

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 28 July 2008

**Public Authority:** Department of Health  
**Address:** Skipton House  
80 London Road  
London  
SE1 6LH

### Summary

---

The complainant made a request to the Department of Health (the "DoH") regarding the release of details of abortion statistics for 2003, where those abortions had been carried out under 'ground (e)'. This request was made under the Freedom of Information Act 2000 (the "Act"). Some information had already been published by the DoH in the annual abortion statistics for England and Wales. However, it suppressed statistics where the number of occurrences was less than 10, instead marking it as "...". The DoH refused to disclose this information, and cited section 36 of the Act. After carrying out an internal review the DoH upheld the use of section 36, and also cited sections 40 and 44, as it believed that the disclosure of this information would be in breach of the Abortion Regulations 1991. During the course of the investigation the DoH informed the Commissioner that it was only relying upon sections 40 and 44 to withhold the information in question. After considering the circumstances of the case the Commissioner decided that the requested information was not personal data, and that therefore section 40 was not engaged. He also decided that the disclosure of the withheld information would not be in breach of the Abortion Regulations 1991, and therefore section 44 was not engaged. Therefore he requires that the withheld information be released. Additionally the Commissioner also decided that the DoH had acted in breach of section 17(1), as it had taken longer than 20 working days to issue a refusal notice.

### The Commissioner's Role

---

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Act. This Notice sets out his decision.

## The Request

---

2. On 21 February 2005 the complainant made the following request to the DoH:

“We refer to our previous correspondence in relation to the 2003 abortion statistics wherein we expressed concern about the significant change to the format of the statistics for abortions carried out under ground E. We are especially concerned by the decision of the Department of Health to withhold the breakdown of abortions for congenital malformations, chromosomal abnormalities and other conditions, which, together with the gestational age of the foetus, have been included since 1995.”

The complainant requested that the DoH release the full details of the abortion statistics for abortions carried out under ground (e) without any figures being suppressed.

3. The DoH responded in a letter dated 22 April 2005. It stated it had recently grown concerned that requests for information about abortion statistics could lead to a breach of an individual's confidentiality where low numbers of cases had been identified in the statistics, and that therefore it had decided only to publish summary data only for 2003. It went on to state that,

“Under the Abortion Regulations 1991, any doctor who performs an abortion must send the Chief Medical Officer (CMO) details of the determination. Data derived from the information furnished to the CMO under the regulations is published annually by way of the Abortion Statistics. However, this data can only lawfully be disclosed if it is sufficiently abstract from the information sent to the CMO, as set out in the regulations.

Data will not be sufficiently abstract where the numbers of cases involved are small and/or where there is a risk of identification of the individuals involved by virtue of the fact that the information disclosed could be put together with other information which is, or may become, available.

We have asked the National Statistician to provide the [DoH] and the new Health and Social Care Information Centre with guidelines for interpreting the National Statistics Code of Practice and associated protocols in the handling of health statistics across the health community, in a way that balances data confidentiality risks with the public interest in the use of the figures. We expect to receive these in the summer.

Once we have received the guidelines, we will carefully consider what the implications are for the publication of abortion data and publish what further abortion data for 2003 we feel able to given the need to protect the identity of those involved.

The [DoH] has therefore decided not to disclose the information you requested. We consider that it is appropriate to rely on the exemptions set

out in section 36 of the [Act]. This is on the basis that publication before we have had the results of the National Statistician's review and determined what we can legally release would be prejudicial to the effective conduct of public affairs."

The DoH then went on to consider the public interest test, and found that the public interest in maintaining the exemption outweighed the public interest in disclosure.

4. In a letter dated 24 May 2005 the complainant requested an internal review.
5. The DoH acknowledged this request in a letter dated 25 May 2005.
6. The complainant contacted the Commissioner on 12 January 2006 to complain about the initial refusal by the DoH and the lack of response to her request for an internal review. The Commissioner contacted the DoH on 26 January 2006 and was informed that a decision had been made in relation to the internal review, and would be sent out shortly. The Commissioner advised the complainant to contact him again if she was unhappy with the outcome of the internal review.
7. The complainant contacted the Commissioner again in March 2006 and informed him that she had still not received the result of the internal review. The Commissioner contacted the DoH again on 23 March 2006 in order to ask whether the internal review had yet been carried out.
8. In a letter dated 7 April 2006 the DoH informed the complainant that it had completed the internal review. In this review the DoH upheld the use of section 36 to withhold the information in question. The DoH stated that it also believed that section 44 of the Act applied as,

"...the Abortion Regulations 1991 prohibit disclosure of a notice of termination of pregnancy given to the Chief Medical Officer under the Regulations, except in defined circumstances, none of which apply here. The Department considers that it is prohibited from publishing the information you are seeking because this would involve disclosing small numbers of cases. We concluded that this information would not be sufficiently abstract from that provided to the CMO under the Regulations, especially where there is a risk that individual patients or medical practitioners might be identified from the information alone or when it is put together with other information."

