

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 1 October 2020

**Public Authority:** Ministry of Justice  
**Address:** 102 Petty France  
London  
SW1H 9AJ

#### Decision (including any steps ordered)

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1. The complainant requested information relating to the Multi-Agency Public Protection Arrangements (MAPPA) Serious Case Review (SCR) report relating to a named individual.
2. The Ministry of Justice (MoJ) confirmed it held the requested information but refused to provide it, citing sections 40(2) (personal information) and 41 (information provided in confidence) of the FOIA.
3. The Commissioner's decision is that the MoJ correctly applied section 40(2) to the personal information within the scope of the request and section 41 to the remaining withheld information.
4. The Commissioner requires no steps to be taken as a result of this decision.

#### Background

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5. By way of context to this request, the MoJ told the Commissioner:

*"Multi-Agency Public Protection Arrangements (MAPPA) are a statutory framework operated by criminal justice and social care agencies that seek to reduce serious re-offending by sexual offenders and violent offenders and protect the public from serious harm. They are set out in Section 325 of the Criminal Justice Act 2003, which also provides for the Secretary of State to issue statutory guidance on the operation of MAPPA. MAPPA is not a statutory body in itself but is a mechanism through which agencies can better discharge their statutory responsibilities and protect the*

*public in a co-ordinated manner. Agencies at all times retain their full statutory responsibilities and obligations”.*

6. The Commissioner has considered the statutory guidance<sup>1</sup> in relation to MAPPA. With respect to SCRs, that guidance explains:

*“20.2 The purpose of the MAPPA SCR is to examine whether the MAPP arrangements were effectively applied and whether the agencies worked together to do all they reasonably could to manage effectively the risk of further offending in the community.*

*20.3 The aims of the MAPPA SCR will be to establish whether there are lessons to be learned, to identify them clearly, to decide how they will be acted upon, and, as a result, to inform the future development of MAPPA policies and procedures in order to protect the public better. It may also identify areas of good practice.*

...

*20.7 The SMB [Strategic Management Board] Chair is responsible for commissioning the MAPPA SCR, and the SMB retains responsibility for the reports generated by the MAPPA SCR process”.*

7. With respect to distribution of the MAPPA SCR report, the guidance states:

*“20.21 This report must not be widely distributed or published, and should only be shared with others on the authority of the SMB Chair”.*

## **Request and response**

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8. On 9 July 2019, the complainant wrote to the MoJ and requested information in the following terms:

*“I am seeking information regarding the serious case review following the conviction of [redacted], also known as [redacted], of*

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<sup>1</sup> [https://mappa.justice.gov.uk/gf2.ti/f/597826/41211397.3/PDF/-/MAPPA\\_Guidance\\_July\\_2019.pdf](https://mappa.justice.gov.uk/gf2.ti/f/597826/41211397.3/PDF/-/MAPPA_Guidance_July_2019.pdf)

*attempted murder in 2017. He had already been convicted of murder in [date redacted].*

*What is the current status of the serious case review in relation to this case?*

*Please provide a copy of the completed serious case review”.*

9. The MoJ responded on 5 August 2019. It confirmed it held information within the scope of the request. With regard to the status of the serious case review (SCR), it confirmed that a SCR had been completed. However it refused to provide a copy of the completed SCR, citing section 40(2) (personal information) of the FOIA as its basis for doing so.
10. The complainant provided a number of reasons for requesting an internal review, including telling the MoJ:

*“The publication of the serious case review is warranted to subject public authorities to scrutiny over their legal obligations to the public, with the end result of improving public protection. Protecting the public from violent re-offenders is something the MOJ is legally obliged to do, and has arguably failed to do as this man has gone on to violently re-offend”.*
11. Following an internal review, the MoJ wrote to the complainant on 27 August 2019 in which it maintained its original position.

