

## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Date: 15 August 2011**

**Public Authority:** Nottinghamshire Healthcare NHS Trust  
**Address:** HIS Admin Office  
Duncan Macmillan House  
Porchester Road  
Mapperley  
Nottingham  
NG3 6AA

#### **Summary**

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The complainant asked Nottinghamshire Healthcare NHS Trust (“the Trust”) for a considerable amount of information about his own whistle blowing case and the circumstances that led to his allegations.

He asked for a mixture of his personal data and third party personal data. The Trust provided the complainant with some of his own personal data under the Data Protection Act.

The complainant asked the Commissioner to issue a Decision Notice about the procedural issues that led to this case becoming protracted. The Commissioner finds that the Trust breached sections 10(1), 17(1) and 17(1)(c) of the Act. However, he requires no remedial steps to be taken in this case.

#### **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 complainant made an allegation under the Trust's whistle blowing procedure about the treatment of one of his patients. He made his request for information to understand how that allegation was treated.

## The Request

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3. On 5 September 2009 the complainant made a ten part request for information to three public authorities, making it clear that he wanted each public authority to answer in turn. A copy of the request is at Appendix A of this Notice. The Commissioner is only considering the way the Trust handled the request.
4. On 10 September 2009 the Trust acknowledged receiving the request.
5. On 22 September 2009 the Trust issued a response. It explained,
  - information was not held by it for requests (1), (2), (7) and (8);
  - that it held relevant recorded information for requests (3), (4), (5), (6), (9) and (10);
  - it was applying section 40(2)(a) to requests (3), (4), (9) and (10); and
  - it was applying section 40(1) to requests (5) and (6).
6. However, it did not say why it was applying the exemptions or move to consider the complainant's rights under the Data Protection Act 1998 ("the DPA").
7. On 8 March 2010 the complainant asked again to be provided with the recorded information he had requested. On 9 March 2010 the Trust provided its response of 22 September 2009 again.
8. The complainant indicated on the same day that this was not what he wanted. He explained that he was happy for client data to be anonymised but that he wanted the residue to be provided to him.
9. On 17 March 2010 the Trust explained that it would treat his request of 8 March 2010 as a new request for information.

10. On 26 March 2010 the Trust issued a response. It explained that it did not hold some of the information requested, although it did not say what information it did and did not hold. For the remainder it applied section 40(1) (first party personal data) and section 40(2) (which it explained as 'confidential data not relating to [the complainant]').
11. On 25 May 2010 the complainant requested an internal review.
12. On 26 May 2010 the Trust communicated the results of its internal review. It explained that his own personal data was exempt by virtue of section 40(1), although he may be able to access it under the DPA, and that his client's personal data was exempt by virtue of section 40(2).
13. On 30 June 2010 the Trust conducted a second review of its handling of the request. It explained that it had reconsidered the situation, but had decided to uphold its position. It explained its position in more detail:
  - all the information held relates to the care of the client;
  - all the information is the client's personal data; and
  - that data is exempt under section 40(2) of the Act, because *'disclosure of the requested information, including any redacted records, would be in breach of the NHS Nottingham City's responsibilities to service user [client redacted] under the DPA.'*

## The Investigation

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### Scope of the case

14. On 22 April 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He explained that he had not received the information to which he was entitled, particularly his own personal data. He explained that he felt that it should be possible to redact the client's data and provide the residue to him.
15. Section 7 of the DPA gives an individual the right to request copies of personal data held about them – referred to as the right of subject access. The Commissioner has assessed the Trust's compliance with the DPA under section 42 of the DPA and has communicated the results to the complainant. This does not form part of this Decision Notice..
16. On 6 July 2011 the complainant agreed that the Commissioner's Decision Notice would focus on the delays he experienced. This is because the Trust held no information that was relevant to the request that was neither his personal data nor the personal data of clients. The

Commissioner has therefore considered the Trust's compliance with the procedural provisions of the Act.

17. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. For example, the Commissioner can make no comment about how the Trust's whistle blowing procedure operates.

## **Chronology**

18. On 22 June 2010 the Commissioner wrote to the complainant and the Trust to explain that he had received an eligible complaint relating to both the DPA and the Act. He explained that he would make the DPA assessment first and asked the Trust to send him a copy of the relevant information.
19. On 19 October 2010 the Trust issued a response to the Commissioner. It carefully outlined what it held and explained its position under the DPA. It also explained the searches it had undertaken.
20. On 24 February 2011 the Commissioner communicated the result of his assessment under the DPA. He explained that the residue of the case would be considered under the Act.
21. Between 4 May 2011 and 6 June 2011 the Commissioner and the complainant exchanged correspondence about the scope of the case.
22. On 6 June 2011 the complainant agreed the scope of the case. The Commissioner wrote to the Trust on the following day to obtain further information about its handling of the request and received a response on the same day.

## **Analysis**

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### **Substantive Procedural Matters**

#### *Procedural Requirements*

23. As noted above, this Decision Notice is concerned solely with the Trust's compliance with the procedural requirements of the Act.

### **Section 10(1)**

24. The Trust explained to the complainant on 17 March 2010 that it was treating the 8 March 2010 as a separate request. The Commissioner has considered that request on the same basis.

25. 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'.*

26. Section 1(1)(a) requires that a public authority confirms or denies that it holds information and section 1(1)(b) requires that non-exempt information is provided.

