

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 20 December 2010

Public Authority: NHS London
Address: Southside
105 Victoria Street
London
SW1E 6QT

Summary

The complainant made a request to NHS London for a copy of a report into a serious untoward incident involving a patient of a specific NHS Trust. This report had been produced by the NHS Trust and provided to NHS London. NHS London confirmed that it held a copy of the report, but refused to disclose it as it was exempt under section 41. During the investigation of the case NHS London also sought to rely upon section 40. After investigating the case the Commissioner decided that some information in the report was exempt under section 41. In relation to the outstanding information which did not come under section 41, the Commissioner decided that section 40 did not apply. Therefore he believes that the outstanding information should be disclosed. The Commissioner also finds that NHS London failed to meet the requirements of sections 1, 10 and 17.

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 complainant wrote to NHS London on 9 November 2009 and made the following request under the Act:

"Please could you provide me with a copy of the summary report which was submitted to you by the Royal Brompton and Harefield NHS Trust in connection with an incident where a transplant operation carried out at the hospital sometime between 2003 and 2008 resulted in serious consequences for the patient as a non-matching pair of lungs were transplanted into his/her body."

For ease of reference the 'summary report' will be referred to as 'the Report' throughout the rest of this Notice.

3. NHS London responded on 4 December 2009 and confirmed that it held information that fell under the scope of the request. It explained that it had consulted with the Royal Brompton and Harefield NHS Trust (the "Trust") – who had provided it with a copy of the Report – about the request. However, the Trust had advised that due to the rareness of the procedure it believed it would be possible to identify the patient who was the focus of the Report. Therefore this information was exempt from disclosure under section 41.
4. The complainant contacted NHS London on 21 December 2009 and requested an internal review.
5. NHS London carried out an internal review and responded on 28 January 2010. It informed the complainant that it still believed that the Report was exempt from disclosure under section 41.

The Investigation

Scope of the case

6. The complainant contacted the Commissioner on 26 February 2010 to complain about the way his request for information had been handled.
7. The Report has been withheld under section 41(1). In addition to this, during the investigation NHS London also sought to rely upon section 40(2) to withhold the Report (see paragraph 9 below). Therefore the scope of this case is to consider NHS London's use of sections 40(2) and 41(1) in order to withhold the Report.

8. Although not referred to by the complainant, the Commissioner has also considered whether NHS London complied with the requirements of sections 10 and 17.

Chronology

9. NHS London wrote to the Commissioner on 19 April 2010 and provided him with a copy of the Report, together with some initial submissions to support its use of section 41(1). In addition to this, it also stated that it believed that section 40(2) applied to the Report.
10. The Commissioner wrote to NHS London on 16 June 2010 in order to seek further information. In relation to its use of section 40(2) he asked it to confirm whether it was also relying upon section 40(3)(a)(i). He also asked it to clarify whether it was applying this exemption to some or all of the Report, and to identify the third parties it believed could be identified. In relation to its use of section 41, the Commissioner asked it to provide further submissions to support its use of this exemption.
11. The Commissioner also informed NHS London that it was his initial view that sections 40 and 41 did not apply to all of the Report, and listed the information that he considered could potentially be disclosed. He asked it for its view on the potential disclosure of this information. He also asked it to provide further information as to the circumstances in which the Report was provided to NHS London. He asked for a response by no later than 15 July 2010.
12. NHS London contacted the Commissioner on 18 June 2010 and asked for an extension to the deadline to respond. A new deadline of 5 August 2010 was agreed.
13. NHS London contacted the Commissioner again on 2 August 2010 and asked for a further extension to the deadline. The Commissioner agreed to a new deadline of 13 August 2010, but warned that no further extension would be granted.
14. NHS London provided a substantive response in an email dated 9 August 2010. It noted that in principle it agreed with the Commissioner's suggested approach that some of the withheld information could be disclosed, but raised a number of concerns about the overall confidentiality of the contents of the Report, and whether its contents could be truly anonymised. It also raised concerns over the resource implications of the Commissioner's suggested approach.

