

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 15 April 2008**

**Public Authority:** Department of Health  
**Address:** Richmond House  
79 Whitehall  
London  
SW1A 2NS

### Summary

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The complainant requested a report from the public authority that it had prepared on the charging of overseas visitors for treatment received under the NHS. Initially the public authority refused to disclose any of the report. However, it subsequently decided to release the report but withheld the names of the NHS Trusts which provided information to assist in its preparation. These names were withheld under sections 36(2)(b)(ii) (inhibition of the free and frank exchange of views), 36(2)(c) (prejudice to the effective conduct of public affairs) and 41 (information provided in confidence). The Commissioner determined that none of the exemptions were applicable to the information and ordered it to be disclosed to the complainant. He also found that the public authority breached section 17(1)(b) and (c), as it did not state in its initial refusal notice that section 41 was applicable to the information requested and did not explain why it applied.

### 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.

### The Request

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2. On 19 October 2005 the complainant requested from the Department of Health (the "public authority") a copy of a report that it had prepared. This reviewed the implementation of charging regulations for overseas visitors who received treatment under the NHS.

3. On 9 November 2005 the public authority wrote to the complainant refusing his request under section 35 of the Act on the basis that disclosure would prejudice the formulation of government policy.
4. On 1 February 2006 the complainant asked the public authority to carry out an internal review of its decision.
5. On 24 March 2006 the public authority wrote to the complainant to inform him that the outcome of its internal review was to confirm its initial decision.

## **The Investigation**

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### **Scope of the case**

6. On 17 May 2006 the complainant wrote to the Commissioner to complain about the public authority's decision to refuse his request for the report.

### **Chronology**

7. There was a considerable amount of correspondence between the Commissioner and the public authority, the most significant of which is outlined below.
8. On 7 March 2007 the Commissioner wrote to the public authority to request a copy of the withheld information and a further explanation of its application of section 35 to the report.
9. Following correspondence with the Commissioner's Office, the public authority reviewed its initial decision. On 28 August 2007 it informed the Commissioner that it had released a copy of the report to the complainant. However, it had withheld the names of the trusts which had provided information for the report and a small amount of personal data.
10. On 31 August 2007 the complainant informed the Commissioner that he wished to pursue his complaint in relation to the withholding of the names of the trusts by the public authority. However, he confirmed that he did not wish to proceed with his complaint in relation to the withholding of the personal data.
11. On 3 September 2007 the Commissioner wrote to the public authority to ask for details of its arguments as to the withholding of the names of the trusts.
12. On 7 September 2007 the public authority informed the Commissioner that it had withheld the names of the trusts because they had provided information for the report on the basis of confidentiality. However, the public authority proposed to consult with them to find out whether they had any objection to the release of their names.
13. On 5 December 2007, following previous unsuccessful attempts to obtain a detailed response from the public authority, the Commissioner informed it that he would

serve an Information Notice unless he received the information he had requested within the next 10 working days.

14. On 17 December 2007 the public authority provided a detailed response to the Commissioner. It argued that the information was exempt from disclosure under section 41 as disclosure would constitute an actionable breach of confidence for which the trusts concerned could take legal action. In addition, it believed that the information was exempt under section 36 as disclosure would be prejudicial to the effective conduct of public affairs as NHS bodies would be less willing to engage with the Government in similar exercises in the future if it did not maintain its promises of confidentiality. It also set out the public interest factors that it had considered.
15. On 4 January 2008 the Commissioner asked the public authority for more information as to why it believed sections 36 and 41 were applicable. In relation to section 36, he requested copies of any documents which recorded the opinion given by the qualified person, in this case the Minister, and any evidence which the Minister considered prior to reaching her decision on the application of the section.
16. On 14 January 2008 the public authority informed the Commissioner that, in relation to section 36, it contended that the process through which the Minister made a decision was not relevant to the consideration of the engagement of the section. It was merely the expression of a conclusion which must in itself be reasonable. It therefore did not provide the information requested by the Commissioner. More detailed discussion of these responses is contained in the "Analysis" section of this decision.
17. On 21 January 2008 the Commissioner sought further clarification of some of the points made by the public authority in relation to the application of the exemptions.
18. On 13 February 2008 the public authority provided further information as to why it believed the exemptions were applicable.
19. On 6 March 2008 the Commissioner sought confirmation from the public authority that it was relying on section 36(2)(c). He also asked the public authority to confirm whether it was arguing that disclosure of the withheld information would or would be likely to have a prejudicial effect.
20. On 18 March 2008 the public authority informed the Commissioner that it was relying on sections 36(2)(b)(ii) and 36(2)(c) in relation to the withheld information and provided further explanation regarding this. It argued that it was unnecessary for it to confirm whether it was relying on whether prejudice to public affairs or inhibition of the free and frank exchange of views would or would be likely to occur.