Finally the DoH also informed the complainant that it believed that section 40 applied as the requested information was the personal data of the patients and doctors concerned, and it would not be fair to release this information as disclosure would contribute to a risk that either might be identified.

9. The DoH went on to inform the complainant that following the publication of the Office for National Statistics (the "ONS") guidance on the disclosure of abortion

statistics in July 2005, it had published more detailed statistics.<sup>1</sup> However, it should be pointed out that these were not to the level requested by the complainant.

## Background

10. In order to put this request into context the Commissioner believes that he should initially provide some background information to this request. The Abortion Act 1967 requires doctors to notify the Chief Medical Officer (the “CMO”) when they carry out an abortion. Doctors provide the CMO with the information specified in the Abortion Regulations 1991. This information is provided on Abortion Notification forms – which according to the DoH are held for three years. Statistical data is drawn from the information on these forms and is published annually, and has been so since 1968. Up until 2002 the ONS processed and published this data, however in that year the DoH took over this responsibility.
11. The Abortion Notification form contains the details of the patient and the abortion which has been carried out. Section 6 of the form lists the grounds for terminating the pregnancy. This request is concerned with ground (e) abortions – which are defined as procedures carried out where, “there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.” The doctor is required to state the foetal abnormality (and the method of diagnosis) or other reason for termination, e.g. the condition in the pregnant woman causing a suspected condition in the foetus.<sup>2</sup> The published ground (e) statistics give some details of the principal condition of the foetal abnormality, the total number of abortions carried out because of that condition, and how many abortions were carried out because of that condition when the foetus was over 24 weeks gestation. These statistics relate to the population of England and Wales and are not broken down to a smaller geographical area.
12. Regulation 5 of the Abortion Regulations 1991 prohibits the disclosure of the notices given to the CMO, except as permitted by the Regulations.
13. Regulation 5 allows for disclosure to an officer of the DoH authorised by the CMO, or to an officer of the Welsh Office authorised by the CMO.
14. Up until, and including, 2002, very detailed statistical data were published, including data showing counts of 0, 1 and 2 cases. This statistical information has been published since 1968. However in 2003 the DoH stopped publishing such detailed figures, and only published summary figures instead. Following the publication of the ONS guidance for abortion statistics, the DoH did publish more detailed statistics. However these were not as detailed as those published prior to 2003, and the DoH only publishes figures relating to ground (e) abortions where the numbers of occurrences were 10 or more. Statistics for numbers less than 10 (including 0) are suppressed and marked as “...” – it is this suppressed information which is the focus of the request in this case.

---

<sup>1</sup> The ONS guidance “Guidance for Abortion Statistics” is available at: [www.statistics.gov.uk/downloads/theme\\_health/abortion\\_stag\\_final.pdf](http://www.statistics.gov.uk/downloads/theme_health/abortion_stag_final.pdf).

<sup>2</sup> DOH Guidance Note for completing the Abortion Notification Form HSA4 (in England and Wales), p3.

## ONS Guidance

15. The ONS guidance, "Disclosure Review for Health Statistics – Guidance for Abortion Statistics," was published in July 2005.
16. The DoH has explained to the Commissioner that following the publication of the ONS guidance abortion statistics were suppressed if the numbers concerned are small and are considered, by the guidance, to be 'unsafe'. According to the ONS guidance these 'unsafe' numbers (which are referred to in the guidance as 'unsafe cells') are counts of abortions that are:
  - Zero, unless no other value is logically possible,
  - Less than 5 for Government Office Region in England, the country of Wales, or any larger geographical area,
  - Less than 10 for any geographical area smaller than the Government Office Region in England or the country of Wales,
  - Less than 10 for highly sensitive variables,
  - Associated with either 1 or 2 practitioners, or
  - Associated with either 1 or 2 hospitals.
17. The highly sensitive variables are:
  - Young ages (less than 15 years of age),
  - Late gestation (over 24 weeks),
  - Procedure by gestation, and
  - Medical conditions.
18. Information regarding ground (e) abortions relates to 'medical conditions' and is therefore considered highly sensitive by the guidance. Therefore figures for less than 10 occurrences are suppressed and marked as "..."

## The Investigation

---

### Scope of the case

19. On 23 May 2006 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the DoH's refusal to disclose the requested information.
20. Although it was not raised as an issue by the complainant the Commissioner has also considered the length of time it took the DoH to issue the initial refusal notice.

