



FREEDOM OF INFORMATION ACT 2000 (SECTION 50)

DECISION NOTICE

Dated 4th May 2006

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

Nature of Complaint

The Information Commissioner (the "Commissioner") has received a complaint which states that on 12 January 2005 he made a request for information to the NHS Purchasing and Supplies Agency, an agency of the Department of Health under section 1 of the Freedom of Information Act 2000 (the "Act"). Although the relevant public authority is the Department of Health, correspondence regarding the complaint was conducted with the PASA.

The complainant reported that he requested a list of the agency's suppliers along with general information such as company name, address, telephone and fax number. A list of some 10,000 suppliers was subsequently provided in electronic format. However the telephone and fax numbers were withheld. When the complainant made a supplementary request for this information, he was refused on the basis that disclosure was prevented by the Data Protection Act. The complainant argued that the information he requested was not in fact personal information and that, therefore, there were no grounds for the refusal of his request.

The Commissioner contacted the PASA to advise it that the Commissioner did not take the view that the Data Protection Act would generally prevent the disclosure of company telephone numbers or, indeed, the numbers of individual telephone extensions. The general advice was subsequently clarified to make clear that although the Data Protection Act would not act as a general bar, if there were concerns about particular numbers or classes of numbers, these could be withheld.

The Commissioner was then informed by the PASA it had shifted the grounds for its refusal of the complainant's request. It was no longer asserted that disclosure was prevented by the Data Protection Act. Rather it was said that the information did not in fact



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belong to the PASA or Department of Health but to a private sector organisation (“the contractor”) which maintains the Supplier Information Database (SID) under contract to the PASA.

The Commissioner considered the information available on the PASA website describing the operation of the SID. This did not appear to bear out the account provided of the ownership of the information. Potential suppliers were invited to register their names, addresses, nature of business and other particulars on the web site. These were then made available on request via the SID to other NHS bodies. The role of BiP in maintaining the SID was largely invisible. In any event, potential suppliers were given the clear impression that their details were being provided to the PASA rather than to BiP.

The Commissioner then issued an Information Notice to the Department of Health, as the public authority, requiring the provision a copy of the contract between the PASA and BiP. A copy of this contract was supplied on 12 August. The covering letter informed the Commissioner that PASA was in the process of renegotiating the contract for the SID to clarify ownership of the information and to make explicit provision for response to requests made under the Act for supplier information. It was stated that, “(The) clauses clearly establish our ownership of the data on the NHS Supplier Information Database (NHS SID) and will then enable us to release the information [the complainant] requested under the Freedom of Information Act.”

Despite the assurance given to the Commissioner, which were subsequently relayed to the complainant, it was reported by the complainant that, as of 23 January 2006, no information had been supplied.

The Commissioner’s Decision

Under section 50(1) of the Act, except where a complainant has failed to exhaust a local complaints procedure, or where the complaint is frivolous or vexatious, subject to undue delay, or has been withdrawn, the Commissioner is under a duty to consider whether the request for information has been dealt with in accordance with the requirements of Part I of the Act and to issue a Decision Notice to both the complainant and the public authority.

The sections of the Act relevant to the Commissioner’s decision are:

Section 1, which provides that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds the information of the descriptions specified in the request and, if that is the case, to have that information communicated to him;



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Section 3, which provides that information is “held” if it is held by the authority, otherwise than on behalf of another person, or it is held by another person on behalf of the authority;

Section 40, which, among other things, provides that information is exempt if it constitutes personal information of which the applicant is not the subject and disclosure would involve a contravention of one or more of the data protection principles; and

Section 41 of the Act, which provides an absolute exemption for information obtained from a third party, the disclosure of which would constitute an actionable breach of confidence.

The Commissioner’s decision is as follows:

1. The Commissioner is satisfied that the information requested was held by the NHS PASA, albeit that it was held on its behalf by BiP.

In reaching this conclusion, the Commissioner has considered the contract between BiP and PASA and the information provided to potential suppliers on its website.

The contract contains no explicit provisions relating to the ownership of the particulars provided by suppliers although there is an explicit provision relating to the ownership of “the Equipment”. The focus of the contract is upon protection of BiP’s intellectual property rights regarding the system and upon ensuring that the system is not modified or corrupted.