15. In relation to its use of section 41 NHS London stated that the Report had been provided by a third party (i.e. the Trust) with an expectation of confidence, and that disclosure would be an actionable breach of that confidence – either by the Trust or by the family of the deceased patient. In addition to this, it also added that the information in the Report was confidential in nature, as it focused on the medical treatment of an individual patient.
16. NHS London also argued that the Report was exempt under section 40(2), as it would be possible, even in a redacted format, for particular individuals to be identified. As the Report was the outcome of an investigation into a Serious Untoward Incident (“SUI”), and given the unique circumstances of the incident, it believed that particular individuals would be identifiable.
17. The Commissioner wrote to NHS London on 3 September 2010. He noted NHS London’s comments, but reiterated his initial view that some of the information contained in the Report could be disclosed. He again listed the information that he believed could be disclosed and asked it to reconsider whether it was prepared to release this information. If it was not, he asked it to provide any further submissions it wished to make to support its use of the exemptions.
18. Following an exchange of communication the Commissioner emailed NHS London again on 10 September 2010. He asked it to confirm by no later than 24 September 2010 whether it was prepared to disclose the information he had identified. If he did not receive a response by this date he would proceed to a Decision Notice for this case.
19. NHS London responded to the Commissioner on 27 September 2010. It stated that it would not disclose any of the information that he had identified as being potentially suitable for disclosure, and it would await the Decision Notice for this case. It also stated that it did not wish to make any further submissions beyond that which it had already made.

Analysis

20. In this case NHS London has relied upon sections 40(2) and 41(1) to withhold the Report. The Commissioner has first considered the application of section 41.

Exemptions

Section 41

21. Section 41(1) provides that information is exempt from disclosure if:

- (a) it was obtained by the public authority from any other person; and
- (b) the disclosure of the information to the public by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

The full text of section 41 can be found in the Legal Annex at the end of this Notice.

22. In considering whether disclosure would constitute an actionable breach of confidence the Commissioner has adopted the approach to confidentiality taken by the court in *Coco v A N Clark (Engineers) Limited [1968] FSR 415*. In that case it was decided that disclosure would constitute an actionable breach of confidence if:

- the information has the necessary quality of confidence;
- the information was imparted in circumstances importing an obligation of confidence; and
- disclosure would be an unauthorised use of the information and to the detriment of the confider.

However, it was made clear that the element of detriment may not be necessary in every case. In the Commissioner's view, information on personal matters can still be protected under the law of confidence, even if disclosure may not be detrimental in terms of any tangible loss. Older case law on the common law of confidence must be considered in light of case law relating to the Human Rights Act and the right to private and family life under article 8. Case law has stressed that an obligation of confidentiality can arise in various circumstances and highlights in particular the distinction between "old fashioned breach of confidence" i.e. arising out of commercial secrets and "misuse of private information".

23. The Commissioner notes that the Tribunal has cited *Coco v A N Clark (Engineers) Limited [1968] FSR 415* when considering cases relating to access to information similar to the information in question in this case.¹

¹ For example, see – *Bluck v ICO & Epsom and St Helier University Hospital NHS Trust* [EA/2006/0090], para 7; and *EY v ICO & Medicines and Healthcare Products Regulatory Authority* [EA/2010/0055], para 10.

24. If these parts of the test are satisfied, the Commissioner believes that he should then consider whether there would be a defence to a claim for breach of confidence based on the public interest in disclosure of the information.
25. NHS London has applied section 41(1) to the whole Report. It has argued that the Report contains sensitive medical information relating to a deceased patient and is therefore, by nature, confidential. It has also argued that the Report was provided to it in confidence by the Trust. However, it has not provided any further substantive comments to support its use of this exemption.
26. After considering the contents of the Report the Commissioner believes that it contains four categories of information, namely:
 1. Information obtained from the patient's medical records, either directly or indirectly and in such a way as that details of their medical care and condition can be easily identified.
 2. Parts of the Report which give detailed information of the circumstances surrounding the patient's death.
 3. Information relating to employees of the Trust involved in the patient's care.
 4. Other, more general, information.
27. The Commissioner has considered the application of section 41 to each of these categories of information.
28. Whilst taking into account the particular circumstances of this case, the Commissioner has also been mindful of the decision of the Tribunal in *Bluck v ICO & Epsom and St Helier University Hospital NHS Trust* [EA/2006/0090] (the "Bluck case"). In that case a request had been received for a deceased person's medical records from an individual who was not the deceased person's personal representative. The Tribunal upheld the Commissioner's decision that the requested information was exempt from disclosure under section 41 of the Act.² Whilst the Commissioner accepts that the request in this case was not for the deceased patient's medical records, given that the contents of much of the Report focus on the medical care of the patient, he believes that this Tribunal judgment is relevant to this case.

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<http://www.informationtribunal.gov.uk/Documents/decisions/mrspbluckvinformationcommissioner17sept07.pdf>

Was the information obtained from a third party?

