

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 10 March 2016

**Public Authority:** Cabinet Office

**Address:** 70 Whitehall

London

SW1A 2AS

#### Decision (including any steps ordered)

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1. The complainant submitted a request to the public authority for copies of evidentiary material which formed the basis of Lord Denning's report following his inquiry into the circumstances leading to the resignation of John Profumo, a Cabinet Minister under Harold Macmillan's government. He also asked for documentation held by the public authority relating to future plans for the evidence including its preservation.
2. The Commissioner's decision is that the public authority was entitled to rely on the exemptions at sections 21(1), 23(1), 35(1)(a) and (b) and 41(1) FOIA to withhold information within the scope of the request. He also finds that the public authority was entitled to rely on section 42(2) FOIA as the basis for neither confirming nor denying whether it holds information within the scope of the request in respect of which a claim to legal professional privilege could be maintained in legal proceedings.
3. No steps are required.

## Request and response

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4. On 3 December 2013 the complainant submitted the following request to the public authority:

*'1. Does the Cabinet Office hold material and or documents which was evidence for Lord Denning's report: "The Circumstances Leading to the Resignation of the Former Secretary of State for War, JD Profumo". This material which was referred to by Lord Wallace of Saltaire in the House of Lords on Thursday 28 July 2013 will include but not be limited to written and oral submissions to Lord Denning's enquiry as well as relevant correspondence, memos, telephone transcripts, internal communications, taped interviews and photographs.*

*2. If the answer to this question is yes can you please provide copies of all the documents and evidence held by the Cabinet Office which was classed as evidence to the aforementioned report.*

*3. Does the Cabinet [sic] hold documentation which relates to its future plans for this evidence including its possible retention and or destruction. If the answer is yes can you please provide copies of this documentation. As far as question 3 is concerned, I am only interested in material which has been generated since 1 January 2012.'*

5. The public authority initially refused to comply with the request on the basis of section 12(2) FOIA. A public authority may, by virtue of section 12(2), refuse to either confirm or deny whether it holds information requested by an applicant if to do otherwise would exceed the appropriate cost limit prescribed in section 3 of The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.

6. However, on 3 February 2015, the Commissioner issued a decision rejecting the public authority's reliance on section 12(2)<sup>1</sup>. Following that decision, the public authority wrote to the complainant on 19 March 2015 and confirmed that it held information within the scope of his request. The relevant information was however withheld by the authority on the basis of the exemptions at sections 21(1), 23(1), 27(1)(a), (c) and (d), 27(2), 35(1)(a) and (b), 40(2) and 41(1) FOIA. It also relied on section 42(2) FOIA as the basis for neither confirming nor

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<sup>1</sup> [https://ico.org.uk/media/action-weve-taken/decision-notice/2015/1043231/fs\\_50536164.pdf](https://ico.org.uk/media/action-weve-taken/decision-notice/2015/1043231/fs_50536164.pdf)

denying whether it held information within the scope of the request in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

7. On 24 March 2015 the complainant requested an internal review of the public authority's decision above.
8. The public authority wrote back to the complainant on 19 August 2015 with details of the outcome of the internal review. The review upheld the original decision.

### **Scope of the case**

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9. The complainant initially contacted the Commissioner on 1 May 2015 and requested that an investigation should commence into the public authority's refusal to disclose the information requested following the authority's delay in issuing an internal review response. However, as indicated above, the public authority did eventually issue its internal review findings in August after the Commissioner had accepted the complaint for investigation.
10. During the course of the investigation, the public authority issued the complainant with a schedule of the documents containing information considered exempt on the basis of section 21(1) FOIA. This would enable the complainant access the relevant information more readily. The Commissioner is therefore satisfied that the information withheld on the basis of section 21(1) is reasonably accessible to the complainant and consequently exempt from disclosure on the basis of section 21(1).
11. The public authority also additionally relied on the exemption at section 38(1)(b) FOIA to withhold some of the information within the scope of the request.
12. The scope of the Commissioner's investigation therefore was:
  - To determine whether the public authority was entitled to withhold the information requested by the complainant on 3 December 2013 in reliance on the exemptions 23(1), 27(1)(a), (c) and (d), 27(2), 35(1)(a) and (b), 38(1)(b), 40(2) and 41(1) FOIA.
  - To also determine whether the public authority was entitled to rely on the exclusion at section 42(2) FOIA.