The contract does contain the following, “BiP, shall, subject to the provisions of the Data Protection Act 1998, have the right to ... use the Data outwith the system; and ... provide Value added Services to any end user.” However, the Commissioner does not accept that this establishes ownership of the data.. On the contrary, it suggests to him that ownership resides with PASA and that BiP is given the right to use the information.

This view is supported by the statements appearing on the PASA web site which inviting potential suppliers to provide their details to PASA and the NHS rather than a contractor

Whatever the position at the time of the original request for information, the PASA has indicated that any uncertainty as to the ownership of the data has been resolved contractually. There is no suggestion in the current version of its web site that information supplied to the SID is owned by anyone other than PASA.

2. It is no longer asserted that the information requested is exempt by virtue of section 40 of the Act. However, the Commissioner has considered whether the original grounds for the refusal of the request were reasonable. He has concluded that they do not provide general grounds for refusal.



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Although the Commissioner has not carried out an analysis of the SID database, he would suspect that the majority of the potential suppliers will not be natural persons but rather companies. Information is only exempt by virtue of section 40 of the Act if it constitutes personal data. Insofar as the requested information consists of the telephone and fax numbers of companies, it will not, therefore be exempt.

The Commissioner understands that some of the information on the SID database consists of personal information, whether that relating to sole traders or that relating to the contacts points of companies supplying their particulars to the SID. It is suggested that some of the telephone numbers supplied may be personal numbers. Although the Commissioner has not been provided with any information to this effect, he would accept that the disclosure of private telephone numbers would constitute a disclosure of personal data and that potentially there may be some risk to a small minority of data subjects. For instance, there may be suppliers who provide services to NHS organisation supporting controversial research. However, the Commissioner considers that this risk is extremely low and that the onus is therefore on the public authority to identify and exclude any such information from any lists released under the Act.

3. Although the public authority has not raised the possibility of reliance upon section 41 of the Act, the Commissioner has considered it.

Suppliers are invited to supply their details to the PASA on the basis of a set of standard terms and conditions. These include the following:

“Privacy Policy

The Agency will keep a record of information provided by the supplier. Any information provided to the Agency may be used within the NHS Purchasing and Supply Agency, the NHS and appropriate bodies of the civil service, but will never be supplied to third parties without first obtaining the supplier's consent. The only time the Agency may need to provide information to third parties is if there is an obligation by law to disclose such information. The NHS Purchasing and Supply Agency is registered as an Executive Agency of the Department of Health, with the office of the Information Commissioner under the Data Protection Act 1998.”

The Commissioner accepts that it may be possible to construe these words as an undertaking of confidentiality on the part of the PASA to suppliers. However, while the Commissioner accepts that some of the information provided may be of a commercially sensitive nature and, as a consequence, have the “quality of confidence”, he does not believe that telephone and fax numbers have this quality, particularly since, in this case, those supplying numbers do so in the expectation that they may be accessed by large numbers of NHS staff and civil servants. He would not accept, therefore, that information could be withheld from the complainant unless, in a particular case, it could be demonstrated that an actionable breach of confidence would arise.



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4. It follows logically that, since he considers that the information requested was held by the public authority and that he does not consider that s.40 or s.41 of the Act would generally prevent disclosure, the Commissioner finds that there was a failure to comply with the requirements of section 1(2) of the Act.

Action Required

In view of the matters referred to above the Commissioner hereby gives notice that in exercise of his powers under section 50 of the Act he requires that:

Dept of Health shall, within 30 days of the date of this Decision Notice communicate to the complainant the remainder of the information requested from the PASA on 12 January 2005 with the exception of any particular information which the public authority is able to demonstrate is exempt by virtue of a possible contravention of the first data protection principle or the provisions of section 41 of the Act.

Failure to comply

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.



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Right of Appeal

Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process can be obtained from:

Information Tribunal	Tel: 0845 6000 877
Arnhem House Support Centre	Fax: 0116 249 4253
PO Box 6987	Email: informationtribunal@dca.gsi.gov.uk
Leicester	
LE1 6ZX	

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

Dated the 4th day of May 2006

Signed:

Graham Smith
Deputy Commissioner

Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF