

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 17 November 2009**

**Public Authority:** Liverpool Women's NHS Foundation Trust  
**Address:** Crown Street  
Liverpool  
L8 7SS

### Summary

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The complainant made a request under the Freedom of Information Act 2000 (the "Act") to the Liverpool Women's NHS Foundation Trust (the "Trust") for the text of any compromise agreements it had entered into with doctors and a list of exploratory or illustratory issues which were covered by the compromise agreements. Furthermore the complainant asked the Trust to provide him with its policy on free speech and the use of gag clauses. The Trust explained that it did not hold this information but provided advice and assistance as to similar information that it did hold. In relation to the remainder of the request it confirmed that the information was held but the Trust refused to disclose this information as it stated that it was exempt from disclosure by virtue of sections 41 and section 40(2) of the Act. During the course of the Commissioner's investigation the Trust withdrew its application of the exemption contained at section 41 of the Act. The text of the compromise agreements was disclosed to the complainant in a redacted format. Furthermore the list of exploratory or illustratory issues covered by the compromise agreements was also disclosed to the complainant during the Commissioner's investigation. The Commissioner has reviewed the remaining withheld information and considers that the Trust correctly applied section 40(2) in order to redact this information from the text of the compromise agreements. However the Commissioner considers that the Trust breached sections 1(1)(b), 10(1) and 17(1)(b) and (c) in its handling of the request.

### 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 3 December 2007 the complainant made a request to the Trust for the following information:-
  - i. Please provide the text of any compromise agreements the Trust has entered with doctors that have been paid off or 'taken voluntary early retirement'. In particular, please provide a list of exploratory or illustratory issues that have been covered by the gag clause.
  - ii. Further, please provide the Trust's policy on free speech, and the use of gag clauses.
3. On 19 December 2007 the Trust responded to the complainant's request for information. In relation to part i of the request the Trust refused to provide the complainant with this information. It explained that any compromise agreements the Trust had entered into with individuals were covered by reciprocal confidentiality clauses. The Trust therefore explained that it was unable to disclose the details of any compromise agreements without breaching the Trust's obligations regarding confidentiality.
4. In relation to point ii of the complainant's request the Trust explained that it did not use gag clauses but did enter into mutually agreed legal agreements with individuals that required confidentiality to be respected by both parties. The Trust explained that it did not have a policy on 'free speech'. It stated that it had a number of policies which explicitly promoted and encouraged openness and the freedom for all staff to engage in free speech. These included the Policies and Procedures for Raising Concerns and Equality and Diversity in Employment.
5. On 22 January 2008 the Trust wrote to the complainant to let him know that it was going to carry out an internal review in relation to its response to the request. The Trust had become aware that the complainant was dissatisfied with its initial response through the Information Commissioner's Office (ICO).
6. On 6 February 2008 the Trust provided the complainant with the result of the internal review it had carried out. In relation to his request for details of compromise agreements between the Trust and doctors employed by it, it upheld its refusal and explained that the exemptions contained at section 41 and section 40 were applicable.

## The Investigation

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### Scope of the case

7. On 19 May 2007 the complainant wrote a detailed letter to the ICO to make a formal complaint about the Trust's response. The complainant asked the Commissioner to consider whether his request had been dealt with in accordance with the Act. As the Trust had not conducted an internal review at that stage the Commissioner wrote to the Trust to invite it to do so. Once the internal review had been completed, the complainant confirmed that he remained dissatisfied with the Trust's response, and therefore wished the Commissioner to undertake a formal investigation.
8. During the course of the Commissioner's investigation the complainant confirmed that point ii of the request should not form part of the investigation. This part of the request is not therefore dealt with in this Notice.
9. Furthermore during the Commissioner's investigation a significant amount of the information requested at point i of the request was also disclosed to the complainant. The remaining withheld information which will be dealt with in this Notice with the complainant's agreement is the names of the parties to the compromise agreements and the dates of those agreements.

### Chronology

10. On 12 February 2009 the Commissioner wrote to the Trust to obtain its further arguments in relation to the exemptions it had applied in order to withhold the requested information.
11. On 26 March 2009 the Trust responded to the Commissioner confirming its application of the exemptions contained at section 41 and 40(2) of the Act. It also suggested that section 12 of the Act which relates to costs may be applicable.
12. On 2 April 2009 the Commissioner wrote to the Trust to ascertain whether or not section 12 would be applicable in this case.
13. On 24 April 2009 the Trust responded to the Commissioner. It explained that much of the information requested was held by the Trust's solicitors who would charge significantly more than £25 per hour in order to search for and collate the information. It explained that due to the solicitor's charges it would exceed the £450 cost limit to comply with the request.
14. On 29 April 2009 the Commissioner wrote to the Trust to explain that notwithstanding the charges the Trust's solicitors may make, under the

Act the Trust could only attribute £25 per hour for time spent by its solicitors in searching for and collating the requested information.