## Background

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13. In 1963, then Prime Minister, Harold Macmillan, asked the Master of the Rolls, Lord Denning, to conduct an inquiry into the circumstances leading to the resignation of John Profumo (who was Secretary of State for War), including any national security implications. Mr Profumo had been in a brief extra-marital affair with a woman who was, at the same time, in a relationship with a naval attaché at the former Soviet Union embassy in London. Although Mr Profumo initially denied the relationship in a personal statement to Parliament, he later admitted it and subsequently resigned. In his report, Lord Denning concluded that there had been no risk to national security arising from the affair.

## Reasons for decision

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### Section 41(1) – Parts 1 and 2 of the request

14. During the course of the investigation, the public authority clarified that most of the information within the scope of the first part of the request (ie excluding part 3) was withheld on the basis of section 41(1). It considered the remaining material exempt on the basis of section 23(1).
15. Section 41(1) states:
- 'Information is exempt information if-*
- a) it was obtained by the public authority from any other person (including another public authority), and*
  - b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.'*
16. As is clear from the above, two criteria must be met in order for the exemption to be engaged. First, the withheld information must have been obtained by the public authority from a third party.
17. Second, disclosure of the withheld information must constitute an actionable breach of confidence.
18. With regards to the first criterion, the Commissioner is satisfied that the relevant withheld information consists of submissions to Lord Denning's inquiry into the Profumo affair. The information was provided by those who gave evidence to the inquiry. It is not information that the public authority has produced or generated. It was obtained by the authority

following the conclusion of the Denning inquiry. The Commissioner therefore finds that the first criterion at section 41(1)(a) has been met.

19. With regards to the second criterion, the Commissioner considers that a breach will be actionable if<sup>2</sup>:
  - i. The information has the necessary quality of confidence. Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial; information which is of importance to the confider should not be considered trivial.
  - ii. The information was communicated in circumstances importing an obligation of confidence. An obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend upon the nature of the information itself, and/or the relationship between the parties.
  - iii. Unauthorised disclosure would cause a specific detriment to either the party which provided it or any other party. However, further developments in case law have established that information about an individual's private and personal life can be protected by the law of confidence, even if disclosure would not result in any tangible loss to the confider. Furthermore, case law also now suggests that any invasion of privacy resulting from a disclosure of private and personal information can be viewed as a form of detriment in its own right.
20. As mentioned, the Commissioner considers that information will possess the necessary quality of confidence if it is more than trivial and not otherwise accessible. The information should be worthy of protection in the sense that someone has a genuine interest in the contents remaining confidential. Generally, the Commissioner will not treat information as trivial if it relates to a personal matter and the confider or the person whom the information is about obviously attaches some importance to that information.
21. The Commissioner is satisfied that the relevant withheld information possesses the necessary quality of confidence. It relates to the private lives of the confiders and others, including graphic details about their (and others) sexual habits and behaviour. Clearly, that type of information is not trivial. On the contrary, it is information which the

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<sup>2</sup> Adopting the position taken by Judge Megarry in *Coco v A N Clark (Engineers) Limited* [1963] FSR 415.

confiders and others connected to it reasonably consider worthy of protection. The information is also not accessible to the general public.