## **Scope of the case**

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12. The complainant contacted the Commissioner on 9 September 2019 to complain about the way his request for information had been handled. Acknowledging the likely existence of third party data within the requested information, he confirmed that he was not requesting any data in relation to persons *“other than that of [redacted], a convicted murderer who has seriously re-offended ...”* .
13. Although not required to do so, he explained the purpose of his request:

*“...was to find out how the processes put in place by public bodies had affected the serious re-offending of [redacted], if at all. It was not an exercise in finding out more information regarding [redacted]”.*
14. During the course of the Commissioner’s investigation, the MoJ revisited its handling of the request. While it confirmed its application of section 40(2), it wrote to the complainant additionally citing section 41 (information provided in confidence) of the FOIA.

15. The complainant confirmed that he was dissatisfied with the MoJ's revised response.
16. The analysis below considers the MoJ's application of sections 40 and 41 of the FOIA to the requested information. That information comprises the MAPPA Serious Case Review (SCR) in the case of the individual named in the request.

## **Reasons for decision**

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17. The MoJ considered that both sections 40(2) and 41 apply to the SCR in its entirety.
18. The Commissioner has first considered its application of section 40(2).

### *Section 40 personal information*

19. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
20. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
21. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
22. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

### *Is the information personal data?*

23. Section 3(2) of the DPA defines personal data as:

*"any information relating to an identified or identifiable living individual".*

24. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

25. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
26. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
27. The request in this case relates to the SCR concerning the management under MAPPA of the individual named in the request.
28. In its submission to the Commissioner, the MoJ explained that, when an offender managed at MAPPA Level 2 or 3 commits a serious further offence:

*"... the local Strategic Management Board (SMB) commissions an independent review to examine whether the MAPPA were applied effectively and whether agencies worked together appropriately. The outcome of the independent review, known as a Serious Case Review (SCR), identifies lessons learned and informs future policy and practice. During the independent review carried out by SMBs, various individuals including offenders, victims and officers from various service providers such as the Police, Probation and Prison Services are interviewed. Details of these interviews are included in the SCR reports".*
29. The Commissioner acknowledges that, in its correspondence with the complainant, the MoJ explained that the report contains personal data of the individual named in the request and others, and criminal offence data specific to the individual named in the request.
30. The MoJ considered that the requested information:

*"... is clearly [name redacted]'s personal data as it relates to him and he is identifiable".*
31. The MoJ told the Commissioner:

*"The report also discusses a number of other identifiable members of the public".*
32. Having considered the withheld information, the Commissioner is satisfied that, in the circumstances of this case, the majority of the information relates to the individual named in the request. She is satisfied that this information both relates to and identifies the individual concerned. She has reached this conclusion on the basis that the SCR

has a specific individual as its main focus and that the requested information is clearly linked to that individual.

33. Although restricted in what she is able to say due to the nature of the withheld information, she is also satisfied that the report also discusses a number of other identifiable members of the public.
34. The Commissioner considers that the personal data of those other identifiable members of the individual named is inextricably linked to the personal data of the individual named in the request and cannot be separated.
35. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
36. However, she finds that some of the withheld information, relating, for example to the review's findings, does not fall within the definition of personal data in section 3(2) of the DPA. Section 40(2) cannot apply to that information.
37. With respect to the information that falls within the definition of personal data in section 3(2) of the DPA, the fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
38. The most relevant DP principle in this case is principle (a).

*Would disclosure contravene principle (a)?*

39. Article 5(1)(a) of the GDPR states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

40. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
41. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
42. In addition, if the requested data is criminal offence data, in order for disclosure to be lawful and compliant with principle (a), it must also meet the requirements of Article 10 of the GDPR. Similarly, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

*Is the information criminal offence data?*

43. Information relating to criminal convictions and offences is given special status in the GDPR.
44. Article 10 of the GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:
  - the alleged commission of offences by the data subject; or
  - proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.
45. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include criminal offence data.
46. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.
47. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under the FOIA are the conditions at Part 3 paragraph 29 (consent from the data subject) or Part 3 paragraph 32 (data made manifestly public by the data subject).
48. The Commissioner has seen no evidence or indication that the individual concerned has specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
49. As none of the conditions required for processing criminal offence data are satisfied there is no legal basis for its disclosure. Processing this criminal offence data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.
50. The Commissioner has therefore decided that the MoJ was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

*Is the information special category data?*



51. Information relating to special category data is given special status in the GDPR.
52. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
53. Having considered the wording of the request and viewed the withheld information, the Commissioner finds that the requested information does include special category data.
54. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
55. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
56. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
57. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.
58. In relation to the information within the report that the Commissioner found did not comprise personal information, and therefore section 40(2) cannot apply, she has next considered the MoJ's application of section 41 to that information.