29. The Commissioner has first considered whether the information in the Report was obtained from a third party.
30. The Commissioner notes that the Report was produced by the Trust, and was provided to NHS London as part of its role in monitoring the investigation of SUIs by the NHS Trusts in its area.³
31. In addition to this, the Commissioner is satisfied that a large proportion of the information contained in the Report has been drawn directly from the patient's medical records. He also believes that the Report contains information which has been written after close consideration of the patient's medical records and has therefore drawn from those records, and from which details of the patient's medical care and condition can be easily identified.
32. Therefore the Commissioner is satisfied that this information has been drawn from the patient's medical records and from interviews with the relevant health professionals involved in his/her care, and has been combined into a report into the circumstances surrounding his/her death. Whilst this information is not in the form of medical records, the Commissioner believes that it is of the same sensitivity and relevance to the deceased as his/her medical records and has been obtained in connection with the provision of health services to the patient by the Trust (and subsequently provided by the Trust to NHS London).
33. Therefore the Commissioner is satisfied that the information contained in the Report was obtained from a third party – both provided by the Trust to NHS London and, in regard to the information obtained from the patient's medical records, by the patient to the relevant employee at the Trust.
34. The Commissioner has gone on to consider whether disclosure would constitute an actionable breach of confidence. Bearing in mind the factors set out at paragraph 22 above, he has first considered whether the various categories of information he has identified in the Report have the necessary quality of confidence.

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<http://www.london.nhs.uk/webfiles/Corporate/Serious%20Untoward%20Incident%20POLICY%2028%207%2009.pdf>

Necessary quality of confidence?

35. The Commissioner believes that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
36. The Commissioner believes that the Report was disclosed to NHS London by the Trust for the sole purpose of the strategic health authority's monitoring role. He has found no evidence that the Trust placed the Report into the public domain, and he also notes that the Trust objected to the potential disclosure of the Report when consulted by NHS London (see paragraph 3 above).
37. The Commissioner notes that the original request contained some detailed references to the events leading to the production of the Report. However, he also notes that the complainant has not provided him with any evidence to show that information about these events has been put into the public domain (for instance, by way of a press release, court case or the findings of a GMC investigation). During the investigation of the case the Commissioner asked NHS London whether any information about these events had been put into the public domain – however, it did not provide any evidence to show that it had been. In addition to this, the Commissioner conducted his own searches (by use of an internet search engine), but was unable to find any evidence that details of these events had been put into the public domain.
38. Given the nature of the events leading up to the death of the patient, the Commissioner would not expect details of those events to generally be put into the public domain (although he is aware that in some circumstances they might be). Bearing this in mind, and given the lack of evidence that any details are in the public domain, the Commissioner is also satisfied that the information contained in the Report is not generally accessible.
39. In this case the Report focuses in great detail on the circumstances surrounding the death of a patient. The majority of the contents of the Report have clearly been drawn up after consulting the health records of the deceased patient, or after interviewing the relevant health professionals who were involved in his/her treatment. Given the seriousness of the issues discussed in the Report, and the nature of the events in question, the Commissioner is satisfied that the information contained in the Report is not trivial.
40. Therefore the Commissioner is satisfied that the information contained in the Report has the necessary quality of confidence.

41. The Commissioner has gone on to consider whether the Report was imparted in circumstances importing an obligation of confidence.

Imparted in confidence?

42. In the internal review NHS London stated that the Report had been provided to it by the Trust with an expectation that it would be treated as confidential. It explained that,

“...at the time when NHS London received the report, guidance was in place which advised that “where appropriate alerts and reports may be shared with other senior NHS personnel on a need to know basis only. [Serious Untoward Incident reports] are confidential information and will be treated in accordance with this requirement by [NHS London].” Therefore, there was a clear understanding that the information was considered to be confidential, was being provided on this basis and should subsequently be held by [NHS London] in confidence.”

Bearing this in mind, and considering the nature of the contents of the Report, the Commissioner is satisfied that the information was provided to NHS London in circumstances that imported an obligation of confidence.

43. Additionally, in relation to the information in the Report that relates to the medical care of the deceased patient, the Commissioner is satisfied that the information was imparted in circumstances importing an obligation of confidence, as it was provided in confidence by the patient to the health professionals involved in his/her care. When patients submit to treatment from doctors and other medical professionals, they do so with the expectation that information would not be disclosed to third parties without their consent. He is satisfied that an obligation of confidence is created by the very nature of the doctor / patient relationship and the duty is therefore implicit. This is further supported by the oath which doctors take guaranteeing to protect doctor / patient confidentiality.