## Analysis

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21. The full text of the sections of the Act which are referred to can be found in the Legal Annex at the end of this notice, however the relevant points are summarised

below. The procedural matters are considered first and then matters relating to the application of the exemptions.

## **Procedural matters**

### **Section 17(1)(b) and (c) – Refusal notice**

22. Section 17(1)(b) and (c) of the Act requires that, where a public authority is relying on a claim that an exemption in Part II of the Act is applicable to the information requested, it should state in its refusal notice which exemptions are applicable and explain why the exemptions apply. In this case, the public authority failed to state in the refusal notice that it was relying on section 41, nor explain why it applied, and, therefore, breached section 17(1)(b) and (c).

## **Exemptions**

23. The Commissioner notes that the public authority initially refused to disclose the whole report requested by the complainant on the basis that it was exempt from disclosure under section 35. However, in August 2007 it reviewed its decision and decided to release most of the report with the exception of the names of the trusts which had contributed to it.

24. In *King v The Information Commissioner and Department for Work and Pensions (EA/2007/085)* the Information Tribunal considered the position where a public authority sought to claim, during the course of an investigation by the Commissioner or an appeal to the Tribunal, that a particular exemption was applicable even though it had not previously relied on this exemption. The Tribunal commented that

“both the Commissioner and the Tribunal have the power to consider exemptions raised in front of them for the first time. Whether it will consider a recently raised exemption will depend on the facts in each case.” (para 55)

25. Given that the public authority reversed its original decision to withhold the whole report, the Commissioner is satisfied that it was appropriate for it to consider whether any parts of the report were still exempt from disclosure and, if so, whether other exemptions to the one originally claimed, in this case section 35, might be applicable. In these circumstances he believes it is appropriate for him to consider the applicability of sections 36 and 41 even though these exemptions were only raised for the first time by the public authority during the course of his investigation. In addition, section 36 only applies to information not exempt under section 35. As the public authority initially believed that all of the information was exempt under section 35, it was appropriate for it not to rely on section 36 at the time it issued its refusal notice.

### **Section 41 – Information provided in confidence**

26. The public authority contended that the names of the trusts contained in the report were exempt from disclosure under section 41 of the Act as it owed a duty of confidence to them in respect of that information.

27. Section 41(1) provides that information is exemption from disclosure if:-

- (a) it was obtained by the public authority from another 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.

28. The Commissioner's view is that disclosure would constitute an actionable breach of confidence if:-

- i. the information has the necessary quality of confidence;
- ii. the information was imparted in circumstances importing an obligation of confidence; and
- iii. there was an unauthorised use of the information to the detriment of the confider (although it may not always be necessary to demonstrate detriment, particularly where the information relates to an individual's personal or private life).

29. If these parts of the test were 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

### **Duty of confidence owed by the public authority to the trusts**

30. The Commissioner considered whether the public authority obtained the withheld information from another person and whether it owed the trusts a duty of confidence in respect of that information.

#### **(a) Was the withheld information obtained by the public authority from another person?**

31. The report which was the subject of the request was based on research carried out in 2004. The research looked at the impact of changes introduced earlier that year to the charging regime for overseas visitors when using NHS hospitals. Information was obtained from 12 trusts in order to compile the report.

