 February 2010 the Commissioner wrote to the DHSSPS requesting its submissions in relation to the application of the exemptions claimed.

12. On 8 June 2010 the DHSSPS provided the Commissioner with its detailed submissions in relation to its application of the relevant exemptions to the withheld information. The Commissioner requested further clarification, which was provided by the DHSSPS on 15 June 2010.

## Analysis

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### Exemptions

13. During the Commissioner's investigation, the DHSSPS confirmed to him that it was seeking to rely upon sections 38 and 40(2) and (3)(a)(i) of the Act as a basis for non-disclosure of all of the withheld information. The Commissioner has examined the application of each of these exemptions in turn.

### Section 40(2): personal information

14. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied.
15. One of the conditions, listed in section 40(3)(a)(i), is where disclosure of the information to any member of the public would contravene any of the data protection principles as set out in schedule 1 to the Data Protection Act 1998 (the DPA.) The full text of section 40 of the Act can be found in the Legal Annex at the end of this Decision Notice.
16. In its letter to the complainant dated 8 January 2009 the DHSSPS stated that the withheld information was exempt from disclosure under sections 40(2) and 40(3)(i)(a) as the numbers were small and there was a real risk that patients and/or doctors could be identified from them. Therefore the DHSSPS was of the view that the information was personal data, and that its disclosure would breach of the first data protection principle.
17. The first data protection principle requires that the processing of personal data be fair and lawful and,
  - at least one of the conditions in schedule 2 is met, and
  - in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.

18. In order to reach a view on the DHSSPS' application of this exemption, the Commissioner initially considered whether or not the information in question was in fact personal data.

**Is the withheld information personal data?**

19. Section 1 of the DPA defines personal data as data which relates to a living individual who can be identified:
- from those data,
  - or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
20. It is the Commissioner's view that, generally, statistical information relating to people has the potential to constitute personal data. This is because sometimes such statistical information can be used to identify individuals, depending on the nature of the information in question. However, the Commissioner believes that statistics which have been truly anonymised do not constitute personal data and will not therefore engage section 40 of the Act.
21. The Commissioner considers statistical information to be truly anonymised if the data controller (in this case the DHSSPS) takes steps to remove any linkage between the statistics and information which could identify an individual.
22. The Commissioner does not accept that, where a data controller holds information which could potentially be used to identify living individuals from the anonymised data, this means that any disclosure of the anonymised data will be a disclosure of personal data. The Commissioner considers that even where the data controller holds that additional 'identifying' information, this does not prevent it from anonymising that information to the extent that if disclosed it would not be possible to identify any living individual from that information, and thus it would no longer be personal data.
23. The Commissioner draws support for this approach from the House of Lords' judgment in the case of the Common Services Agency v Scottish Information Commissioner [2008] UKHL 47.
24. However if a member of the general public could identify individuals by cross-referencing the disclosed, 'anonymised' data with information already in the public domain, then the information will be personal data. Whether it is possible to identify individuals from the

'anonymised' data is a question of fact based on the circumstances of the specific case.

25. The DHSSPS has argued that the withheld information in this case is personal data as it constitutes "small figure statistics", disclosure of which could lead to the identification of either the patient or the doctor who carried out the abortion, when combined with other information which may be publicly available.
26. In reaching a view as to whether disclosure of the withheld information would be a disclosure of personal data the Commissioner has been mindful of the wording of section 1 of the DPA and Article 2 of Directive 95/46/EC (the European directive enacted in the UK by the DPA). Article 2 states that the term personal data, "shall mean any information relating to an identified or identifiable natural person". Recital 26 of the Directive states that, "to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or any other person."
27. Bearing this in mind, during the course of the investigation the Commissioner asked the DHSSPS to provide further arguments and evidence as to the other information which would be "reasonably likely" to come into the hands of "any other person" which could lead to the identification of individual doctors or patients if the withheld information were to be disclosed. The DHSSPS stated that it was concerned that other information would, or already has, come into the hands of the complainant, which would enable an individual to be identified. However, it was unable to provide the Commissioner with any evidence that such information was available to the complainant or any other person.
28. In the absence of clear evidence from the DHSSPS the Commissioner has gone on to consider whether the withheld information could be considered to be a disclosure of the personal data of patients or doctors.

### **Is the withheld information the personal data of doctors or patients?**

29. The DHSSPS argued that there is a risk that the doctors who carried out individual procedures could be identified from the disclosure of this information, and that therefore the small figure statistics should be regarded as the personal data of the doctors. However, the DHSSPS has not provided the Commissioner with a clear, step-by-step explanation as to how a member of the public might identify a particular doctor from the withheld information.