Would disclosure be to the detriment of the confider?

44. The Commissioner has considered this issue in relation to each of the categories of information identified at paragraph 26 above.
45. In relation to the information contained in the Report which was drawn from the deceased patient’s medical records and from interviews with the relevant health professionals involved in his/her care, the

Commissioner considers that as medical records constitute information of a personal nature there is no need for there to be any detriment to the confider, in terms of any tangible loss, in order for it to be protected by the law of confidence. In reaching this conclusion the Commissioner has been mindful of the views of the Tribunal in the *Bluck* case, which noted that the loss of privacy can be a detriment in its own right.⁴ This view was repeated by the Tribunal in *EY v ICO & Medicines and Healthcare Products Regulatory Agency* [EA/2010/0055] which dealt with a request for similar information, and stated that,

“A communication to the general public was plainly unauthorised. It would cause no positive harm to the confider but we have no doubt that knowledge of its disclosure would distress many patients or surviving relatives. Like the Tribunal in *Bluck*, we respectfully adopt the view of Lord Keith in *Attorney General v Guardian Newspapers [1990] 1 AC 109* that knowledge that confidential information has been passed to those to whom the confider would not willingly convey it may be sufficient detriment.”⁵

Bearing this in mind, the Commissioner does not believe that it would be necessary for disclosure of this information to cause detriment in order for the disclosure of this category of information to be actionable.

46. In regard to the second category of information the Commissioner notes that this provides details of the circumstances surrounding the patient's death. Given this, and the context of the Report, he believes that this information is also sensitive personal information that a patient would expect to be kept confidential and would be highly sensitive to the family of the deceased patient. In particular, the Commissioner would echo the above view of the Tribunal, that disclosure of this information into the public domain would distress surviving relatives. Bearing these points in mind, the Commissioner believes that the same arguments as those relating to the first category of information also apply to information falling under the second category. Therefore the Commissioner does not believe that it would be necessary for disclosure of this information to cause detriment in order for the disclosure of the second category of information to be actionable.
47. In relation to the information contained in the Report relating to employees of the Trust involved in the patient's care, the Commissioner believes that given the context of the information, i.e. a

⁴ EA/2006/0090, para 15.

⁵ EA/2010/0055, para 13.

report into an SUI looking at the circumstances leading to the death of a patient, that information is clearly significant personal information about the employees and it is not necessary to establish that tangible detriment would be caused. Although this information related to roles individuals held at a public body, the nature and context of the information (to some extent an assessment of performance) makes the information more intrinsically private than public. In addition the Commissioner also notes that disclosure of this information would cause distress.

48. Finally, the Commissioner has considered the fourth category of information, which he has described as 'other, more general, information.' The Commissioner has identified a limited amount of information in the Report that falls under this category. This is information which does not fall under any of the other categories, and relates (broadly) to the administrative aspects of producing the Report, or to the more general observations or recommendations which did not closely relate to details of the deceased patient's medical care, the events leading up to his/her death, or the Trust staff involved in these events. Although the Commissioner notes that some individuals are identified in this category of information, he is not persuaded that the disclosure of this information would cause them significant detriment in any way. Nor is he persuaded that these individuals would suffer any loss of privacy because of the disclosure of this information. The information clearly relates to their role as public employees. In addition, not all of this information relates to individuals. In terms of the general relationship between the NHS London and the Trust the Commissioner accepts that some detriment would be possible in terms of flow of information in other future cases.
49. Therefore in relation to the fourth category of information the Commissioner is satisfied that disclosure would be likely to cause some detriment, but at the low end of the scale.

Would there be a defence to disclosure in the public interest?

50. In the Commissioner's view disclosure will not constitute an actionable breach of confidence if there is a public interest in disclosure which outweighs the public interest in keeping the information confidential, i.e. that there is a public interest defence for a breach of confidence.
51. The complainant has argued that there is a public interest defence as the Report relates to "a major medical blunder".
52. The Commissioner notes that NHS London has confirmed that it holds a report into "an incident where a transplant operation carried out at the

hospital sometime between 2003 and 2008 resulted in serious consequences for the patient as a non-matching pair of lungs were transplanted into his/her body." The Commissioner believes that there is a strong public interest in the public understanding how such an incident occurred and whether it has been investigated appropriately.

53. In weighing this against the public interest in keeping the information confidential, the Commissioner has been mindful of the wider public interest in preserving the principle of confidentiality.
54. The consequence of any disclosure of confidential information will, to some degree, undermine the principle of confidentiality which is really to do with the relationship of trust between confider and confidant. People would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected. In the Bluck case the Tribunal quoted from *Attorney General v Guardian Newspapers [1990] 1AC109*, which stated that "...as a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence..."⁶
55. In relation to the information in question in this case the Commissioner has been mindful of the role that investigations into SUIs play in the NHS. NHS London's SUI Reporting Policy states that,

"The principle definition of an SUI is something out of the ordinary or unexpected, with the potential to cause serious harm, and/or likely to attract public and media interest that occurs on NHS premises or in the provision of an NHS or a commissioned service. This may be because it involves a large number of patients, there is a question of poor clinical or management judgement, a service has failed, a patient has died under unusual circumstances, or there is the perception that any of these has occurred. SUIs are not exclusively clinical issues, for example an electrical failure may have consequences that make it an SUI."⁷

SUIs are investigated by the relevant NHS Trust – which considers all appropriate evidence, such as examining patients' medical records and questioning relevant employees. The investigation system is designed to identify lessons that can be learnt from such incidents, in order to improve services and systems, which will feed into improving patient

⁶ EA/2006/0090, para 8.

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<http://www.london.nhs.uk/webfiles/Corporate/Serious%20Untoward%20Incident%20POLICY%2028%207%2009.pdf>, page 10.

safety, quality of care, etc... The Commissioner recognises that given the sensitive nature of many of these incidents, a reasonable expectation of confidentiality by all involved is important for the effective investigation of such incidents.

56. Strategic Health Authorities have a role in monitoring the investigation of SUIs by the NHS Trusts. NHS London's SUI Reporting Policy states that it:

"...will ensure each SUI report and subsequent action plan address the issues to minimise the risk of recurrence...NHS London will monitor the number and type of SUIs reported by each Trust and PCT and where necessary take action and share learning across NHS organisations in London."⁸

Given the nature of SUI reports (many of which relate in detail to the medical treatment of individual patients), the Commissioner accepts that SUI Reports are provided by NHS Trusts to the relevant Strategic Health Authority with a reasonable expectation of confidence. The Commissioner accepts that this reasonable expectation of confidence is an important component of this reporting process.

57. Bearing in mind the purpose of these SUI reports, the role that Strategic Health Authorities (such as NHS London) play in monitoring the effective investigation of SUIs, and the nature of the majority of the information contained in these reports, the Commissioner believes that the public interest in maintaining the confidentiality attached to the outstanding information from the Report (i.e. the first three categories of information listed at paragraph 26 above) is particularly strong.
58. In addition to this, in relation to the information in the Report that was obtained from the patient's medical records, either directly or indirectly and in such a way as that details of their medical care and condition can be easily identified, the Commissioner would concur with the comments of the Tribunal in the Bluck case that it is in the interest of the public that patients to have confidence that medical staff will not disclose sensitive medical data before they divulge full details of their medical history and lifestyle. Without that assurance patients may be deterred from seeking advice and without adequate information doctors cannot properly diagnose or treat patients.

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<http://www.london.nhs.uk/webfiles/Corporate/Serious%20Untoward%20Incident%20POLICY%2028%207%2009.pdf>, page 4.

59. Bearing all these points in mind, despite the tragic nature of the events leading to the production of the Report, the Commissioner does not believe that the public interest in understanding how this incident occurred and whether it has been investigated appropriately is sufficient to outweigh the considerable public interest in maintaining the confidentiality of the outstanding information in this case. In reaching this view the Commissioner has borne in mind the views of the Tribunal in the Bluck case – that the public interest in maintaining confidentiality in medical records of a deceased person outweighed, to a considerable degree, the countervailing public interest in disclosure.
60. In terms of the fourth category of information in the report, including the “action plan” the Commissioner considers that detriment caused would be less given the general nature of the information and the public interest in this specific information is very strong, as it would enable to the public to understand what should be done to put things right and what the lessons learned were. The Commissioner also notes that there was little information in the public domain and the public were entitled to have some understanding about the outcome of the report. The Commissioner notes that in child protection cases, Serious Case Review summaries are published (as a minimum). For this information the Commissioner finds that NHS London would have a public interest defence, and that the public interest in disclosing this information is enough to override the public interest in maintaining trust and preserving free flow of information.
61. In conclusion, the Commissioner believes that NHS London would not have a public interest defence for breaching its duty of confidence in this case, apart from the information in the fourth category.
62. Finally, the Commissioner has considered the question of whether the duty of confidence (in relation to the information in the Report that was obtained from the patient's medical records, either directly or indirectly and in such a way as that details of their medical care and condition can be easily identified) can survive the death of the individual to whom the duty is owed. In reaching a view on this, the Commissioner has been guided by the views of the Tribunal in the Bluck case, which considered this question and concluded that a duty of confidence is capable of surviving death of the confider.⁹ The Commissioner is aware that the requested information in this case is not the medical records of the deceased patient. However, and as noted at paragraphs 31 and 32 above, the Commissioner believes that given that much of the contents of the Report that have been drawn from the deceased patient's medical records and from interviews with the relevant health