32. The report contained detailed statistical information on areas such as the origins and nature of treatment received by overseas visitors. It also contained detailed financial information, such as the amounts of money that were recoverable and the amounts actually recovered in respect of overseas visitors by the trusts. In addition there was some information which had been obtained by carrying out interviews with the Overseas Visitors Managers, the officers in the trusts who had responsibility for this area, and senior executives in the 12 trusts.

33. The Commissioner is satisfied that the information which the public authority claimed was exempt under section 41 was information obtained from a third party, in this case the trusts.

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

**(i) Does the information have the necessary quality of confidence to justify the imposition of an obligation of confidence?**

34. The names of the trusts to which some of the information contained in the report relates is not information which the Commissioner believes is otherwise accessible to the public by other means. He also accepts that the information is more than trivial. As a result he is of the view that the information concerned has the necessary quality of confidence to justify the imposition of an obligation of confidence.

**(ii) Was the information communicated in circumstances that created such an obligation?**

35. The public authority informed the Commissioner that all of the 12 trusts which had taken part in the research exercise had been guaranteed that their involvement would remain confidential. This guarantee was contained in a letter sent by the public authority to the Chief Executive of each of the trusts when seeking their agreement to help with the project. The public authority was unable to provide the Commissioner with a copy of this letter. However, it informed him that it was clear from its consultations with the trusts that they recollected the guarantee of confidence being given.

36. It would have been helpful to the Commissioner to see a copy of the letter sent to the trusts in order to ascertain the basis of the promise of confidentiality which was given. In the absence of a copy of this letter, he is however satisfied that an express promise of confidentiality was made and that it is likely that it covered the circumstances of this case.

**(iii) Would disclosure of the information have been unauthorised and have had a detrimental impact on the confider?**

37. In relation to whether the disclosure of the information would have been unauthorised, the public authority informed the Commissioner that six of the trusts which had provided information for the report objected to the disclosure of their names. This had been ascertained from its consultation exercise in September 2007 referred to in paragraph 12. This therefore left six trusts which would not have objected to their names being released.

38. The Commissioner asked the public authority whether any of the six trusts which did not object to disclosure of their names in September 2007 would have objected to disclosure in October 2005, when the initial request was made. The public authority informed him that it had not consulted the trusts when the request was made as it believed the entire report was exempt from disclosure. It therefore felt



unable to speculate on what the trusts' views might have been more than two years previously. It also did not view it as reasonable to expect the trusts to speculate as to what their view might have been at that time.

39. In the Commissioner's view it would not have been unreasonable for the public authority, as part of its consultation exercise in 2007, to ask the trusts what their view on disclosure might have been two years earlier. In the absence of evidence to the contrary, the Commissioner has assumed that the six trusts which did not object to disclosure of their names in September 2007, would also not have done so when the request was made. He is therefore of the view that a disclosure of the names of these six trusts would not have been an unauthorised disclosure and that this would not then have given rise to an actionable breach of confidence.
40. In relation to the six trusts which confirmed to the public authority that they did not wish to have their names released, the Commissioner has assumed that they would have held the same view at the time that the request was made. However, in addition to the issue of whether there was consent to disclosure of the information, he also considered whether the disclosure of the information would have caused any detriment to the six trusts which did not consent to disclosure.
41. The Commissioner suggested to the public authority that as half of the trusts consulted apparently did not perceive that any harm would result from the disclosure of their names, this raised the question of the extent to which any of the other trusts would have been likely to suffer harm. He therefore asked whether there was anything specific about the six trusts which did not want their names disclosed that differentiated them from the six which had no objection to disclosure.
42. The public authority informed the Commissioner that it was not aware of any specific circumstances that would differentiate the six trusts which objected to disclosure from the others. However, it pointed out that each trust would have made its decision based on a range of factors relevant to its own particular circumstances. The public authority informed the Commissioner that it was not in a position to speculate why different trusts might have made different decisions as it was not party to the decision making process of the individual trusts.
43. Without arguments from the trusts as to the harm that they might suffer from the disclosure of the information, the Commissioner is left in a position of potentially having to speculate as to what, if any, harm might have occurred. In the circumstances, without any substantive arguments from the trusts, the Commissioner is not satisfied that there is any evidence on which he could find that they would have suffered detriment from the release of this information.
44. The public authority also argued that the withheld information related to an area managed by identifiable individuals in each of the trusts, the Overseas Visitors Manager. Disclosure could have directly prejudiced their ability to perform their duties as it may well have lead to them being pursued, for example, to explain or justify remarks in the report attributable to them or their employer.
45. The public authority stated that the charging of overseas visitors was a highly emotive subject that created very strong views on all sides. It pointed to the case of

an Overseas Visitors Manager, from a different trust to those which provided information from the report, who underwent a campaign of harassment for several months. It was of the view that this could happen to one of the Overseas Visitors Managers from one of the trusts that contributed to the report if someone were to take exception to their comments or those of their employer. It felt that it was unacceptable to put NHS staff in such a position of risk.

46. The Commissioner acknowledges the concerns of the public authority for the wellbeing of staff within the trusts. However, there are many individuals in a wide range of public authorities who undertake roles related to areas on which some members of the public may have very strong views. The Commissioner is reluctant to accept that this should prevent public authorities from releasing information, some of which may contain the views expressed by individuals on behalf of the public authority, because it relates to a controversial area. He is of the view that the public should realise that any views that are expressed by officers in public authorities will be made on behalf of the authority, rather than being of a personal nature.
47. The report itself only contains the views attributable to specific trusts in a small number of places. Some of these views are attributable to trusts which had no objection to the release of this information. Having considered the views in the report linked to the trusts which objected to disclosure, the Commissioner has not been able to identify anything which appears to be of a contentious nature.
48. Based on the evidence available to him, the Commissioner can see no reason why the release of the specific information that has been withheld should cause officers of the relevant trusts to suffer harassment or unreasonable levels of public attention so as to prevent them from carrying out their duties.
49. In the circumstances the Commissioner is not satisfied that there is sufficient evidence to conclude that the trusts which did not consent to disclosure of their names would have been likely to suffer any detriment from disclosure.
50. However, the Commissioner acknowledges that there may be an argument that it is not necessary to demonstrate that disclosure would cause detriment to the confider. In his view, this is particularly of relevance where the information relates to an individual's personal or private life. Whilst the information in this case does not fall into that category, he has nevertheless gone on to consider whether there would have been a defence to any claim for breach of confidence based on public interest arguments.

**(c) Would the public authority have had a defence to a claim for breach of confidence based on the public interest in disclosure of the information?**

51. Section 41 is an absolute exemption and therefore there is no public interest test to be applied under the Act. However, under the common law, a duty of confidentiality can be overridden if there is an overriding public interest in the disclosure of the information concerned.



52. Under the Act, the public interest test assumes that information should be disclosed unless the public interest in maintaining the exemption exceeds the public interest in disclosure. Under the law of confidence, the public interest test assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence. The public interest test in relation to the duty of confidence is therefore the reverse of that under the Act. Disclosure would, therefore, be lawful where the public interest in disclosure outweighed the public interest in maintaining the duty of confidence.

**Public interest arguments in favour of maintaining the duty of confidence owed to the trusts**

53. The Commissioner recognises that where a duty of confidence has been created it should not be overridden lightly. He gives particular weight to this in circumstances where the obligation touches on the rights of individuals acting in a personal capacity. The Commissioner notes that this case concerns information provided by public authorities on operational matters.

54. The Commissioner has considered the impact disclosure would have had on the interests of the confiders, in this case the trusts, and the wider public interest in preserving the principle of confidentiality.

55. In relation to the potential impact disclosure might have had on the trusts, the Commissioner has explained above why he was not satisfied that there was sufficient evidence that the trusts might have suffered any detriment from the disclosure of their names. In the absence of any potential impact on the interests of the trust he went on to consider the wider public interest arguments in maintaining any duty of confidence which may have existed.

56. The public authority was of the view that there was a very strong public interest in public authorities being able to receive information in confidence. It feared that the disclosure of the information would have had a negative impact on its ability to persuade trusts to cooperate in future studies if it was unable to guarantee confidentiality.

57. The public authority believed that it was clearly in the public interest for it to receive highly sensitive information from its working partners. If information of this kind, which both parties considered to be highly sensitive, could not be subsequently held in confidence then it was unlikely that it would be willingly supplied in future. It argued that it was not in the public interest for the Department to be ignorant of such critical matters regarding NHS trusts. Disclosure in this case would have significantly prejudiced the essential relationship of trust which guaranteed the flow of such information.

58. The public authority also believed that the disclosure of the trusts' identities, particularly in the context of a freedom of information case, would have set a major precedent with long term implications, not just for the Department of Health, but for all Government departments. Its effect would have been to weaken the position of all Departments in seeking to ensure that responses to similar enquiries on sensitive issues were open and unbiased.

59. The Commissioner acknowledges the public authority's concerns over the wider effect that disclosure of this information might have had. However, given that he has not been able to determine that its release would have any detrimental impact on the trusts, he is unable to view the information as of a sensitive nature. He has been particularly influenced by the fact that six trusts that contributed to the report objected to the disclosure of information which appeared to be similar to the information which the other six trusts were content to see released.
60. If the information was not sensitive then the Commissioner is not convinced that its disclosure would have been likely to have caused any real deterioration in the relationship between the trusts concerned, or other trusts, and the Department of Health. If this were the case it should not in turn have affected the broader relationship between public authorities and government departments.

### **Public interest arguments in favour of the disclosure of the information**

61. The Commissioner recognises the general public interest in the disclosure of information which would further the public's understanding of and participation in debates on issues of the day. He is aware that the issue of the treatment of overseas visitors to the UK under the NHS has been an issue on which there has been a considerable amount of public comment. The disclosure of this information would therefore have assisted the public in gaining a better understanding of these issues and in being able to contribute to the debate that was taking place.
62. Disclosure would also have provided the public with more information on the effectiveness of the Government's policies in this area and, particularly, on how effectively its new guidance and regulations were working. In addition, it would have provided the public with detailed information on the approaches being adopted by specific trusts and how well they were implementing the relevant policies.
63. As part of the report related to how much money specific trusts had recovered in relation to the treatment of overseas visitors, the release of the information would have helped to promote accountability and transparency in the spending of public money in the NHS.
64. The information would also have contributed to allowing individuals to gain a better understanding of decisions made by public authorities that affected their lives. This is particularly the case in relation to those people who were most likely to be affected by the policies in this area, overseas visitors who may have been liable for the payment of fees for treatment that they received. The release of this information may have helped them to gain a better understanding of how policies were being applied in practice.
65. After considering the public interest arguments, particularly the lack of any apparent harm which might have been suffered by disclosure, the Commissioner has formed the view that, in this case, the public interest in disclosure outweighed the public interest in maintaining the duty of confidence owed to the six trusts which did not

consent to their names being disclosed. He is therefore satisfied that section 41 did not apply to the withheld information.

### **Section 36 – Prejudice to the effective conduct of public affairs**

66. The public authority argued that the withheld information was exempt under section 36 as in the reasonable opinion of a qualified person disclosure would or would have been likely to inhibit the free and frank exchange of views for the purpose of deliberation (section 36(2)(b)(ii)) and to prejudice the effective conduct of public affairs (section 36(2)(c)).

67. In order to determine whether the exemptions were applicable to this information the Commissioner considered:-

- i. whether the exemptions were engaged;
- ii. the opinion of the qualified person;
- iii. as section 36 is a qualified exemption, whether the public interest in maintaining the exemptions outweighed the public interest in disclosing the information.

#### **(i) Engagement of the exemptions**

68. The public authority argued that the information was exempt from disclosure under section 36(2)(b)(ii) as disclosure would have allowed comments to be traced back to individual officers in trusts. This could have resulted in others in similar positions being less willing to cooperate with the public authority in similar exercises in future. The consequence of this would have been a likely restriction on the free exchange of views with the public authority for the purpose of the deliberations.