15. On 6 May 2009 the Trust accepted that section 12 would not therefore be applicable in this case and confirmed that it would provide the requested information to the Commissioner for the purposes of his investigation.
16. On 27 May 2009 the Trust confirmed to the Commissioner that it had sent a copy of all compromise agreements it had entered into in the post.
17. On 11 June 2009 the Commissioner wrote to the Trust once he had received and had the opportunity to review the compromise agreements sent to him by the Trust. The Commissioner suggested that the compromise agreements could be provided to the complainant in a redacted format.
18. On 15 July 2009 the Trust provided the compromise agreements to the complainant with the redactions it had agreed with the Commissioner.
19. On 23 July 2009 the complainant confirmed to the Commissioner that he remained dissatisfied with the extent of the Trust's disclosure. The complainant explained that he was dissatisfied with the redactions made to the compromise agreements.
20. Furthermore on 31 July 2009 the complainant explained that he did not believe that the part of his request for a list of exploratory or illustratory issues covered by the compromise agreements had been answered satisfactorily. The complainant explained that by this he required a list of reasons behind why the compromise agreements had been entered into. He explained that the information he required would not be contained within the text of the compromise agreements and therefore the Trust's disclosure to date did not adequately answer this part of his request. However the complainant did agree that as the Trust had stated that the information requested at point ii of the request was not held and it had attempted to provide other information to satisfy this part of the request, this should not form any further part of the scope of the Commissioner's investigation.
21. On 31 July 2009 the Commissioner wrote to the Trust to ascertain whether it held information relevant to the scope of the complainant's request for a list of exploratory or illustratory issues covered by the compromise agreements. The Commissioner explained that the complainant wished to obtain a list of reasons as to why the compromise agreements had been entered into. The Commissioner asked the Trust to provide him with such a list if held and to provide submissions in support of the relevant exemption(s) if the Trust wished to withhold this information.

22. On 16 October 2009 the Trust provided the complainant with a list of exploratory or illustratory issues covered by the compromise agreements.
23. On 16 October 2009 the Commissioner wrote to the complainant and explained that he believed that the remaining redacted information, which the complainant disagreed with were the names of the parties to the compromise agreements and the dates of those agreements. The Commissioner asked the complainant to contact him if this was not the case. As the complainant did not contact the Commissioner to dispute his interpretation set out above the Commissioner has limited this Notice to the names of the parties to the compromise agreements and the dates of those agreements redacted from the text of the compromise agreements as this has been the focus of the complainant's dissatisfaction.

## Analysis

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### Exemptions

#### Section 40(2)

24. Section 40(2) of the Act provides an exemption for information that constitutes the personal data of third parties:

*“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.”*

25. Section 40(3)(a)(i) of the Act states that:

*“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),”*

26. The full text of section 40 can be found in the legal annex attached to

this decision notice.

27. In this case the Trust has argued that the names of the parties to the compromise agreements and the dates of those agreements constitute the personal data of those individuals and are therefore exempt under section 40(2) of the Act by virtue of section 40(3)(a)(i) as to release the information would breach the data protection principles.
28. In order to reach a view on the Trust's arguments the Commissioner has first considered whether the withheld information is the personal data of a third party. Section 1 of the DPA defines personal data as information 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.
29. In this instance the information is the names of the parties to the compromise agreements and the dates of those agreements. This is information which relates to living individuals who can be identified. The names of the parties to the compromise agreements would certainly identify the identity of the data subjects, furthermore dates may assist those with local knowledge to attach the text of the compromise agreements with an individual who is known to have left the Trust at a certain date. Therefore the Commissioner considers that the withheld information in this case does constitute the personal data of those individuals.
30. Such information is exempt if either of the conditions set out in sections 40(3) and 40(4) of the Act are met. The relevant condition in this case is at section 40(3)(a)(i) of the Act, where disclosure would breach any of the data protection principles. The Trust has argued that disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in Schedule 2 should be met.
31. In reaching a decision as to whether disclosure of the requested information would contravene the first data protection principle the Commissioner has specifically considered the following:

### **Likely Expectation of the Data Subject**

32. The Trust has argued that the data subjects would have a strong expectation of confidentiality. It explained that this is because confidentiality is expressly provided for within the text of the compromise agreements.
33. The Commissioner does not consider that the data subjects would have expected their names or the dates of the compromise

agreements they had entered into, from which they would be identifiable, to be disclosed into the public domain.