22. The Commissioner considers that there are essentially two circumstances in which an obligation of confidence may apply: the confider has attached explicit conditions to any subsequent use or disclosure of the information or the confider has not set any explicit conditions, but the restrictions on use are obvious or implicit from the circumstances.
23. The public authority drew the Commissioner's attention to the fact that Lord Denning assured each witness involved in the inquiry that the information given to him would be treated in strict confidence and would be used only for the purposes of his inquiry. Information was therefore provided on the basis and in the expectation that it would be kept confidential. The public authority further submitted that the presumption of confidentiality is implicit in the character of the information.
24. Given the age of the relevant withheld information, the public authority was keen to point out that the duty of confidentiality continues even after the death of the person to whom the duty is owed, and could therefore be enforced by a deceased confider's personal representatives.
25. In view of the explicit assurance of confidentiality given by Lord Denning, the Commissioner is satisfied, that those who provided evidence to his inquiry did so on the basis that it would be kept confidential. He is also satisfied that in the circumstances, those giving evidence would have done so in the expectation that it would be kept confidential.
26. Furthermore, although some of the witnesses and those connected to the inquiry in one way or another may be deceased, it is also the case that several of the parties connected to the case were only very young at the time. Therefore, in the absence of other officially verified information, the Commissioner considers that a life expectancy of 100 years is a reasonable basis on which to proceed. He has taken this approach because he does not have the capability or resource to investigate this and nor, for the same reason, does he expect the public authority to do so. With that in mind, the Commissioner has accepted the public authority's position that the duty of confidentiality owed to those who provided evidence to the inquiry could also be enforced by their personal representatives who are likely to still be alive.
27. Although the Commissioner does not consider that it is necessary to establish an element of detriment to the confiders in this case, he is satisfied that in the circumstances, any invasion of privacy resulting

from a disclosure of the relevant withheld information can be viewed as a form of detriment in its own right.

28. The Commissioner therefore finds that the second criterion at section 41(1)(b) has also been met.

### **Public interest test**

29. Section 41(1) is an absolute exemption so there is no requirement to carry out a public interest test as set out in section 2(2)(b) FOIA.
30. However, case law on the common law of confidence indicates that a breach of confidence will not succeed, and therefore will not be actionable, in circumstances where a public authority can rely on a public interest defence. This effectively requires a public authority to carry out a test to determine whether it would have a public interest defence for breach of confidence when relying on the exemption at section 41(1) to withhold information.
31. The test does not function in the same way as the public interest test set out in section 2(2)(b) where the public interest operates in favour of disclosure unless outweighed by the public interest in maintaining the exemption. Rather, the reverse is the case. The test assumes that the public interest in maintaining confidentiality will prevail unless the public interest in disclosure outweighs the public interest in maintaining the confidence. However, it does not require exceptional circumstances to override a duty of confidence that would otherwise exist. It is a test of proportionality; whether there is a public interest in disclosure which overrides the competing public interest in maintaining the duty of confidence.
32. The public authority did not provide the Commissioner with specific public interest arguments in support of the disclosure of the relevant withheld information which would also provide a defence for breach of confidence. However, it acknowledged more generally (in relation to the application of the other qualified exemptions it relied on) that there is a public interest in openness and transparency regarding the circumstances leading to the resignation of Mr Profumo.
33. In addition to the public interest in transparency and openness, the Commissioner considers that there is a public interest in understanding the details of the inquiry's conclusions. Opening up the relevant withheld information to public scrutiny would increase public understanding of how the inquiry evaluated the evidence.
34. Disclosure of the relevant withheld information would also shed additional light on the role of Stephen Ward (a key player in the events who was subsequently convicted) and increase public understanding of

the activities of others connected to the events leading to Mr Profumo's resignation.