⁹ EA/2006/0090, para 21.

professionals involved in his/her care, that information of the same sensitivity and relevance to the deceased as his/her medical records. The Commissioner would also note that this is the approach he has taken in several previous cases in relation to information of a similar nature to that requested in this case.¹⁰

63. Therefore in regard to the information contained in Report which was drawn from the deceased patient's medical records and from interviews with the relevant health professionals involved in his/her care, the Commissioner believes that the duty of confidence owed to the patient would survive his/her death, and that therefore the disclosure of this information by NHS London would be a breach of the duty of confidence owed to the deceased patient. Furthermore, in relation to this information it is the Commissioner's view that in determining whether disclosure would constitute an actionable breach of confidence, it is not necessary to establish whether, as a matter of fact, the deceased person has a personal representative who would take action.
64. In view of the above, the Commissioner considers that the information in the Report that falls under the following categories is exempt under section 41 of the Act:
- Information obtained from the patient's medical records, either directly or indirectly and in such a way as that details of their medical care and condition can be easily identified.
 - Parts of the Report which give detailed information of the circumstances surrounding the patient's death.
 - Information relating to Trust staff involved in the patient's care.

Therefore the Commissioner believes that NHS London was correct to apply this exemption in relation to these categories of information.

65. The full text of section 41 can be found in the Legal Annex attached to the end of this Notice.
66. As the Commissioner has decided that these categories of information are exempt under section 41 he has not gone on to consider the application of section 40 to this information. However, as he has decided that some of the information in the Report is not exempt under section 41, he has gone on to consider the application of section 40 in relation to this outstanding information.

¹⁰ For example: East London and the City Mental Health NHS Trust (FS50101567); NHS London (FS50146982); Hertfordshire Partnership NHS Trust (FS50124800); and Calderdale and Huddersfield NHS Foundation Trust (FS50247341).

Section 40

67. NHS London has argued that it believes that section 40(2) applies as,
- “...although the [Report] could be anonymised, it would still be possible to identify members of staff referred to in the report, and members of the patient’s family.”
68. Section 40(2) states that information is exempt if it constitutes the personal data of a third party (other than the applicant) and one of the conditions listed in sections 40(3) or 40(4) are satisfied.
69. During the investigation of the case the Commissioner asked NHS London to:
- clarify which of the conditions listed in section 40(3) and 40(4) it believed also applied;
 - clarify whether it believed that this exemption applied to the whole of the Report, or only to specific sections (and if it was the latter, which sections); and
 - provide further submissions as to why it believed that this exemption applied.
70. Despite the Commissioner requesting this information, NHS London has not provided any further clarification as to the application of this exemption.
71. After considering the nature of the withheld information and the limited arguments that NHS London has made, the Commissioner has proceeded on the basis that it is relying upon section 40(3)(a)(i) in order to engage this exemption. This provides an exemption for information that is the personal data of a third party, the disclosure of which would contravene any of the principles of the Data Protection Act 1998 (the “DPA”).
72. In addition to this, it is also not clear whether NHS London believes that this exemption applies to all or only some of the Report. During the course of the investigation the Commissioner asked NHS London to clarify this – however, it has not. Therefore the Commissioner has considered that NHS London has sought to apply this exemption to all of the Report.
73. As noted above, as the Commissioner has found that the majority of the information contained in the Report is exempt under section 41, he has only considered the application of section 40 in relation to the outstanding information from the Report. The information that the