### **Distress to Data Subjects**

34. The Trust explained that the termination of employment is often a difficult process for both employer and employee, and that most employees are keen to make a clean break and move on with their lives. It suggested that this is one reason why confidentiality clauses are so common. It stated that ex-employees could suffer distress if past events that they thought had been put behind them were brought into the public domain.
35. The Commissioner's Guidance, Awareness Guidance 1 Section 40 Personal Information, states that public authorities should take into account the potential harm or distress that may be caused by the disclosure. The Guidance states that, "For example, there may be particular distress caused by the release of private information about family life. Some disclosures could also risk the fraudulent use of the disclosed information (e.g. addresses, work locations or travel plans where there is a risk of harassment or other credible threat to the individual), which is unlikely to be warranted. However, the focus should be on harm or distress in a personal capacity. A risk of embarrassment or public criticism over administrative decisions, or the interests of the public authority itself rather than the individual concerned, should not be taken into account."
36. The above Guidance can be accessed at the following:  
  
[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/personal\\_information.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/personal_information.pdf)
37. Taking into account the Trust's arguments and the Commissioner's Guidance on this issue, the Commissioner considers that disclosure into the public domain could have caused significant distress to the data subjects in a personal capacity.

### **The Legitimate Public Interest**

38. The Trust has suggested that there may be a legitimate interest in the public knowing how much the Trust has paid in settlement in relation to compromise agreements to account for public expenditure. However the Trust has confirmed that as the compromise agreements, including the settlement figures, have been provided to the complainant, albeit in a redacted format, this information has been disclosed under the Act.
39. In this case the Commissioner considers that as the Trust has disclosed the majority of the text of the compromise agreements it had entered into at the date of the request and a list of exploratory or illustratory issues covered by the compromise agreements, this goes a

significant way to meeting the legitimate interests of the public without identifying the individuals who are party to those agreements. The Commissioner therefore considers that as the legitimate expectations of the data subjects concerned have been clearly set, and as the disclosures made in this case go some way to meeting the legitimate interests of the public, the overriding of the legitimate expectations of those concerned that the information will not be disclosed cannot be justified.

40. The Commissioner therefore concludes that disclosure of the names of the parties to the compromise agreements and the dates of those agreements would be unfair and therefore the section 40(2) exemption was correctly applied to this information in this case.

## **Procedural Requirements**

### **Section 1(1)(b)**

41. Section 1(1) of the Act states that:

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

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and  
(b) if that is the case, to have that information communicated to him.”*

42. In this case the Trust did not disclose the text of the compromise agreements in a redacted format or the list of exploratory or illustratory issues covered by those agreements within the statutory time for compliance. The Commissioner therefore considers that the Trust breached section 1(1)(b) in its handling of this request.

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

43. Section 10(1) of the Act provides that:-

*“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”*

44. The Commissioner has considered whether or not the Trust complied with section 10(1) of the Act.
45. As the Trust did not comply with its obligations under section 1(1)(b) within the statutory time for compliance, it breached section 10(1) in its handling of the request.

## Section 17(1)

46. Section 17(1) states that –

*“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.”*

47. The Commissioner has considered whether the Trust has complied with section 17(1)(a), (b) and (c) of the Act.

48. The Trust stated to the complainant that section 40 of the Act was applicable in this case. The Commissioner notes that the exemptions contained at section 40 of the Act are multifaceted and the Trust did not specify the subsection of the exemptions in question which it had applied.

49. Furthermore the Commissioner considers that the Trust did not provide the complainant with an adequate or relevant explanation as to why the section 40(2) exemption by virtue of section 40(3)(a)(i) was engaged.

50. The Commissioner therefore considers that the Trust breached section 17(1)(b) and (c).

## The Decision

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51. The Commissioner’s decision is that the Trust correctly applied section 40(2) in order to redact the names of the parties to the compromise agreements and the dates of those agreements from the requested information.

52. The Commissioner does however consider that the Trust breached section 1(1)(b), section 10(1) and section 17(1)(b) and (c) in its handling of the request.

## Steps Required

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53. The Commissioner requires no steps to be taken.

## Right of Appeal

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54. 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)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

**Dated the 17th day of November 2009**

**Signed .....**

**David Smith  
Deputy Commissioner**

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

## Legal Annex

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### General Right of Access

**Section 1(1)** provides that -

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

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

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

**Section 1(2)** provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

**Section 1(3)** provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

**Section 1(4)** provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

**Section 1(5)** provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

**Section 1(6)** provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

### **Time for Compliance**

**Section 10(1)** provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

**Section 10(2)** provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

**Section 10(3)** provides that –

“If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

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

**Section 10(4)** provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

**Section 10(5)** provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

**Section 10(6)** provides that –

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or

- (b) if later, the day on which it receives the information referred to in section 1(3);

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

### **Refusal of Request**

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

“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.”

**Section 17(2)** states –

“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.”

**Section 17(3)** provides that -

“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.”

**Section 17(4)** provides that -

“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.

**Section 17(5)** provides that –

“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.”

**Section 17(6)** provides that –

“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.”

**Section 17(7)** provides that –

“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.”

**Personal information.**

**Section 40(1)** provides that –

“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.”

**Section 40(2)** provides that –

“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.”

**Section 40(3)** provides that –

“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.”

**Section 40(4)** provides that –

“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).”

**Section 40(5)** provides that –

“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) the 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)."

**Section 40(6)** provides that –

“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.”

**Section 40(7)** provides that –

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.