69. The Commissioner accepts that the public authority's argument would potentially bring it within the scope of section 36(2)(b)(ii).

70. The public authority also argued that section 36(2)(c) was applicable to the information. This provides that information is exempt from disclosure if, in the reasonable opinion of a qualified person, disclosure would, or would be likely, to prejudice the effective conduct of public affairs.

71. The Commissioner notes the Information Tribunal's comments in its decision in *McIntyre v Information Commissioner & The Ministry of Defence (EA/2007/0068)*

"...that this category of exemption is intended to apply to those cases where it would be necessary in the interests of good government to withhold information, but which are not covered by another specific exemption, and where the disclosure would prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure."  
(para 25).

The Commissioner accepts that the public authority's argument, that disclosure would or would have been likely to have caused trusts to be less willing to provide it with important information in future, would potentially bring it within the scope of this exemption. If such information was not forthcoming it could be argued that this would affect the public authority's ability to ensure that the NHS operated effectively.

**(ii) Reasonable opinion of the qualified person**

72. The public authority confirmed to the Commissioner that an opinion was given by the qualified person, a Minister of the Department of Health, on 13 December 2007.
73. The public authority's submission informed the Commissioner that that Minister had considered the matter and was content to use section 36 to exempt the relevant information relating to the trusts. Its submission did not indicate that the Minister specifically considered section 36(2)(b)(ii) or 36(2)(c).
74. In the case of *Guardian & Brooke v The Information Commissioner & the BBC (EA/2006/0011 and 0013)*, the Information Tribunal stated that "in order to satisfy the subsection the opinion must be both reasonable in substance and reasonably arrived at." (para 64). In relation to the issue of reasonable substance, the Tribunal indicated that "the opinion must be objectively reasonable" (para 60). Whilst these references were to the application of section 36(2)(b)(ii), the Commissioner believes they are equally applicable to section 36(2)(c).
75. In determining whether an opinion had been reasonably arrived at, the Tribunal suggested that the qualified person should only take into account relevant matters and that the process of reaching a reasonable opinion should be supported by evidence. It did however accept that materials which may assist in the making of a judgement will vary from case to case and that conclusions about the future are necessarily hypothetical.
76. The Commissioner requested that the public authority provide him with copies of any documents which recorded the opinion given by the Minister and any evidence which the Minister considered prior to reaching her decision on the application of the section. However, the public authority argued that the process through which the qualified person, in this case the Minister, made a decision was not relevant to the consideration of the engagement of the section. It was merely the expression of a conclusion which must in itself be reasonable. It therefore did not provide any of the evidence considered by the Minister.
77. In addition, it was not clear to the Commissioner whether the qualified person had reached her opinion on the basis that she considered that disclosure would be inhibiting and prejudicial or that it would be likely to be inhibiting and prejudicial.
78. The public authority argued that it did not feel that the distinction between "would" or "would be likely" had a bearing on the balance of the public interest in disclosure and that the Minister had not been asked to make such an assessment in this instance.

79. The Commissioner notes the Information Tribunal's comments in the case of *McIntyre v Information Commissioner & The Ministry of Defence (EA/2007/0068)*

"...in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level." (para 45)

Whilst these references were to the application of section 36(2)(c), the Commissioner believes they are equally applicable to section 36(2)(b)(ii).

80. In its correspondence the public authority indicated to the Commissioner that it believed that the likelihood of prejudice arising from disclosure in this case was high. This suggests that it was relying on the lower, rather than higher, level of prejudice. The Commissioner has therefore proceeded on the basis that the lower threshold is the appropriate one to apply in this case.

81. The Commissioner notes the Tribunal's view from the *McIntyre* case, when commenting on the application of section 36(2)(c), that where the reasonable opinion of the qualified person is based on the higher threshold,

"...this will give greater weight to the public interest inherent ... in the... exemption in favour of maintaining the exemption than if the reasonable opinion was based on the lower threshold. That in turn will affect the public interest balance." (para 43)

He has considered this further when applying the public interest test in relation to this exemption.

82. As no evidence was submitted to the Commissioner as to the matters taken into account by the Minister in reaching her opinion, the Commissioner is unable to determine whether her opinion was reasonably arrived at.

83. However, the Commissioner notes the comments of the Tribunal in *McIntyre* that

"where the opinion is overridingly reasonable in substance then even though the method or process by which that opinion is arrived at is flawed in some way this need not be fatal to a finding that it is a reasonable opinion" (para 31)

84. Despite not being provided with details of the evidence considered by the qualified person, the Commissioner is of the view that the opinion appears to be overridingly reasonable in substance. He is therefore satisfied that section 36(2)(b)(ii) and 36(2)(c) were engaged in relation the information that was withheld.

85. The Commissioner then went on to consider whether the public interest in maintaining the exemptions outweighed the public interest in disclosure.

### **(iii) Public interest test**

86. The Commissioner notes the comments of the Information Tribunal in the *Guardian & Brooke* case that he should give due weight to the reasonable opinion of the qualified person when considering the public interest test in relation to section 36. However, the Tribunal's view was that the qualified person's opinion was limited to the degree of likelihood that inhibition or prejudice would occur and that the opinion "does not necessarily imply any particular view as to the severity or extent of such inhibition (or prejudice) or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant" (para 91).
87. The Commissioner therefore, in assessing the public interest arguments, particularly those related to withholding the information, considered the relevance of factors such as the severity, extent and frequency with which inhibition of the free and frank exchange of views and prejudice to the effective conduct of public affairs would be likely to have occurred.

#### **Public interest arguments against disclosing the information in relation to section 36(2)(b)(ii)**

88. The public authority argued that disclosure of the information would have made it possible in some cases to identify individuals by their connection to particular NHS Trusts. For example, the report quotes Overseas Visitors Managers directly, and identifies their Trust. From this it would not be difficult to establish the identity of the specific Overseas Visitors Manager concerned.
89. Given the evidence that it had provided to the Commissioner concerning the harassment of an Overseas Visitors Manager in another trust, the public authority believed the disclosure of this information could have prejudiced the ability of Overseas Visitor Managers in the 12 trusts which participated in the report to perform their duties. This in turn would have made it highly likely that other staff in similar positions would have been unwilling to co-operate with the public authority in similar exercises in the future. As a result this would have restricted the free exchange of views for the purposes of its deliberations.
90. Whilst the Commissioner notes the public authority concerns, the report itself only contains views that are attributable to specific trusts in a small number of places. Some of these views are from trusts which had no objection to the release of this information. The Commissioner looked at the views in the report linked to the trusts which objected to disclosure. However, he was not able to identify anything which appeared to be of a contentious nature.
91. Based on the evidence available to him, the Commissioner can not see any reason why the release of the specific information that has been withheld should cause officers of the relevant trusts to suffer harassment or unreasonable levels of public attention so as to prevent them from carrying out their duties. He therefore cannot see any reason why they, and similar officers in other trusts, would be likely to be inhibited from entering into free and frank discussions with the public authority in future.



### **Public interest arguments against disclosing the information in relation to section 36(2)(c)**

92. The public authority emphasised that the twelve trusts which took part in the project were guaranteed that their involvement in the work would remain confidential. It believed its credibility and trustworthiness with NHS organisations could have been damaged if it had reneged on this commitment. As a consequence, it was of the view that organisations may have been less willing in future to engage with the Department of Health, and other government departments, in this type of exercise or to provide them with open and unbiased responses on sensitive issues if it was felt that it did not keep their promises of confidentiality.
93. The Commissioner notes the point made in paragraph 79 that as the lower threshold of prejudice was being applied in this case this would give lesser weight to the public interest inherent in the exemption than if the higher threshold were being applied.
94. The Commissioner notes that six of the 12 trusts which provided information for the report appeared to have no objection to the disclosure of their names to the public. He can therefore see no public interest in withholding their names.
95. In relation to the remaining six trusts which objected to disclosure, the Commissioner asked the public authority for information as to why their positions were different to the other trusts. The public authority was unable to provide him with any explanation as to why there was any difference. Without such evidence the Commissioner is unable to see why the information in the report that related to those trusts, as opposed to the other six trusts which did not object to disclosure, was sensitive and why they would have been adversely affected by release.
96. Given the lack of evidence on which the Commissioner can conclude that the trusts would have suffered any harm from disclosure, and that the information was approximately three years old at the time that this exemption was applied, he is not persuaded that any prejudice that might have been suffered by the public authority to its relationship with the trusts and other NHS organisations would have been significant in terms of its severity, extent or frequency. He is therefore not convinced that there was a strong public interest in withholding this information.