35. The public authority however submitted that there was generally a very strong public interest in protecting the duty of confidence and it did not consider that it would be able to successfully defend the disclosure of the relevant withheld information on public interest grounds.
36. The Commissioner acknowledges the wider public interest in preserving the principle of confidentiality. However, as he has previously mentioned, this does not require exceptional public interest factors to override the duty of confidence. In this case however, the Commissioner has attached significant weight to the duty of confidence owed to those who provided information to Lord Denning's inquiry. The witnesses did not give evidence under oath but did so under a guarantee of strict confidence. Some of their statements, including very frank allegations of criminal offences against named individuals have not actually been legally tested because the inquiry was not set up to determine criminal guilt or innocence. Therefore, it is quite possible that some of those alleged to have committed offences or to have acted inappropriately did not get the opportunity to rebut the allegations when they were made. Given the fact that some of those connected to the activities and events leading up to the affair are still alive, there is a significant public interest in not disclosing information which might impugn their character or that of their relatives before they have had the opportunity to defend themselves.
37. The impact of the disclosure of the relevant withheld information is likely to be keenly felt by those who gave evidence to the inquiry and/or their families. It is also likely to be felt by those alleged to have committed criminal offences and/or taken part in certain sexual activities. This would amount to a serious breach of confidence owed to those who provided evidence to the inquiry in the expectation that it would not be made public.
38. The Commissioner therefore considers that the public authority would not be able to successfully rely on a public interest defence in the event of an action for breach of confidence by those who gave evidence to the inquiry or their personal representatives.
39. He consequently finds that the public authority was entitled to rely on the exemption at section 41(1).

## Section 23(1)

40. As mentioned, the public authority withheld some of the information held within the scope of the first part of the request on the basis of the exemption at section 23(1).

41. Section 23(1) states:

*'Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).'*

42. To successfully engage the exemption at section 23(1), a public authority must be able to demonstrate that the relevant information was *directly or indirectly* supplied to it by, or *relates to* any of the bodies listed at section 23(3). This means that if the requested information falls within this class, it is absolutely exempt from disclosure under the FOIA. This exemption is not subject to the public interest test in section 2(2)(b).

43. Therefore, the only matter for the Commissioner to decide is whether the relevant information in this case falls within the description of information covered by section 23(1).

44. On this occasion, the Commissioner has not viewed the relevant withheld information. Instead, a senior official of the public authority has written to him and stated that the information to which this exemption had been applied does either relate to, or was supplied by, one of the bodies listed in section 23(3). The Commissioner is prepared, in limited circumstances, to accept the assurance of a senior official that information withheld under section 23(1) has indeed been supplied by or is related to security bodies specified in section 23(3). He will only do so where the official occupies a position in relation to the security bodies which allows them genuinely to validate the provenance of the information, and where the official is independent of the public authority's process for dealing with freedom of information requests. The Commissioner is satisfied that the author of this letter occupies such a position within the public authority. In addition, having inspected some of the withheld information, he has been able to form his own independent view as to security body interest in parts of that information.

45. The Commissioner is therefore satisfied that section 23(1) is engaged in respect of the information to which it has been applied.

### **Section 35(1)(a) and (b)**

46. The public authority withheld information within the scope of part 3 of the request on the basis of these exemptions.

47. Section 35(1)(a) and (b) state:

*'Information held by a government department.....is exempt information if it relates to*

*a) the formulation or development of government policy,*

*b) Ministerial communications..'*

48. Section 35(1)(a) is one of the class-based exemptions in the FOIA. This means that there is no need to show any harm in order to engage the exemption. The information simply has to fall within the class described. The Commissioner considers that the provision, *'relates to the formulation or development of government policy'* can be interpreted broadly. This means that the information does not itself have to be created as part of the formulation or development of government policy. Any significant link between the information and those activities is enough.

49. The public authority explained that the withheld information relates to the formulation of government policy with respect to the future of the papers relevant to Lord Denning's inquiry, including information related to senior ministers and Ministerial communications on the inquiry.

50. The Commissioner finds that the withheld information relates to the formulation or development of government policy with respect to plans for the future of the evidence including its possible retention and/or destruction. He is also satisfied that some of the withheld information relates to Ministerial communications.

### **Public interest test**

51. The exemptions at section 35(1)(a) and (b) is subject to the public interest test set out in section 2(2)(b) FOIA. Therefore, the Commissioner also considered whether in all the circumstances of the case, the public interest in maintaining the exemptions outweigh the public interest in disclosing the withheld information.

52. The public authority recognised the general public interest in disclosing information which can increase public understanding of how government takes decisions about the handling of historic records.

53. The public authority however explained that plans for the future of the evidence remain under discussion. The Commissioner understands that options for the future of the inquiry papers, including possible retention or destruction were discussed by officials and Ministers in November 2013. The papers have since been selected for permanent preservation, and are set to be retained by the public authority until at least 2063. However, further discussions are ongoing with the Advisory Council on National Records and Archives. The Commissioner has not revealed the nature of the discussions because the public authority has advised him that applications made to the Advisory Council are not made public as they may contain sensitive information.
54. The public authority therefore argued on that basis that there is a very strong public interest in officials and Ministers not disclosing the withheld information whilst discussions relating to plans for the future of the inquiry papers are still ongoing with the Advisory Council.
55. It further argued that the continuing public and media interest in the inquiry papers also meant that there is a very strong public interest in ensuring that officials and Ministers are able to discuss the government's plans for the future of the inquiry papers freely and frankly without fear that their views could be disclosed prematurely.
56. Similarly, there is a very strong public interest in officials and Ministers having the private thinking space to properly consider all options in relation to plans for the future of the inquiry papers.

*Balance of the public interest*

57. The Commissioner considers that disclosure would enhance the general public interest in openness and transparency in relation to the preservation of significant historical records.
58. More specifically, given the continuing interest in the events leading up to Mr Profumo's resignation from the Cabinet, and in fully understanding the basis of some of the conclusions of the Denning led inquiry, there is a strong public interest in disclosing information which sheds light on the government's plans for the future of the inquiry papers. He considers that the public interest in that regard has been met to a limited degree by the fact that the papers have been selected for permanent preservation.
59. The Commissioner considers that there is a significant public interest in maintaining a safe space for ongoing discussions between officials, Ministers, and the Advisory Council in relation to plans for the future of the papers. The papers are part of historical records on a significant period in British politics which has continued to generate interest.

However, Ministers and officials need to be able to discuss various options in relation to plans for the future of the papers without external interference which is very likely to happen should the withheld information be disclosed.

60. Similarly, he considers that there is also a very strong public interest in Ministers being fully apprised of all the options with regards to plans for the future of the papers. In order for this to happen, officials need to be able to discuss options freely and frankly. Given that the withheld information within the scope of part 3 of the request is fairly recent and relates to ongoing discussions, the Commissioner accepts that disclosure could affect the candour with which officials and Ministers express their views on the subject and that would not be in the public interest.
61. Therefore, the Commissioner considers that, on balance, in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosing the withheld information.
62. Consequently, he finds that the public authority was entitled to withhold information within the scope of part 3 of the request on the basis of the exemptions at sections 35(1) (a) and (b).

### **Section 42(2)**

63. Relying on section 42(2), the public authority neither confirmed nor denied holding information within the scope of part 3 of the request which if held could be subject to legal professional privilege (LPP).
64. Section 42 states:
  - 1) *'Information in respect of which a claim to legal professional privilege.....could be maintained in legal proceedings is exempt information.*
  - 2) *The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.'*
65. The public authority explained that confirming it holds information in respect of which a claim to LPP could be maintained in legal

proceedings<sup>3</sup> would indicate that the withheld information includes legal advice obtained by the authority. On the other hand, denying that it does<sup>4</sup> would indicate that the withheld information does not contain legal advice. The public authority argued that revealing whether the authority had sought or obtained legal advice in relation to the plans for the future of the inquiry papers would, of itself, reveal information in respect of which a claim to LPP could be maintained in legal proceedings.

### *Commissioner's finding*

66. Section 1(1)(a) FOIA imposes a duty on a public authority to respond to requests for information by either confirming or denying whether it holds the requested information. This is commonly referred to as "the duty to confirm or deny".
67. By virtue of section 42(2), a public authority is excluded from the duty to confirm or deny to the extent that doing otherwise would involve the disclosure of information in respect of which a claim for LPP could be maintained in legal proceedings.
68. The Commissioner is satisfied that the public authority was entitled to rely on section 42(2). He accepts that revealing whether the public authority had sought or obtained legal advice in relation to plans for the future of the inquiry papers would reveal the content of legal advice which is clearly subject to LPP.

### **Public interest test**

69. Section 42(2) is subject to the public interest test set out in section 2(2)(b) FOIA. Therefore, the Commissioner also considered whether in all the circumstances of the case, the public interest in revealing whether the public authority had sought or obtained legal advice in relation to plans for the future of the inquiry papers outweigh the public interest in issuing a confirmation or denial.
70. The public authority recognised the general public interest in openness in public affairs. It also specifically acknowledged the public interest in knowing whether officials have sought or obtained legal advice in

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<sup>3</sup> For the avoidance of doubt, this is not to say that the public authority holds information which would be considered exempt on the basis of section 42(1).

<sup>4</sup> For the avoidance of doubt, that is not to say that the public authority does not hold information which would be considered exempt on the basis of section 42(1).

relation to plans for the inquiry papers given the importance of the inquiry.

71. The public authority however argued that there is a very strong public interest in protecting the confidentiality of communications between lawyers and their clients. It argued that it was particularly important Ministers and officials are able to seek legal advice in relation to sensitive and difficult decisions without that fact being made public. It submitted that, without the assurance of confidentiality about their legal consultations, Ministers and officials might be deterred from seeking legal advice.

*Balance of the public interest*

72. The Commissioner shares the view that, given the importance of the evidence provided to Lord Denning for the purpose of his inquiry, there is a public interest in revealing whether the public authority sought or obtained legal advice in relation to plans for the future of the evidence.
73. The Commissioner however accepts that there is generally a very strong public interest in protecting the confidentiality of legal advice, and consequently LPP. He shares the Information Tribunal's view that, '*..there is a strong element of public interest inbuilt into the privilege itself. [and that] At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest.*'<sup>5</sup>
74. Specifically, the Commissioner considers that the public interest in maintaining LPP is quite strong in this case given the importance of the inquiry papers. Revealing the actual position (which the Commissioner is unaware of) could leave the government open to criticism. This could result in Ministers and officials being less candid when seeking legal advice in relation to plans for the future of the inquiry papers, or not seek legal advice at all, or seek legal advice when perhaps there is no need to. Clearly, it would not be in the public interest if any of these situations arise as a result.
75. The Commissioner fully appreciates that the public interest in confirming or denying whether legal advice was sought or obtained is by no means weak in the circumstances of this case. Nevertheless, the fact that discussions are still ongoing in relation to plans for the future of the evidence increases the weight of the already strong inbuilt public

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<sup>5</sup> Bellamy v Information Commissioner & the Secretary of State for Trade and Industry (EA/2005/0023, 4 April 2006)

interest in protecting LPP. The detrimental effect of revealing whether legal advice was sought or obtained would be significant under those circumstances.

76. Therefore, on balance, the Commissioner finds that the public interest in neither confirming nor denying whether the public authority sought or obtained legal advice in relation to plans for the future of the inquiry papers outweighs the public interest in doing otherwise.

### **Other Matters**

77. Although there is no time limit under the FOIA for public authorities to complete internal reviews, the Commissioner expects internal reviews to take no longer than 20 working days, and in exceptional circumstances, 40 working days.
78. The Commissioner is concerned at the length of time the public authority took to complete its internal review in this case, far exceeding the maximum 40 working days that he expects internal reviews to take. While he appreciates the particular complexities of this case, he does not consider that the length of time taken to complete the internal review can be justified in the circumstances. Taking such an inordinate amount of time to complete an internal review goes completely against the spirit of the FOIA, and in the Commissioner's view, is tantamount to denying an applicant their information access rights.

## Right of appeal

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79. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

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

80. 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.

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

**Signed** .....

**Gerrard Tracey**  
**Principal Adviser**  
**Information Commissioner's Office**  
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