## Chronology

21. On 6 August 2007 the Commissioner wrote to the DoH and asked it to provide him with its submissions as to why it thought the information in question should be withheld. In relation to its use of sections 40 and 44 he drew the DoH's attention to its submissions on a different case relating to national abortions statistics<sup>3</sup> and asked whether it was content to rely upon the arguments it had submitted in that case. In relation to its use of section 36 he referred to the refusal notice – which had stated that this was being cited as the DoH was awaiting the publication of the ONS guidance – and noted that by the time of the internal review this guidance had been published. The Commissioner asked the DoH whether it was still seeking to rely upon section 36 to withhold the information in question.
22. The DoH responded in a letter dated 5 September 2007. It confirmed that it was content to rely upon the arguments advanced in the previous case (FS50122432), in relation to its use of sections 40 and 44, and referred him in particular to two letters dated 10 October 2005 and 8 March 2006. In its letter dated 10 October 2005 the DoH had provided the Commissioner with arguments as to why it believed that the disclosure of small number statistics would breach the Abortion Regulations 1991 (therefore engaging section 44 of the Act). It explained the background which informed its decision to no longer publish abortion statistics in full and to withhold small number statistics. In this letter the DoH had acknowledged that although individuals could not be identified from small figure statistical information in isolation, in practice small figure statistical information could lead to the identification of an individual patient or doctor when it was read together with other information which might become available.
23. In order to support this argument the DoH referred the Commissioner to an incident where it argued that this had occurred. The DoH referred to an incident in 2002 – 2004, when a member of the public had made a complaint to the Police following the publication of the 2001 Abortion Statistics (which at that time were published in full, and did not suppress small figure statistics). The 2001 figures had shown that an abortion had been carried out under ground (e) (in this case for a foetal abnormality of a cleft lip or palate) over 24 weeks gestation. The DoH had provided information to the Police in order to assist their investigation of this complaint. After the Police decided not to take any further action against the doctors involved the member of the public sought a Judicial Review of this decision, during which the police force who had investigated the original complaint were named as a defendant. The DoH informed the Commissioner that from this information journalists were able to establish which hospitals came under that constabulary, and from that to deduce the name of the doctor who they thought had most likely to have carried out the procedure. The doctor was named as the doctor possibly connected to this abortion, and he later publicly confirmed that he had carried out the procedure. For ease of reference this will be referred to as the “2002-2004 Incident” throughout the rest of this Notice.

---

<sup>3</sup> FS50122432. The Decision Notice for this case is available on [www.ico.gov.uk](http://www.ico.gov.uk).



24. In the letter dated 5 September 2007 the DoH also provided supplemental arguments to the application of these exemptions. It informed the Commissioner that information surrounding ground (e) abortions was regarded as highly sensitive by the ONS guidance, and referred the Commissioner to the ONS guidance. It also again referred the Commissioner to the 2002-2004 Incident and argued that this directly illustrated that small number statistics on the medical condition of an aborted foetus could be used (in conjunction with other information) to identify the medical practitioner who performed the abortion. Finally the DoH confirmed that the internal review had merely upheld its initial use of section 36 (i.e. before the publication of the ONS guidance) and stated,

“After DH received the National Statistician’s advice in July 2005 and we considered how data should be published in the future, Section 36 was no longer relevant to this case but a decision was made that Sections 40(2) read together with 40(3)(a)(i), and 44(1)(a) were now the relevant exemptions.”

25. The Commissioner wrote to the DoH again on 6 November 2007, and asked it to provide further information to support its use of the exemptions. In particular he asked the DoH to provide further arguments surrounding the potential identifiability of small number statistics, and how the publication of these figures could lead to individuals (patients or doctors) being identified.
26. Following two telephone conversations the Commissioner wrote to the DoH again on 14 December 2007 and informed it that he had not yet received a response. He informed that DoH that if he did not receive a response by 2 January 2008 he would proceed to a Decision Notice based on the arguments previously submitted.
27. The DoH provided the Commissioner with a response in a letter dated 17 December 2007. In this letter the DoH provided further arguments in support of its use of sections 40 and 44. It also provided the Commissioner with further reasons as to why it believed that the disclosure of this information could lead to the identification of individuals. In support of its argument that there would be a reasonable likelihood of identification if the requested information were to be released, the DoH drew the Commissioner’s attention to the ONS guidance, and in particular to two scenarios which it considered, “those that are appropriate for the release in question.” These were:

“Self-identification/identification: Where a cell has a large value, risks arising from identification are not usually significant. Where a cell has a small value, this does need more consideration as identification or self-identification can lead to the discovery of rareness, or even uniqueness, in the population of the statistic. For certain types of information, rareness or even uniqueness may encourage others to seek out the individual. The threat of reality of this could cause harm or distress to the individual, or may lead them to claim that the statistics are inadequate to protect them, and therefore others. Due to the sensitive nature of abortion statistics, and in particular those due to medical conditions protection should be provided against identification.

The Motivated Intruder: Here the information in the statistic is combined with information from local sources to identify an individual and disclose further details...Although the local sources reveal the identity of the individual it is the statistics that cause the motivated intruder to start looking and attempting to reveal what is disclosive.”

28. In this letter the DoH also made reference to sections 36 and 38 of the Act.
29. In an email dated 10 January 2008 the Commissioner asked the DoH a series of factual questions, in order to provide further background in relation to its arguments. He also asked for a copy of the withheld information. The Commissioner noted the DoH's reference to sections 36 and 38 in its last letter, and asked it to clarify whether it was now seeking to rely upon these exemptions as well.
30. Following two telephone conversations the DoH responded to the Commissioner in an email on 28 January 2008, and provided a copy of the withheld information. In a letter attached to this email the DoH provided answers to the factual questions asked by the Commissioner and also confirmed that it was not relying upon sections 36 and 38 to withhold the information in question.