30. The Commissioner has considered this argument carefully. In Northern Ireland, statistical information as to the number of abortions carried out from 2003-2007 is publicly available. However, as stated at paragraph 3 above, there is no statistical information available to indicate where the abortion was carried out, the stage of pregnancy or the type of abortion. Even though Northern Ireland is a relatively small geographical area and contains a limited number of hospitals where abortions can be carried out, the limited statistical information available would, in the Commissioner's view, make it very unlikely to make it possible for anyone to identify a particular doctor from it.
31. The Commissioner considers that the withheld information would simply add to the already available statistics by confirming how many of those who had an abortion in Northern Ireland during 2003-2007 gave addresses outside Northern Ireland and/or in the Republic of Ireland.
32. The Commissioner believes that, given the already available information, a determined individual with a substantial amount of additional knowledge *may* be able to deduce whether a particular doctor had carried out a particular abortion. However, whilst the Commissioner cannot rule out the possibility of a doctor being identified from the already available information, he believes that this possibility is remote and will not, in any case, be increased by the disclosure of the withheld information. Therefore the Commissioner is satisfied that disclosure of the withheld information would not be a disclosure of the personal data of doctors.
33. Similarly, in reaching a view on whether a disclosure of the withheld information would be a disclosure of the personal data of patients the Commissioner has considered the possibility of an individual patient being identified from the withheld information and other information which is reasonably likely to come into the possession of a member of the public.
34. The DHSSPS has argued that the disclosure of the withheld information, together with other information which it believed may be held by the complainant, may lead to the identification of patients, and that therefore this information is the personal data of those patients.
35. During the course of the investigation the Commissioner sought to establish what other information may be held by the complainant or be available elsewhere. As part of his enquiries the Commissioner asked the DHSSPS to provide further submissions to support its arguments that if this information was to be disclosed there would be a reasonable possibility of identification. The DHSSPS stated that it had no evidence



- to suggest that the complainant was holding other information which may assist her in identifying individuals. Furthermore, it was unable to provide the Commissioner with any evidence regarding other information which may be available or become available to any other member of the public that may allow an individual patient to be identified from the publication of small number statistics.
36. The Commissioner considers it highly relevant that statistics in relation to the number of women who have had abortions in Northern Ireland between 2003-2007 have already been published. The withheld information would simply be a further breakdown of these statistics to specify how many of those women provided addresses outside Northern Ireland and/or in the Republic of Ireland.
37. The DHSSPS also argued that release of that further statistical breakdown may lead to self-identification and therefore cause unnecessary distress or damage to the individual patients. The Commissioner does not accept this argument as, in general, it will not be possible for individuals to identify themselves from anonymised statistics. In the event that, exceptionally an individual might be able to identify him or herself from statistical information, this could only constitute a breach of the DPA if that statistical information revealed information to the individual of which he or she was not already aware. That could not be the case under the present circumstances, as anyone who might possibly be able to identify herself from the withheld information would already know in which year she had an abortion in Northern Ireland and what address she provided for this. Therefore, in the Commissioner's opinion, even if it were possible for an individual to identify themselves from the withheld information this would not tell them anything that they do not already know. The possibility, on its own, in this case, that an individual might identify themselves from the statistical information would not mean that disclosure of the statistical information would be in breach of the DPA. In any case the Commissioner does not believe that there is a significant risk that release of the withheld information would cause distress or damage to such an individual.
38. Despite the above arguments, the Commissioner generally accepts that a situation may conceivably arise whereby a series of apparently unrelated requests for non-personal data could be compiled to form a "mosaic" of requests, the disclosures in response to which could lead to the deduction of personal data when put together. Therefore it is theoretically possible that an informed individual, with a particular interest in an issue, may be able to uncover personal data regarding a particular individual by putting together apparently anonymised information.

39. The Commissioner accepts that this is a particular concern for the DHSSPS, given the sensitivity of the subject matter. However, the DHSSPS has not provided any convincing arguments to substantiate its concern and admits that it has no evidence, beyond concerns about the specific nature of the request, to suggest that the complainant is in a position to form such a “mosaic” of requests.
40. In addition, the Commissioner notes that the DHSSPS has been unable to provide the Commissioner with examples of any other relevant evidence in the public domain which would feed into such a “mosaic”. The Commissioner accepts that statistics relating to medical abortions in Northern Ireland for the relevant years constitute other information in the public domain, however he does not accept that disclosure of the withheld information would contribute to the formation of a “mosaic”. This is because it would simply provide a further breakdown of the existing statistics into those individuals providing addresses in Northern Ireland and those providing addresses outside Northern Ireland.
41. The Commissioner has taken all the DHSSPS’ arguments into consideration and has concluded that disclosure of the withheld information would not constitute disclosure of the personal data of either doctors or patients. Therefore, the section 40(2) and (3)(i)(a) exemptions are not engaged in relation to the withheld information and the Commissioner has not gone on to consider whether disclosure of the withheld information would breach any of the data protection principles.