- Commissioner has considered the application of section 40 in relation to is that listed in table 1 of the Confidential Annex attached to the end of this Notice.
74. In order to establish whether section 40 has been correctly applied the Commissioner has first considered whether the Report contains the personal data of third parties.
75. Section 1 of the DPA defines personal data as data which relate to a living individual, who can be identified:
- from that data, or
 - from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller
76. After considering the outstanding information from the Report the Commissioner believes that it contains a limited amount of personal data in relation to individuals who were involved in the administrative process of the SUI investigation into the patient's death. However, the Commissioner would point out that not all of the outstanding information from the Report contains personal data.
77. Therefore, although the Commissioner accepts that section 40 applies to some of the outstanding information (in so far as it contains the personal data of third parties) he does not believe that section 40 applies to all of the outstanding information.
78. The Commissioner has gone on to consider whether the disclosure of the outstanding information which he does believe contains personal data would be in breach of the principles of the DPA. In particular the Commissioner has considered whether the disclosure of this information would be in breach of the first data protection principle.
79. The first principle provides that:
- "Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
- (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

80. The Commissioner has first considered whether the disclosure of this information would be fair.

81. In considering whether disclosure of this information would be fair the Commissioner has taken the following factors into account:
- whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned (i.e. the consequences of disclosure);
 - the individual's reasonable expectations of what would happen to their information; and
 - balancing the rights and freedoms of the data subject with legitimate interests.
82. As noted above, the Commissioner believes that some of the outstanding information from the Report contains the personal data of some of the Trust's employees who were involved in the administrative process of the SUI investigation into the patient's death.
83. The Commissioner has considered each of these factors in turn.
84. In relation to the first factor, the Commissioner notes that the information in question records the involvement of certain employees of the Trust in the investigation of this SUI. However, these individuals were not involved in the clinical care of the deceased patient. This information does not give any details about these individuals, but instead simply records their involvement in the SUI investigation. Therefore the Commissioner does not believe that the disclosure of this information would cause any unnecessary or unjustified damage or distress to the individuals concerned. In reaching this view the Commissioner has noted that NHS London has not provided any detailed arguments as to how the disclosure of this information would breach the principles of the DPA.
85. In relation to the second factor, the Commissioner again notes that NHS London has provided little substantive arguments to support its use of this exemption. Bearing in mind the comments he has made earlier in this Notice in relation to confidentiality, the Commissioner believes that it is realistic to assume that individuals would have had a reasonable expectation of confidentiality in relation to most of the contents of the Report. However, he believes that this expectation would only apply in relation to the sensitive parts of the Report (i.e. the sections dealing with the medical history of the deceased or the circumstances surrounding their death). He does not believe that the outstanding information contains anything of a particularly sensitive nature. Given the relative seniority of these individuals, and the high level nature of the information in question, the Commissioner does not believe that the individuals concerned would have had a reasonable expectation that information recording their involvement in this

investigation process would be kept secret, particularly given their seniority.

86. In relation to the final factor, the Commissioner notes that there is a legitimate interest in the public understanding whether this incident has been investigated appropriately. Knowing the names of some of individuals who were involved in the production of this Report would go some way to increasing this understanding. Bearing this in mind, and given that he believes that there would be little prejudice to the rights and freedoms of the data subjects, the Commissioner is not persuaded that the rights and freedoms of the data subjects outweigh the public's legitimate interest in the disclosure of this information.
87. Therefore the Commissioner believes that the disclosure of this information would be fair.
88. Having decided that disclosure of this information would be fair, the Commissioner has gone on to consider whether the disclosure would be lawful. As noted at paragraph 49 above, the Commissioner does not believe that the disclosure of the outstanding information in this case would be an actionable breach of confidence. In addition to this, the Commissioner is not aware of any statutory bar protecting this information. Therefore he is satisfied that the disclosure of the outstanding information would not be unlawful.
89. The first principle of the DPA also provides that personal data must not be processed unless at least one of the conditions in Schedule 2 of the DPA is met.
90. Therefore, the Commissioner has gone on to consider whether any of the conditions in schedule 2 of the DPA can be met for the disclosure of the outstanding information.
91. The Commissioner considers that the most applicable condition in this case is likely to be condition 6 which gives a condition for processing personal data where:
 - The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
92. In order to consider whether this condition is met the Commissioner believes that disclosure must satisfy a three part test:

- there must be legitimate interests in disclosing the information;
 - the disclosure must be necessary for a legitimate interest of the public; and
 - even where the disclosure is necessary, it nevertheless must not cause unwarranted interference (or prejudice) to the rights, freedoms and legitimate interests of the data subject.
93. The Commissioner believes there is a legitimate interest in NHS London being as open and transparent as possible. In addition to this, he also believes that there is a public interest in the public understanding whether this incident has been investigated appropriately. The Commissioner is of the view that disclosure of the withheld information would go towards satisfying this interest by providing a fuller picture of who was involved in the investigation of this SUI.
94. Having already established that the processing is fair, the Commissioner is also satisfied that the release of this information would not cause any unnecessary interference with the rights, freedoms and legitimate interests of the data subjects. In reaching this view the Commissioner has again been mindful of the nature of this information, and the lack of any substantive arguments from NHS London in relation to its use of this exemption.
95. Therefore the Commissioner is of the view that the disclosure of the outstanding information which contains the personal data of third parties would not be in breach of the first principle.
96. Therefore the Commissioner does not believe that section 40 provides an exemption for the outstanding information from the Report.
97. The full text of section 40 can be found in the Legal Annex at the end of this Notice.

Procedural Requirements

98. Section 1(1) states that:

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

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

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

99. Section 10(1) states that:

“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.”

100. As the Commissioner has decided that some of the withheld information is not exempt from disclosure under any of the exemptions cited by NHS London, he believes that this information should have been provided to the complainant in line with the duty at section 1(1)(b). NHS London’s failure to do so therefore constitutes a breach of section 1(1)(b). Furthermore, by failing to provide this information within 20 working days of the request NHS London also breached section 10(1).
101. The Commissioner has also considered whether NHS London has complied with its obligations under section 17(1).
102. Section 17(1) requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal 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.
103. During the investigation of the case NHS London informed the Commissioner that it was seeking to rely upon section 40(2) in order to withhold the Report. It had not previously informed the complainant that it was seeking to rely upon this exemption. By failing to cite this exemption in either the refusal notice or the internal review, NHS London failed to meet the requirements of sections 17(1)(b) and (c).
104. The full texts of sections 1, 10 and 17 can be found in the Legal Annex at the end of this Notice.

The Decision

105. The Commissioner's decision is that NHS London dealt with the request for information in accordance with the Act in that it correctly withheld the information in the Report that falls under the following categories:

- Information obtained from the patient's medical records, either directly or indirectly and in such a way as that details of their medical care and condition can be easily identified.
- Parts of the Report which give detailed information of the circumstances surrounding the patient's death.
- Information relating to Trust staff involved in the patient's care.

This information was correctly withheld under section 41(1). This information is all of the contents of the Report other than the information listed in table 1 of the Confidential Annex attached to the end of this Notice.

106. However, the Commissioner also decided that NHS London did not deal with the request in accordance with the Act in that it incorrectly relied upon sections 40 and 41 in order to withhold the information listed in table 1 of the Confidential Annex attached to the end of this Notice.

107. In addition to this, the Commissioner also decided that NHS London failed to meet the requirements of sections 10 and 17.

Steps Required

108. The Commissioner requires NHS London to take the following steps to ensure compliance with the Act:

NHS London should disclose the withheld information as set out in table 1 of the Confidential Annex attached to this Notice

109. NHS London must take the steps required by this notice within 35 calendar days of the date of this Notice.

Failure to comply

110. 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

111. 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.

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 sent.

Dated the 20th day of December 2010

Signed

Steve Wood
Head of Policy Delivery

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

Legal Annex

Section 1

- (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 the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
- (3)** Where a public authority –
- (a) reasonably requires further information in order to identify and locate the information requested, and
 - (b) informed the applicant of that requirement,
- the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.
- (4)** The information –
- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
 - (b) which is to be communicated under subsection (1)(b),
- is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.
- (5)** A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).
- (6)** In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

Section 10

- (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.
- (2)** Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.
- (3)** If, and to the extent that –
 - (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
 - (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

- (4)** The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.
- (5)** Regulations under subsection (4) may –
 - (a) prescribe different days in relation to different cases, and
 - (b) confer a discretion on the Commissioner.
- (6)** In this section –

“the date of receipt” means –

 - (a) the day on which the public authority receives the request for information, or
 - (b) later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

Section 17

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

(2) Where—

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
 - (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- (4)** A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.
- (5)** A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
- (6)** Subsection (5) does not apply where –
- (a) the public authority is relying on a claim that section 14 applies,
 - (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
 - (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7)** A notice under section (1), (3) or (5) must –
- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
 - (b) contain particulars of the right conferred by section 50.

Section 40

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

- (a) it constitutes personal data which do not fall within subsection (1), and
 - (b) either the first or the second condition below is satisfied.
- (3)** The first condition is-
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of 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 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 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) he 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 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 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 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 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.

Section 41

(1) Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.