### **Public interest arguments in favour of disclosing the information in relation to section 36(2)(b)(ii) and 36(2)(c)**

97. As the public interest arguments in favour of disclosure in relation to section 36(2)(b)(ii) and 36(2)(c) were the same, the Commissioner considered them both together.
98. The Commissioner recognises that there is a general public interest in the disclosure of information which would further the public's understanding of and participation in debates on issues of the day. He is aware that the issue of the treatment of overseas visitors to the UK under the NHS has been an issue on which there has been a considerable amount of public comment. The disclosure of this information would therefore have assisted the public in gaining a better

understanding of these issues and in being able to contribute to the debate that was taking place.

99. Disclosure would also have provided the public with more information on the effectiveness of the Government's policies in this area and, particularly, on how effectively its new guidance and regulations were working. In addition, it would have provided the public with detailed information on the approaches being adopted by specific trusts and how well they were implementing the relevant policies.
100. As part of the report related to how much money specific trusts had recovered in relation to the treatment of overseas visitors, the release of the information would have helped to promote accountability and transparency in the spending of public money in the NHS.
101. The information would also have contributed to allowing individuals to gain a better understanding of decisions made by public authorities that affected their lives. This is particularly the case in relation to those people who were most likely to be affected by the policies in this area, overseas visitors who may have been liable for the payment of fees for treatment that they received. The release of this information may have helped them to gain a better understanding of how policies were being applied in practice.
102. After considering the public interest arguments, the Commissioner has decided that the public interest in maintaining the exemption did not outweigh the public interest in disclosing the information in relation to section 36(2)(b)(ii) or 36(2)(c). He has therefore determined that section 36(2)(b)(ii) and 36(2)(c) were not applicable to the withheld information.

## **The Decision**

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103. The Commissioner's decision is that the public authority has not dealt with the following elements of the request in accordance with the requirements of the Act:
  - it did not state in its refusal notice that section 41 was applicable to the information that had been requested and explain why the exemption applied. It therefore breached section 17(1)(b) and (c);
  - it incorrectly applied sections 36 and 41 to the information that was withheld.

## **Steps Required**

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104. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- to disclose the withheld information to the complainant.

105. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

### **Other matters**

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106. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

- that it was necessary for him to advise the public authority that an Information Notice would be issued before he obtained a full explanation as to why information had been withheld;
- that it appears that the public authority consulted with the trusts which provided information for the report after it had made a decision to withhold their names. Under Part IV of the section 45 Code of Practice the Commissioner would expect that consultations with relevant third parties would take place prior to a decision being reached;
- that a proper record does not appear to have been kept by the public authority of the opinion given by the qualified person in relation to the application of section 36 to the withheld information;

### **Failure to comply**

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107. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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108. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

109. 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.

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

**Dated the 15<sup>th</sup> day of April 2008**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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

## Legal Annex

### Formulation of Government Policy

**Section 35(1)** provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.

### Prejudice to effective conduct of public affairs.

**Section 36(1)** provides that –

“This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

**Section 36(2)** provides that –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
  - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
  - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
  - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
  - (i) the free and frank provision of advice, or
  - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

**Section 36(3)** provides that –

“The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).”

**Section 36(4)** provides that –

“In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

**Section 36(5)** provides that –

“In subsections (2) and (3) "qualified person"-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,

**Information provided in confidence.**

**Section 41(1)** provides that –

“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.”