### **Section 38 (health and safety)**

42. The DHSSPS has cited sections 38(1)(a) and (b), which provide an exemption from disclosure where this would, or would be likely to, endanger physical or mental health, or endanger safety. Consideration of this exemption is a two-stage process; for information to be withheld the exemption must first be engaged and, secondly, the public interest in the maintenance of the exemption must outweigh the public interest in disclosure.
43. The first steps in considering this exemption are to establish that the arguments advanced by the public authority are relevant to the exemption and to whom the predicted endangerment would result. The DHSSPS argued that individuals involved in the provision of abortions could be put at risk by disclosure of the withheld information. The DHSSPS subsequently clarified to the Commissioner its view that disclosure of the withheld information may lead to the identification of certain individuals, which would be extremely detrimental to their physical or mental health and would endanger their safety. Therefore

the DHSSPS sought to apply similar arguments to those advanced in relation to section 40(2) and 40(3)(a)(i). The DHSSPS did not provide any further arguments to the Commissioner in relation to section 38.

44. The Commissioner accepts that the issue of abortion is very emotive, and that, outside Northern Ireland, individuals who are known to be involved in the provision of abortion services have been at risk of physical violence in some instances. However the Commissioner must consider whether the specific withheld information in this particular case would or would be likely to endanger any of the individuals concerned.
45. The Commissioner notes that the withheld information in this case consists of statistical information relating to the country of origin of individuals receiving an abortion. As set out above, the Commissioner does not accept that disclosure of this information would lead to any more than a very remote possibility of identification of the individuals concerned. The difficulty in identifying such individuals would clearly make it extremely difficult if not impossible to target these individuals.

Therefore the Commissioner can not be satisfied that there is a real and significant likelihood of endangerment to the physical or mental health or safety of any individuals.

46. For the reasons set out above the Commissioner concludes that the exemptions provided by sections 38(1)(a) and (b) are not engaged. Consequently the Commissioner is not required to consider the balance of the public interest.

## **Procedural Requirements**

### **Sections 1 and 10: duty to comply with a request within the statutory timescale**

47. The Commissioner finds that the withheld information is not exempt from disclosure under sections 38(1)(a) and (b) or 40(2) and (3)(i)(a) of the Act. Therefore it ought to have been provided to the complainant within 20 working days of receipt of the request. Therefore the Commissioner finds that the DHSSPS failed to comply with the requirements of sections 1(1)(b) and 10(1) of the Act.
48. The Commissioner also finds that, in relation to part 7 of the complainant's request, the DHSSPS should, for the avoidance of doubt, have confirmed whether or not it held information relating to that part of the request. Therefore, the Commissioner finds that the DHSSPS failed to comply with section 1(1)(a) of the Act.

## **Section 17: refusal notice**

49. The Commissioner also concludes that the refusal notice inadequately communicated the DHSSPS's position to the complainant. Section 17(1)(c) states that, where a public authority claims that information is exempt from disclosure must give the requestor a notice specifying which exemption(s) apply and why they apply. The refusal notice in this case did not contain sufficient information on the application of the exemptions. Therefore the Commissioner finds that the DHSSPS failed to comply with section 17(1)(c) of the Act.

## **The Decision**

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50. The Commissioner's decision is that the DHSSPS did not deal with the request for information in accordance with the Act in the following respects:
- The DHSSPS wrongly withheld information on the basis of the exemptions at sections 40(2), 40(3)(a)(i), 38(1)(a) and 38(1)(b) of the Act
  - The DHSSPS failed to comply with section 17(1)(c) in issuing a refusal notice

## **Steps Required**

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51. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Disclose the withheld information to the complainant.
52. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## **Failure to comply**

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53. 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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54. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

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

Tel: 0845 600 0877

Fax: 0116 249 4253

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

Website: [www.informationtribunal.gov.uk](http://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 sent.

**Dated the 11<sup>th</sup> day of August 2010**

**Signed .....**

**David Smith  
Deputy Commissioner**

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

## **Legal Annex**

### **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.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections

### **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.

### **17. Refusal of request**

(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—

(b) specifies the exemption in question

(c) states (if that would not otherwise be apparent) why the exemption applies.

### **38. Health and safety**

(1) Information is exempt information if its disclosure under this Act would, or would be likely to—

(a) endanger the physical or mental health of any individual, or

(b) endanger the safety of any individual.

#### **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.