*Section 41 information provided in confidence*

59. Section 41 sets out an exemption from the right to know where the information was provided to the public authority in confidence.
60. Section 41 of the FOIA states that:

*'(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.'*

61. Therefore, for this exemption to be engaged, two criteria have to be met: the public authority has to have obtained the information from a third party and the disclosure of that information must constitute an actionable breach of confidence.

62. In her guidance on section 41, the Commissioner acknowledges:

*"[Section 41] is designed to give those who provide confidential information to public authorities, a degree of assurance that their confidences will continue to be respected, should the information fall within the scope of an FOIA request".*

63. The complainant told the Commissioner:

*"... I am asking for a report that has been created on behalf of the Ministry of Justice, so it is arguable this exemption cannot be engaged given it is their report".*

64. He considered that at least some parts of the SCR cannot fall under the section 41 exemption:

*"... such as the report's analysis, conclusions, executive summary, actions taken since etc"*

*Was the information obtained by the MoJ from another party?*

65. Section 41(1)(a) requires that the requested information must have been obtained by the public authority from another person. In her guidance on section 41, the Commissioner acknowledges that, in this context, the term 'person' means a 'legal person'. This could be an individual, a company, another public authority or any other type of legal entity.

66. Her guidance also states:

*"It follows that the exemption won't cover information the authority has generated itself, although it may cover documents (or parts of documents) generated by the public authority if these record information provided in confidence by another person, ..".*

67. In its submission, the MoJ explained that MAPPA was created pursuant to Section 325 of the Criminal Justice Act 2003 (CJA 2003) and responsibility for them rests with local multi-agency Strategic Management Boards (SMB) rather than with a government department.

68. With respect to the complainant's argument that section 41 cannot be engaged, the MoJ told the Commissioner that the SCR report:

*"... was created on behalf of the local MAPPA Strategic Management Board, not the Ministry of Justice".*

69. The MoJ told the Commissioner:

*"The MOJ received information contained in the MAPPA SCR report in confidence from various MAPPA Agencies".*

70. In its submission to the Commissioner, the MoJ confirmed what it had told the complainant, namely that information in the SCR report was provided by third parties in confidence to the NPS (National Probation Service) and the SMB.

71. The Commissioner understands that the NPS works with Her Majesty's Prison and Probation Service (HMPPS) and that HMPPS is an executive agency, sponsored by the MoJ.

72. While acknowledging the complainant's view that some information cannot be said to be provided by a third party, from the evidence she has seen, the Commissioner is satisfied that the withheld information was either obtained by the MoJ from another person or, if disclosed, would reveal the content of information obtained from another person.

*Would disclosure of the information constitute an actionable breach of confidence?*

73. In considering whether disclosure would constitute an actionable breach of confidence, the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd [1968] FSR 415*. That judgment suggested that the following three-limbed test should be considered in order to determine if information was confidential:

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

74. Further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

*Does the information have the necessary quality of confidence?*

75. For the information to have the necessary quality of confidence it must not be trivial **and** not otherwise available to the public. Information which is of a trivial nature or already available to the public cannot be regarded as having the necessary quality of confidence.
76. The Commissioner recognises that information should be worthy of protection in the sense that someone has a genuine interest in the contents remaining confidential. She also acknowledges that information will be in the public domain if it is realistically accessible to the general public at the time of the request.
77. The MoJ considered that the information in the requested report has the necessary quality of confidence as it is not trivial and not otherwise accessible.
78. It argued that the individuals whose personal data are contained in the SCR report have a general expectation that their privacy will be respected and that those who contributed to the report did so on the understanding that the report would not enter the public domain.
79. The Commissioner is mindful that the term 'serious case review' appears to be a generic term used in circumstances other than those relating to MAPPA. For example, SCRs are conducted when a child or young person dies or is seriously injured, and abuse or neglect are known or suspected to be factors in the death.
80. From her own research, the Commissioner accepts that there are instances when the overview report of an SCR, has been published. In that respect, she is aware of examples of overview reports being published in relation to the safeguarding of children. However, the Commissioner is not aware of this being the case with MAPPA SCRs.
81. Having considered the withheld information, the Commissioner is satisfied that it is more than trivial. Nor is she aware that the information is in the public domain.
82. The Commissioner is therefore satisfied that the withheld information in this case has the necessary quality of confidence required to sustain an action for breach of confidence, and as such she considers that this limb of the confidence test is met.

*Was the information imparted in circumstances importing an obligation of confidence?*

83. Even if information is to be regarded as confidential, a breach of confidence will not be actionable if it was not communicated in circumstances that created an obligation of confidence.

84. The Commissioner's guidance recognises that there are essentially two circumstances in which an obligation of confidence may apply:

*"The confider has attached explicit conditions to any subsequent use or disclosure of the information (for example in the form of a contractual term or the wording of a letter); or*

*The confider hasn't set any explicit conditions, but the restrictions on use are obvious or implicit from the circumstances. For example, a client in therapy wouldn't need to tell their counsellor not to divulge the contents of their sessions to others, it is simply understood by both parties that those are the rules".*

85. The MoJ told the complainant:

*"The MAPPAs Guidance issued by the Secretary of State provides that the report "must not be widely distributed or published." As such, those who contributed to the report, including members of staff and the victim's family, did so on the understanding that the report would not enter the public domain".*

86. With regard to the second limb of the test, the MoJ told the Commissioner:

*"The information in the MAPPAs SCR report was clearly provided to the MOJ in confidence .... It is our submission that disclosure of the MAPPAs SCR report would likely undermine the trust required for the statutory function of the MAPPAs Agencies as provided in Section 325 of CJA 2003 and other MAPPAs Agencies who might be engaged in similar safeguarding functions in the future".*

87. Responding to the complainant's arguments that some of the information should be disclosed, the MoJ told the Commissioner:

*"... information provided in confidence by third parties remains confidential when an agency uses it in a confidential report"*

and

*" ... analysis of, conclusions drawn from, summaries of and actions taken as a result of information provided in confidence remain information provided in confidence".*

88. Having considered the 'reasonable person' test used by Judge Megarry in the *Coco v Clark* case, the Commissioner accepts that there is an expectation of confidence on the part of the provider that the information provided was shared in confidence and will not be disclosed to the public.

89. The Commissioner has also taken into account the MAPPA guidance where it states that a MAPPA SCR should only be shared with others on the authority of the SMB Chair.
90. The Commissioner therefore accepts that there is an obligation of confidence in this case. As such she considers that this limb of the confidence test is met.

*Would disclosure be of detriment to the confider?*

91. Having concluded that the information withheld in this case has the necessary quality of confidence, and was imparted in circumstances giving rise to an obligation of confidence, the Commissioner has proceeded to consider whether unauthorised disclosure could cause detriment to the confider.
92. The MoJ considered that disclosure of the information to the public will be detrimental to the individuals who provided the information used in the report. It told the complainant:

*"... disclosure of the SCR report may cause potential harm or distress to the data subjects".*

93. Similarly, in its correspondence with the Commissioner, the MoJ told her:

*"Pursuant to Section 325 of the CJA 2003, Information in the MAPPA SCR report are provided to respective MAPPA Agencies in strict confidence; this is to enable them to discharge their respective statutory duties without fear; it also allows them to have a free and frank deliberation without inhibition which may arise from any disclosure to the public.*

94. It also told the Commissioner that disclosure of the information to the public will be detrimental to the individuals who provided the information used in the report.
95. The Commissioner is mindful that the complainant explained the purpose of his request was not an exercise in finding out more information regarding the named individual: rather it was about the processes in place.
96. Nevertheless, the Commissioner is satisfied that the requested information is about the individual named in the request, and others, and that disclosure would be contrary to their expectation of maintaining confidentiality in respect of their private information. She is satisfied that contributors would have a genuine interest in their views remaining confidential.

97. The Commissioner is therefore satisfied that this limb of the confidence test is also met.

*A legal person must be able to bring an action for breach of confidence*

98. Section 41(b) provides that the breach of confidence must be actionable by either the legal person who gave the information to the public authority, or by any other legal person.

99. The Commissioner's guidance on that point explains:

*"This means that when considering whether a disclosure would constitute a breach of confidence an authority may consider the expectations of, and the impact on, both:*

- *the person who gave the information directly to the public authority, and*
- *any other previous confiders of confidential material within the requested information".*

100. The MoJ considered that failure to treat the requested information as being held in confidence would constitute an actionable breach of confidence for which proceedings could be initiated by the MAPPA agencies.

101. The Commissioner is satisfied that a person would be able to bring a claim for breach of confidence.

102. The final part of the test for engaging section 41 is whether the action of breach of confidence is likely to succeed.

*Is there a public interest defence for disclosure?*

103. Although section 41 is an absolute exemption, and does not need to be qualified by a public interest test under section 2 of the FOIA, case law on the common law of confidence suggests that a breach of confidence will not succeed, and therefore will not be actionable, in circumstances where a public authority can rely on a public interest defence.

104. In its correspondence with the Commissioner, the MoJ told her that it considered that disclosure in this case:

*"... would damage the trust that has built up between different agencies under MAPPA that allows them to share sensitive information with confidence and could have a detrimental impact on public safety".*

105. It argued that the resultant loss of trust would be counter to the public interest.

*The Commissioner's view*

106. In a case such as this, the test is whether there is a public interest in disclosure which overrides the competing public interest in maintaining the duty of confidence.
107. This test does not function in the same way as the public interest test for qualified exemptions, where the public interest operates in favour of disclosure unless outweighed by the public interest in maintaining the exemption. Rather, the reverse is the case. The test assumes that the public interest in maintaining confidentiality will prevail unless the public interest in disclosure outweighs the public interest in maintaining the confidence.
108. The Commissioner has considered whether there is any overriding public interest in the disclosure of the requested information that would justify an actionable breach of confidence.
109. She recognises that some weight should always be afforded to the general public interest in ensuring that public authorities remain transparent, accountable and open to scrutiny.
110. In that respect, the Commissioner recognises the complainant's interest in the report in general and in its conclusions.
111. He told her:
- "The publication of the serious case review is warranted to subject public authorities to scrutiny over their legal obligations to the public, with the end result of improving public protection".*
112. The Commissioner acknowledges that disclosure would add to the public's understanding of the way in which MAPPA arrangements were applied in this case and whether lessons could be learned with respect to managing the risks and protecting the public.
113. She has taken into account the stated aims of the MAPPA SCR process, namely to identify and act upon any lessons to be learned and to inform the future development of policies and procedures to protect the public better.
114. She has also considered the wider public interest in preserving the principle of confidentiality and the impact of disclosure on the interests of the confider.
115. In weighing the above public interest arguments for and against disclosure, the Commissioner has taken account of the wider public interest in preserving the principle of confidentiality. She is mindful of the need to protect the relationship of trust between confider and



confidant and not to discourage, or otherwise hamper, a degree of public certainty that such confidences will be respected by a public authority.

116. The role of the Commissioner is to regulate access to recorded information under the FOIA. Her role in this case is simply to consider if, at the time of the request, the public interest in disclosure outweighs the competing public interest in maintaining a confidence.
117. Having considered all the circumstances of this case, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information. Therefore the Commissioner finds that the information was correctly withheld under section 41 of the FOIA.

## Right of appeal

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118. 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,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

119. 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.

120. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Laura Tomkinson  
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Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**