## Analysis

---

### Procedural matters

#### Section 17

31. Section 17(1) states that a public authority which is relying on a claim that the information is exempt must, within the time for complying with section 1, issue a refusal notice which:
  - (a) states the fact that information is exempt,
  - (b) specifies the exemption in question, and
  - (c) states why the exemption applies.
32. Section 10 of the Act provides that a public authority must comply with section 1 of the Act no later than the twentieth working day following receipt of the request.
33. The complainant made her request on 21 February 2005. The DoH did not issue a refusal notice until 22 April 2005. This refusal notice only cited section 36. The DoH did not cite sections 40 and 44 until it carried out the internal review on 7 April 2006.
34. The full text of section 17 can be found in the legal annex at the end of this Notice.



## Exemptions

35. During the investigation of this case the DoH confirmed to the Commissioner that it was seeking to rely upon sections 40 and 44 to withhold the information in question. The Commissioner has examined the application of each of these exemptions in turn.

### Section 40(2)

36. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied.
37. One of the conditions, listed in section 40(3)(a)(i), is where the disclosure of the information to any member of the public would contravene any of the principles of the DPA.
38. In its letter to the complainant dated 7 April 2006 the DoH stated that it believed that the requested information is the personal data of both the patient and the doctor who carried out each of these procedures, "and it is not fair to release it because that would contribute to a risk that either might be identified."
39. The DoH has confirmed to the Commissioner that it believes that this information is personal data, and that the release of this information would be in breach of the first and second principles of the Data Protection Act 1998 (the "DPA"). Therefore it believes that section 40(2) of the Act applies.
40. The first principle of the DPA requires that the processing of personal data is fair and lawful and,
- at least one of the conditions in schedule 2 is met, and
  - in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.
41. The second principle of the DPA requires that:
- personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or purposes.
42. In order to reach a view on the DoH's use of this exemption the Commissioner initially considered whether disclosure of the requested information would involve the disclosure of personal data.

### Is the requested information personal data?

43. Section 1 of the DPA defines personal data as data which relates to a living individual who can be identified:
- from that data,
  - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

44. In its correspondence with the Commissioner the DoH has provided two arguments as to why it believes that the withheld information is personal data.
45. Firstly, the DoH has argued that the withheld information, when combined with other information it holds, i.e. the information on the Abortion Notification forms, is personal data. Therefore it has argued that it holds the information as personal data, and any processing it carries out in relation to the information involves the processing of personal data. It believes that disclosing the withheld information in these circumstances would be in breach of the first and second principles of the DPA.
46. The Commissioner is not persuaded by this argument. The statistical information that has been requested is not personal data to the extent that none of the individuals concerned can be identified by someone who possesses that information alone. The Abortion Notification forms, from which the numerical information is gleaned, contain details about individual patients, such as their name, date of birth, and grounds for abortion, are personal data – but the disclosure requested will be of statistical information extracted from the information contained on those forms. The Commissioner believes that this statistical information is so far removed from the information on the Abortion Notification forms that it no longer retains the attributes of personal data. In reaching this view the Commissioner has also noted that the DoH accepts that an individual cannot be identified by the requested information alone.
47. Secondly the DoH has argued that the withheld information is personal data as the disclosure of these small figure statistics could lead to the identification of either the patient or the doctor who carried out the abortion, when combined with other information which may be publicly available.
48. In order to support this argument the DoH has referred the Commissioner to the ONS guidance, and to the circumstances surrounding the 2002-2004 Incident.
49. In reaching a view as to whether the withheld information is personal data the Commissioner has been mindful of the wording of section 1 of the DPA and Article 2 of Directive 95/46/EC (the European directive enacted in the UK by the DPA). Article 2 states that the term personal data, “shall mean any information relating to an identified or identifiable natural person.” Recital 26 of the Directive states that, “to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or any other person.”
50. Bearing this in mind, during the course of the investigation the Commissioner asked the DoH to provide further arguments and evidence as to the other information which would be reasonably likely to come into the hands of ‘any other person’ which would lead to the identification of individual doctors or patients if the withheld information were to be disclosed. In response the DoH quoted the ONS guidance, and in particular cited two scenarios from that guidance (see paragraph 27). It also again referred the Commissioner to the 2002-2004 Incident. The Commissioner believes that it is important to note that, other than the 2002-2004 Incident, the DoH did not provide him with any other examples of

either a doctor or a patient being identified through the publication of the national abortion statistics (which have been published since 1968).

51. Whilst considering the DoH's arguments on the identifiability of the withheld information the Commissioner also asked it to provide further factual information, which it provided in its letters of 17 December 2007 and 25 January 2008. This information centred on the numbers of hospitals, clinics and doctors involved in ground (e) abortions in 2003. The Commissioner has noted that in 2003 there were 420 NHS hospitals that were able to carry out an abortion under ground (e).
52. The Commissioner has gone on to consider in turn whether the withheld information is the personal data of doctors or patients.

Is the requested information the personal data of doctors?

53. The DoH has argued that there is a high risk that the doctors who carried out individual procedures will be identified from the disclosure of this information, and that therefore the small figure statistics should be regarded as the personal data of the doctors. In order to support its argument it pointed out to the Commissioner that a large number of the suppressed statistics related to ground (e) abortions which were carried out at a late stage of pregnancy. It explained that, although there are a large number of NHS hospitals and clinics who can carry out an abortion, there are only a limited number of doctors who are, "willing to perform abortions over 24 weeks." Therefore, although the abortion statistics relate to a large geographical area (i.e. England and Wales) this is irrelevant as there are only a limited number of doctors who would carry out late abortions – which leads to an increased risk of the identity of a doctor who carried out a particular abortion being identified.
54. The Commissioner has considered this argument carefully. During the course of the investigation he asked the DoH to provide him with the numbers of hospitals where abortions over 23 weeks were carried out in 2003. He also presented a specific scenario to the DoH in order to consider how likely it was that an individual doctor could be identified from this information. The DoH provided answers to these requests – although the Commissioner does not believe that it is appropriate to record the exact numbers involved in this Notice, as this information is not itself in the public domain.
55. The Commissioner also considered the two scenarios provided by the DoH which it stated supported its argument that if the requested information was disclosed, there would be a reasonable likelihood of identifiability. These scenarios were drawn from the ONS guidance, and are detailed in paragraph 27 above.
56. The main thrust of both of these scenarios is that the disclosure of small figure statistics could motivate a requestor to try and seek out other information in order to identify the individuals concerned. Although it is not the small figure statistics themselves which identify the individuals, other information from 'local sources,' which the requestor has been motivated by the disclosure to try and find out may lead to the identification of individuals.

57. The Commissioner has carefully considered the arguments presented by the DoH but is not persuaded by them. Although he acknowledges that it is a viable scenario that the disclosure of the withheld information may motivate an individual to try and find out further information, he does not believe that this means that the requested information is, in itself, personal data. As the DoH itself has acknowledged, an individual cannot be identified from the withheld information alone. He is not persuaded that these scenarios in themselves can lead him to accept that the withheld information is the personal data of the doctors who carried out particular abortions. Indeed he believes that were he to accept the logic of these arguments, he may be led to deduce that the publication of all the abortion statistics would involve disclosure of the personal data of the doctors concerned.
58. The Commissioner has taken into account the DoH's arguments, the withheld information, the events surrounding the 2002-2004 Incident and the numbers of possible locations where abortions could be performed, together with the factual information provided by the DoH in response to his questions. He has also noted that the DoH has not provided him with examples of any other specific information which is in the public domain, or is reasonably likely to come into the possession of a requestor, which would lead to the identification of a particular doctor who carried out a particular abortion if the withheld information was to be disclosed.
59. Finally the DoH has also referred the Commissioner to the 2002-2004 Incident. In its letter to the Commissioner dated 5 September 2007 the DoH wrote that this incident, "directly illustrates that small number statistics on the medical condition of an aborted foetus can be used (in conjunction with other information) to identify the medical practitioner who performed the abortion."
60. After considering these points the Commissioner is not persuaded by the DoH's arguments that the disclosure of the requested information would, in itself, be likely to lead to the positive identification of a particular doctor who carried out a particular abortion. The Commissioner believes that as a worst case scenario if this information was to be released a requestor with a substantial amount of additional knowledge (which, it should be noted, the DoH has not shown to the Commissioner to be in the public domain or to be reasonably accessible) may be able to deduce that a particular doctor had possibly carried out a particular abortion. In reaching this view he has noted that in the 2002-2004 Incident the doctor was named as being the one who was suspected as having carried out that particular procedure – it was only when that doctor took the voluntary step of confirming he had carried out that particular abortion that the doctor was positively identified. In reaching this view the Commissioner has also noted the large number of possible locations for an abortion to be carried out.

Is the requested information the personal data of patients?

61. As stated at paragraph 46 above, the Commissioner does not believe that the withheld statistical information is, on its own, personal data.
62. Therefore in reaching a view on whether the withheld information is the personal data of patients the Commissioner has considered the likelihood of an individual

- patient being identified from the withheld information and other information which it is reasonably likely may come into the possession of a member of the public.
63. The DoH has argued that the disclosure of the withheld information, together with other information which it referred to in its letter of 10 October 2005 as, “readily available,” may lead to the identification of patients, and that therefore this information is the personal data of those patients.
  64. During the course of the investigation the Commissioner sought to establish what other information was ‘readily available’, and he asked the DoH to provide further submissions to support its arguments that if this information was to be disclosed there would be a reasonable likelihood of identifiability.
  65. In response the DoH referred the Commissioner to the events surrounding the 2002-2004 Incident and also to the ONS guidance, pointing out that the guidance regards information about abortions as, “amongst the most sensitive of any information published.” The DoH did not provide the Commissioner with further examples of what other information is ‘readily available’ that would allow an individual to be identified from the publication of small number statistics.
  66. As noted above, the DoH has also referred the Commissioner to the two scenarios from the ONS guidance described at paragraph 27 above.
  67. The Commissioner has considered the DoH’s arguments that the release of this information, when combined with other information which it is reasonably likely will come into the possession of a requestor, may lead to the identification of the patients concerned. He has noted that the DoH has not provided him with any specific examples of other information which is readily available which could be combined, together with the withheld information, to identify any of the patients concerned. Further to this, in regard to the 2002-2004 Incident, the Commissioner has noted that the patient was never identified.
  68. The Commissioner has gone on to consider the nature of the withheld information itself. In reaching a view on this point the Commissioner has considered the population size involved, the geographical area concerned, the size of the suppressed figures and the scenarios presented by the DoH.
  69. In larger populations it is more difficult to identify individuals from the data released in statistical tables. As a rough guide to the numbers of females in England and Wales the Commissioner has referred to the 2001 Census. According to the 2001 Census there were 14,172,832 females living in England and Wales between the ages of 10 and 49.
  70. The Commissioner accepts that even where the population size is relatively large there would be a greater likelihood of identification where that population is contained within a small geographic area. However in this case the information relates to England and Wales.
  71. Whilst arguing its position the DoH has relied considerably on the ONS guidance, and, as noted above, has quoted two specific examples which it believes are

most appropriate to support its view about the identifiability of the withheld information. In regard to the specific scenarios presented by the DoH (which were taken from the ONS guidance), for the reasons listed at paragraph 57 above, the Commissioner is not persuaded by these arguments.

72. On a more general level, after considering the ONS guidance the Commissioner notes that simply because a cell contains small numbers, the cell is not automatically suppressed. The ONS guidance makes it clear that a public authority should consider each case on its merits before applying the relevant guidance. Further to this he has noted that in some instances the ONS guidance advises that abortion statistics are only suppressed for figures less than five – guidance the DoH follows. For example the published 2006 Abortion Statistics list in greater detail the numbers of females who were non-UK residents by country of origin who had had an abortion in this country, e.g.
- Canada – 5
  - Saudi Arabia – 5
  - Nigeria – 5
  - Greece – 5
  - Switzerland – 6
  - Japan – 6
  - Qatar – 6
73. A further example is information published by the Scottish Centre for Infection and Environmental Health, which published statistics on the incidence of HIV/AIDS. For the three month period from October 2004 to December 2004 a table sets out new reported incidences of HIV infection by health board and method of infections. Many of the table's cells contain small numbers and in many cases numbers of 1 or 2. The Commissioner notes that in this case no suppression took place despite the sensitive nature of the information and the fact that the geographical area was much smaller than in the present case (the table is by Health Board).
74. The Commissioner acknowledges that the ONS guidance sets out thorough and detailed guidelines on the publication of national abortion statistics. However he believes that a reliance on a policy of non-disclosure based on this guidance in respect of such information is not in itself a sufficient basis to withhold that information when requested under the Act.
75. After considering the DoH's arguments in detail, the geographic area the withheld information relates to, and the population size in question, the Commissioner is of the view that for an individual to use the withheld information to identify an individual patient a very considerable amount of additional knowledge about that patient would be needed and the likelihood of this occurring is remote. In the Commissioner's view the DoH has not sufficiently demonstrated that there is a reasonable likelihood of an individual patient being identified from the information requested in this case and from other information which it is reasonably likely may come into the possession of a member of the public.
76. In reaching this view the Commissioner has also noted that during the investigation of this case (and of FS50069392), the DoH did not provide him with



- one example of a patient being identified from already published National Abortion statistics.
77. Finally the Commissioner also notes that the DoH suppresses statistics where the count is “0” – in line with the ONS guidance. However, given the definition of personal data and the circumstances of this case, the Commissioner does not believe that in this case a “0” count is personal data, as it does not relate to a living individual. Therefore in relation to a “0” count, he does not believe that section 40 can apply in this case.
78. The Commissioner acknowledges that this case deals with very sensitive information. Bearing this in mind the Commissioner has, during the course of the investigation, asked the DoH a number of questions in order to further inform him about the likelihood of individuals being identified from the publication of these small number statistics. He has also given due consideration to the ONS guidance on the publication of abortion statistics.
79. The Commissioner accepts that there is a problematic area where several requests made under the Act, which in themselves are focused on non-personal data, may be compiled to form a ‘mosaic’ of requests, which can lead to personal data being deduced from a number of disclosures of information. He acknowledges that it is possible that an informed individual, with a particular interest in an issue, may be able to discover personal data about particular individuals by combining apparently anonymous data with other information at their disposal.
80. Bearing this in mind, and given the sensitivity of the withheld information, during the investigation of this case the Commissioner asked the DoH to explain further how it would be likely for a requestor to be able to build up a ‘mosaic’ of information which would allow them to identify an individual if the withheld information was released. The DoH’s submissions are detailed above (in particular (in paragraphs 22 – 27, 50 & 53). However, after considering the DoH’s arguments in detail the Commissioner does not believe that the DoH has provided compelling arguments in order to support its use of this exemption. Further to this he notes that the DoH was unable to provide him with any examples of other information which is in the public domain and is readily available, which would feed into a ‘mosaic’ of information and would lead to the definite identification of individual patients or doctors.
81. In reaching a view on the application of section 40, whilst acknowledging that this information is of a high degree of sensitivity to the individuals concerned, the Commissioner has had to consider the facts of the case and the arguments advanced by the DoH. He has noted the large geographical area this statistical information relates to, the large population figures, and the number of locations where a ground (e) abortion could be carried out in England and Wales in 2003. The Commissioner has also taken into account the recent judgment of the House of Lords in the case of *CSA v Scottish Information Commissioner* (14 July 2008), which has some parallels to this case, but is satisfied that - in this case – the representations made by the DoH do not indicate a significant risk of direct or indirect identification. Taking all these points into consideration, the

Commissioner has concluded that the requested information is not the personal data of either doctors or patients. As such, he does not believe that the section 40 exemption is engaged.

82. The Commissioner notes that the DoH also stated that the information is 'sensitive personal data' as defined by section 2(e) and (f) of the DPA – which state that personal data relating to an individual's physical or mental health or condition is that individual's sensitive personal data. The Commissioner acknowledges that if the information fell within the definition of personal data in section 1 of the DPA the information would constitute the sensitive personal data of the patients. However the Commissioner does not believe that it would be the sensitive personal data of the doctors.
83. The full text of the section 40 exemption can be found in the Legal Annex at the end of this Notice.

#### **Section 44**

84. Section 44 of the Act allows a public authority to withhold information if disclosure is prohibited by or under any other enactment. The DoH stated that in this case disclosure of the withheld information is prohibited by the Abortion Regulations 1991 (the "Regulations") and therefore section 44(1)(a) of the Act applies.
85. The DoH has argued that disclosure of small figure statistics for ground (e) abortions (i.e. numerical figures less than 10) is prohibited by regulation 5 of the Regulations.
86. In support of its use of this exemption the DoH has informed the Commissioner that,

"The disclosure of any information which is protected by the Abortion Regulations is a criminal offence, even if no individual is identified by the disclosure alone. Only once there has been sufficient aggregation is no offence committed, because at that point it changes into new information. For example, in our opinion aggregation is not sufficient where the place of abortion can be determined from the disclosed information and other facts which may be in the public domain."

In order to explain its reasoning on whether it considers numbers sufficiently aggregated the DoH has referred the Commissioner to the ONS guidance. Further to this the DoH has also referred the Commissioner to the 2002-2004 Incident.

87. Regulation 5 states that, "a notice given or any information furnished to the Chief Medical Officer in pursuance of these Regulations shall not be disclosed," other than in particular circumstances as set out in paragraphs (a) to (h) of the regulation. None of the particular circumstances as set out in paragraphs (a) to (h) apply in this case. The full text of regulation 5 of the Regulations can be found in the Legal Annex at the end of this Notice.

88. Regulation 4 requires that any practitioner carrying out a termination of pregnancy must, within seven days of the termination, provide the CMO with a notice of termination and other information as specified in Schedule 2 of the Regulations (as amended by the Abortion (Amendment)(England) Regulations 2002). This information is provided to the CMO on the Abortion Notification form. The Commissioner understands that the Abortion Notification form includes the following:
- Details of practitioner terminating the pregnancy (name, address, and GMC registration number).
  - Certification including the name and address of the two doctors who provided the opinion to say that the woman has grounds for an abortion.
  - Patient's details (date of birth, postcode, ethnicity, marital status, hospital/clinic number or NHS number, parity – number of previous pregnancies resulting in (i) live or still birth, (ii) spontaneous miscarriage or ectopic pregnancies, or (iii) an abortion).
  - Treatment details (name and place of termination, funding (e.g. NHS, NHS agency or Non-NHS), feticide, surgical terminations, and medical terminations.
  - Gestation.
  - Grounds for the abortion.
  - Selective termination.
  - Chlamydia screening.
  - Complications.
  - Death of woman.
89. While the Regulations do not make express provision for statistics to be released, abortion statistics have been published since 1968. According to the DoH this is because the published statistics were considered to be anonymised and different from the information sent to the CMO.
90. The Commissioner is not convinced by the DoH's argument in support of its application of this exemption and the applicability of this statutory bar. He has noted that the Regulations contain no specific provision for the publication of statistics based on the information contained in the Abortion Notification forms, nor to allow the publication of this information once it is sufficiently aggregated. Further to this, after considering the wording of regulation 5 the Commissioner believes that this prohibition only relates to information directly supplied to the CMO whether on the Abortion Notification form or otherwise. He does not believe that the regulation applies to statistical information manipulated from information contained on the Abortion Notification forms.
91. In fact the Commissioner is minded that if the DoH's view was correct and the publication of statistics for ground (e) abortions relating to less than 10 cases was in breach of regulation 5, then it would be arguable that in essence the DoH would be in breach of the Regulations each time it publishes statistics for ground (e) abortions relating to 10 or more cases, as these statistics are still gleaned from information contained in the Abortion Notification forms.

92. In reaching this view the Commissioner has noted that in an email dated 27 January 2006 the DoH informed him that no official of the DoH, including the CMO, has ever been found in breach of these Regulations. This is despite the fact that prior to 2003 the DoH published statistical information about ground (e) abortions in an unsuppressed format (i.e. showing occurrences between 0 and 9).
93. He has also noted again that some of the published National Abortion statistics refer to occurrences down to 5, and that the ONS guidance makes it clear that a public authority should consider the facts of each case before making the decision to suppress any numbers (see paragraph 72 above).
94. As the Commissioner has formed the view that the wording of regulation 5 refers to information supplied directly to the CMO and not the manipulation of this information to produce statistics, he does not believe that the statutory bar applies to the withheld information. Therefore he does not believe that section 44 is engaged.
95. The full text of section 44 can be found in the legal annex at the end of this Notice.

### **Other exemptions**

96. Although sections 36 and 38 have been referred to in this case, during the course of the investigation the DoH informed the Commissioner that it was not seeking to rely on these exemptions. Therefore the Commissioner has not considered the application of these exemptions.

### **The Decision**

---

97. The Commissioner's decision is that the DoH did not deal with the request for information in accordance with the Act. The Commissioner believes that the DoH acted in breach of section 1 of the Act in that it wrongly relied upon section 40 and section 44 to withhold the information in question. He also believes that the DoH acted in breach of section 17(1) of the Act, in that it did not issue a refusal notice within twenty working days of receipt of the request.

### **Steps Required**

---

98. The Commissioner requires the DoH to take the following steps to ensure compliance with the Act:
- Disclose a copy of the requested information.
99. The DoH must take the steps required by this Notice within 35 calendar days of the date of this notice.

## **Other matters**

---

100. Although they do not form part of this Decision Notice the Commissioner wishes to note his concern that the DoH took 11 months to carry out an internal review for the complainant. This is an issue which the Commissioner has highlighted in the practice recommendation issued to the DoH on 31 March 2008

## **Failure to comply**

---

101. 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

---

102. 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).

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 28<sup>th</sup> day of July 2008**

**Signed .....**

**Richard Thomas  
Information Commissioner**

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



## Legal Annex

### Section 17

- (1)** A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -
- (a) states that fact,
  - (b) specifies the exemption in question, and
  - (c) states (if that would not otherwise be apparent) why the exemption applies.
- (2)** Where—
- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
    - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
    - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
  - (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,
- the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.
- (3)** A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -
- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
  - (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

- (4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.
- (5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
- (6) Subsection (5) does not apply where –

  - (a) the public authority is relying on a claim that section 14 applies,
  - (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
  - (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7) A notice under section (1), (3) or (5) must –

  - (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
  - (b) contain particulars of the right conferred by section 50.

## Section 40

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

  - (a) it constitutes personal data which do not fall within subsection (1), and
  - (b) either the first or the second condition below is satisfied.
- (3) The first condition is-

  - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

    - (i) any of the data protection principles, or

- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
  - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
- (4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).
- (5) The duty to confirm or deny-
  - (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
  - (b) does not arise in relation to other information if or to the extent that either-
    - (i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
    - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).
- (6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.
- (7) In this section-
  - "the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
  - "data subject" has the same meaning as in section 1(1) of that Act;
  - "personal data" has the same meaning as in section 1(1) of that Act.

## Section 44

- (1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-
  - (a) is prohibited by or under any enactment,
  - (b) is incompatible with any Community obligation, or
  - (c) would constitute or be punishable as a contempt of court.
- (2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

## **Abortion Regulations 1991**

### **Restriction on disclosure of information**

- (5) A notice given or any information furnished to a Chief Medical Officer in pursuance of these Regulations shall not be disclosed except that disclosure may be made—
  - (a) for the purposes of carrying out their duties—
    - (i) to an officer of the Department of Health authorised by the Chief Medical Officer of that Department, or to an officer of the Welsh Office authorised by the Chief Medical Officer of that Office, as the case may be, or
    - (ii) to the Registrar General or a member of his staff authorised by him; or
  - (b) for the purposes of carrying out his duties in relation to offences under the Act or the law relating to abortion, to the Director of Public Prosecutions or a member of his staff authorised by him; or
  - (c) for the purposes of investigating whether an offence has been committed under the Act or the law relating to abortion, to a police officer not below the rank of superintendent or a person authorised by him; or
  - (d) pursuant to a court order, for the purposes of proceedings which have begun; or
  - (e) for the purposes of bona fide scientific research; or
  - (f) to the practitioner who terminated the pregnancy; or
  - (g) to a practitioner, with the consent in writing of the woman whose pregnancy was terminated; or

- (h) when requested by the President of the General Medical Council for the purpose of investigating whether there has been serious professional misconduct by a practitioner, to the President of the General Medical Council or a member of its staff authorised by him.