27. The Trust did not explain what information it did and did not hold in its response of 26 March 2010. Although it explained this in its response of 22 September 2009, it is the Commissioner's view that it was appropriate for the Trust to also provide this detail in the second refusal notice, or at least make clear that it still held the same data, as the position could have changed in the (approximate) six months between the requests. The Commissioner finds a breach of section 10(1) in relation to the handling of the second request because the Trust failed to comply with section 1(1)(a) (confirmation or denial that it held information) within 20 working days.

### **Section 17(1)(c)**

28. Section 17(1)(c) explains that a public authority must explain why an exemption applies when it is not otherwise apparent.

29. In this case, the Trust applied sections 40(1) (the requester's personal data) and 40(2)(a) (third party personal data), but failed to explain why it applied these exemptions in a manner that would enable the complainant to understand its approach.

30. In particular, it failed to explain why it believed that the information constituted personal data and why the disclosure of the section 40(2)(a) information would contravene one or more of the data protection principles. It also failed to explain that it was not possible to anonymise the information so it wasn't personal data.

31. As the refusal notice and internal review were not sufficiently detailed, the Commissioner finds a breach of section 17(1)(c).

### **Section 17(1)**

32. Section 17(1) requires a complete refusal notice to be issued in 20 working days. As the refusal notices did not comply with section 17(1)(c), the Commissioner also finds a breach of section 17(1) in this case.

## **The Decision**

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33. The Commissioner's decision is that the Trust did not deal with the request for information in accordance with the Act. There were procedural breaches of sections 10(1), 17(1) and 17(1)(c).

## **Steps Required**

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34. The Commissioner requires no steps to be taken in this case.

## **Other matters**

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35. Although not part of this Decision Notice, the Commissioner wishes to highlight the following matters to help improve compliance in the future. As noted above, section 7 of the DPA gives an individual the right to request copies of personal data held about them – known as the right of subject access. As the information being sought was the complainant's personal data, this request should have been dealt with as a subject access request rather than a request under the Act. The Commissioner encourages public authorities to consider requests under the correct regime in the first instance. In the Commissioner's opinion, responsibility for applying exemptions and determining whether a request should be considered under the Act or the DPA rests with the public authority rather than the requestor. He therefore advises the Trust to ensure that it deals with requests under the correct access regime in the future.

## Right of Appeal

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36. 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: 0300 1234504

Fax: 0116 249 4253

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

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

37. 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.
38. 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 15<sup>th</sup> day of August 2011**

**Signed .....**

**Faye Spencer  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Appendix A

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Request dated 5 September 2009

1) *Records of any dialogue/communication between [Individual A redacted], [Individual B redacted], [Individual C redacted], [Individual D redacted] and [Individual E redacted] subsequent to 9/5/08 which concerns myself and investigations done under the whistleblowing procedure.*

2) *Records of any dialogue/communication between [Individual F redacted] , [Individual D redacted], [Individual B redacted], [Individual C redacted] and [Individual G redacted] concerning the application of FACS (Fairer Access to Care Services) to the case of a client of mine [Client redacted]. I would also be interested in any reference to the file held at Denewood relating to panel documentation on [Client redacted] going missing. The discussions may have followed, related to Adult Panel meetings between July 07 and May 08.*

3) *The records of any dialogue/communication between [Individual B redacted], [Individual C redacted], [Individual D redacted] and Nottingham City PCT specifying two commissioners ([Individual H redacted] and [Individual I redacted]) and two nurse assessors ([Individual J redacted] and [Individual K redacted]). I will be making a Fol request to the PCT but I am aware that [Individual B redacted] was on the NHS Continuing Care Panel. This would have been between December 07 and May 08.*

4) *The records of any dialogue/communication between [Individual B redacted] and [Individual D redacted] relating to [Individual D redacted]'s investigation of a complaint in Oct 07 by [Client redacted]'s carer. I would also appreciate seeing any report written either by [Individual B redacted] or [Individual D redacted] concerning this investigation.*

5) *The records of any dialogue communication relating to an e-mail I sent on 6/7/07 about bed problems in the Trust to a number of senior managers of Notts Healthcare Trust, ASHH, nurses and clinicians. These included [Individual L redacted], [Individual F redacted] and [Individual D redacted].*

6) *The records of any dialogue/communication relating to a letter I wrote to the Medical Director of Nottinghamshire Healthcare Trust on 3/12/07 concerning my worry that a person had been unlawfully detained and related possibly to a lack of beds.*

7) *The records of any dialogue/communication following my having allegedly sent a letter to an MP. This would have occurred in October 07 and involved [Individual B redacted], [Individual C redacted] and [Individual D redacted].*



*8) The records of any dialogue/communication between [Individual B redacted], [Individual C redacted] and [Individual D redacted] concerning my re-registration with my professional organisation the GSCC. This would have been from March 08 and is still- I think - continuing.*

*9) The records of any dialogue/communication relating to the intervention of [Individual M redacted] in concerns about myself linking to the R.B. case and also other matters. I feel that she would have had contact with [Individual D redacted], [Individual N redacted], [Individual C redacted] and [Individual B redacted].*

*10) The records of a meeting held at Duncan Macmillan House on the 12/05/08 concerning [Client redacted] chaired by [Individual M redacted].*

## Legal Annex

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### General Right of Access

#### Section 1(1) provides 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.”*

### Time for Compliance

#### Section 10(1) provides 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’.*

### Refusal of request

#### Section 17(1) provides that -

(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 subsection (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.