

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date 5 February 2007**

**Public Authority:** The Royal Surrey County Hospital  
**Address:** Egerton Road  
Guildford  
Surrey  
GU2 7XX

### Summary

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The complainant made three requests to the public authority for copies of two x-rays taken during the course of the medical care given to her late husband. The complainant alleged that the public authority failed to respond to the first of these requests within 20 working days. The complainant also complained that the information provided in response to these requests was inadequate because of the poor quality of the first x-ray and the fact that the second x-ray did not fulfil her request. Having investigated the matter, the Commissioner has decided that the information provided did fulfil the complainant's requests although the public authority did not respond to the first request within 20 working days. The Commissioner has also decided that the information was exempt under section 21 of the Act because it was accessible to the applicant under the Access to Health Records Act. The Commissioner has established that the public authority failed to provide the complainant with a refusal notice citing section 21.

### 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 the 9 June 2005 the complainant submitted a request for information to the Trust for copies of two x-rays taken of her late husband. The request asked for copies of an x-ray taken on 12 December 2002 and a copy of an x-ray taken on 15 December 2002.

3. The Trust acknowledged the request on 15 June 2005 and explained that it would provide the x-rays in the next few days.
4. The complainant contacted the Trust on 26 July 2005 in order to complain that to date, she had not received a copies of the x-rays.
5. On the 11 August 2005 the Trust provided the complainant with copies of the x-rays taken on 12 and 15 December 2002.
6. On the 28 December 2005 the complainant contacted the Trust and asked to be provided with further copies of the x-rays of 12 and 15 December 2002. The complainant explained to the Trust that copies provided on 11 August 2005 were inadequate because:

*'It has been noted that the x-rays supplied at that time are in portrait rather than landscape view. They are not of the whole lung down to the base. In addition it has been noted that the x-ray of 12.12.02 is slightly underexposed. The replacements of these x-rays should therefore be representative copies of those viewed with Dr [name removed] on 23.01.03'.*

7. In her letter of 28 December 2005 the complainant also submitted a further request to the Trust for:

*'A representative copy of the chest x-ray of 27.06.02 recording the placement of the groshong line, the tip of which resided in the distal CV'.*

8. The Trust wrote to the complainant on 26 January 2006 and provided her with a copy of the chest x-ray of 27 June 2002.
9. In its letter of 26 January the Trust explained to the complainant that it was refusing to provide her with further copies of the x-rays of 12 and 15 December 2002 because it considered the copies already supplied to her to be:

*'a replica of the originals and there is no reason for radiology staff to believe they were not reproduced as exact copies of the originals. It is nevertheless entirely reasonable that images can be presented in either portrait or landscape view as either is acceptable for interpretation.'*

10. The Trust acknowledged that whilst the x-ray of 12 December 2002 'is under penetrated "at priori", direct comparison of copy images with the originals shows no difference in the degree of exposure and any interpretation of the copy film would be comparable with the interpretation of the original film'.
11. On 7 June 2006 the complainant contacted the Trust again. She complained that the Trust had failed to fulfil her requests because on the copy of the x-ray of 12 December 2002, 'the identity tag was obliterated on the copy provided'. She also complained that with regard to her request for the post-placement x-ray taken 27 June 2002, 'the pre-placement film was provided and therefore not as requested'. The complainant also complained to the Trust she did not receive a response to

her request of 9 June 2005 until 11 August 2005, outside of the 20 working day limit. In this letter the complainant requested a replacement copy of the x-ray of 12 December 2002 and a copy of the post placement x-ray of 27 June 2002. In this letter the complainant specifically cited both the Freedom of Information Act and the 'Access to Medical Records' legislation as regimes under which she wanted to be provided with copies of the x-rays in question.

12. On the 1 August 2006 the solicitors acting on behalf of the Trust wrote to the complainant in response to her letter 7 June 2006. This letter informed the complainant that the Trusts' position was that 'the copy of the x-ray of 12 December 2002 already given to you is the best that can be provided. Therefore, we believe that this part of your request has been dealt with fully'. With regard to the x-ray of the 27 June 2002, the complainant was informed that the Trust had undertaken a number of checks and was confident that the x-ray provided to her was the post-placement x-ray, rather than a pre-placement x-ray, and therefore that part of her request had been fulfilled.

## The Investigation

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### Scope of the case

13. The complaint originally complained to the Commissioner in February 2005 in relation to how the Trust had handled a separate request she had submitted on 5 January 2005. Between May 2005 and May 2006 the Commissioner had carried out an extensive investigation into this complaint and the conclusions of this investigation are detailed in decision notice FS50063716. During the course of this investigation, the complainant raised with Commissioner her concerns over how the Trust had handled her requests for copies of the x-rays as detailed in above in paragraphs 2 to 12.
14. The Commissioner understood that the basis of this complaint was that:
  - (i) The Trust had failed to respond to her request of 9 June 2005 within 20 working days.
  - (ii) The Trust has failed to fulfil her request of 7 June 2006 for a further copy of the x-ray of 12 December 2002. The complainant explained to the Commissioner that she wanted to be provided with a further copy because the identity tag on the copy previously provided was 'obliterated'.
  - (iii) The Trust had failed to fulfil her request of 7 June 2006 for a copy of the post-placement x-ray taken on 27 June 2002 because the information supplied in response to this request was a pre-placement x-ray rather than post-placement x-ray.
15. The complainant provided the Commissioner with an explanation as to why she considered the x-ray provided to the pre-, rather than post-placement. The

complainant referred the Commissioner to a leaflet provided by the Trust at the time of the insertion of the line entitled 'The Skin Tunnelled Catheter'. This leaflet provides advice to patients about the process of inserting two different types of catheter, a Hickman line and Groshong line. The complainant referred the Commissioner to the section of the leaflet which explained that 'As soon as the procedure is completed, an x-ray will be taken to confirm the placement of the tip of the line. On an x-ray the position of the line [will] be clearly seen going into the vein'. The complainant explained to the Commissioner that on the x-ray she was provided with the line was not visible 'in the manner described on the leaflet provided the Trust at the time of the procedure. The x-ray is likely to be a pre-placement record as opposed to post-placement'.

## Chronology

16. The Commissioner wrote to the Trust's solicitors on 11 August 2006 in order to establish a number of issues relating to how the Trust had handled the complainant's requests.
17. With regard to complaint (ii) the Commissioner explained to the solicitors that the complainant had provided him with a photocopy of the x-ray that had been provided to her. Based upon sight of this photocopy, and the complainant's allegations the Commissioner asked for a response to the following questions about the identity tag on the x-ray in question:
  - a) *On the photocopy of the x-ray viewed by the Commissioner, the only information visible on the identity tag appears to be the date, i.e. '12.12.02'. What other information is usually contained on the identity tag of an x-ray?*
  - b) *What format does the identity tag take? Is it printed directly on to the x-ray? Is it a separate piece of paper simply attached to the x-ray itself?*
  - c) *Is it possible to transcribe the rest of the information on the identity tag of this x-ray? What does this information state?*
  - d) *If there is further information contained on the x-ray of 12 December, why was this not transcribed and provided to the complainant?*
  - e) *If the Trust made a copy of an x-ray for its own use, would this copy usually include a fully visible identity tag?*
18. With regard to complaint (iii) the Commissioner asked the Trust's solicitors to provide clarification on the issues surrounding the x-ray of 27 June 2002. Specifically, the Commissioner asked for a response to the following questions:
  - a) *In the solicitors' letter to the complainant of 1 August 2006 you explained that 'We are instructed by the Trust that it is not routine for an image to be taken prior to the insertion of a Groschong line'. In what circumstances would an x-ray be taken prior to the insertion of a Groschong line?*

*b) Does the Trust have an established policy or procedure for determining when pre-placement x-rays are taken? If so, what does this policy or procedure state?*

*c) Is it possible to provide the Commissioner with a copy of the relevant sections of x-ray register referred to in your letter of 1 August? (I.e. the entries relating to the complainant's husband).*

*d) When x-rays are taken, are the relevant details always entered into the x-ray register?*

19. The Trust's solicitors acknowledged the Commissioner's letter on 26 August 2006 and provided a substantial response to the Commissioner's enquires in a letter dated 6 October 2006.
20. This letter explained to the Commissioner that at the time the x-ray of 12 December 2002 was taken, the following information was usually applied to the identity tag: the patient's surname and first name, the patient's date of birth, where the patient has come from (i.e. GP or ward name) and the date the x-ray was taken.
21. The Trust's solicitors explained that with regard to this x-ray the date of '12.12.02' was actually punched into the x-ray film just above a white sticker which was stuck on the x-ray. The patient's name, date of birth and ward name were written on this sticker instead of being printed on to the x-ray itself.
22. The Trust's solicitors confirmed that although the information contained on the white sticker would not have been reproduced when the copy x-ray made, the Trust believed that a copy label bearing the same information was made and stuck on to the copy x-ray.
23. The Trust's solicitors also explained to the Commissioner that the x-ray labelling system in use at the time had a known fault which meant that rather than the information contained on an identity tag being automatically printed on to the x-ray itself, this information would be blanked out causing the identity tag to effectively be obliterated on the x-ray film. In order to deal with this issue, the radiograph would manually apply a sticky label containing the patient's details.
24. The Trust's solicitors also provided the Commissioner with a response to his queries regarding complaint (iii). The Trust's solicitors explained that it is not usual for an x-ray to be taken prior to the insertion of a Groschong line and if any x-ray was taken prior to the insertion of the line this would have been on other clinical grounds unconnected with the insertion of the line.
25. The Trust's representatives also provided the Commissioner with a copy of the relevant section on the x-ray register for the day in question.
26. The Trust's representatives informed the Commissioner that the Trust had reviewed the original and its copy of the x-ray of 27 June 2002 and on both of these x-rays the line 'was clearly visible...although our clients observe that

identifying the line will be easier for those with the appropriate training and experience who know what to look for.' The letter also contained instructions on how the line could be identified.

27. On the 31 October 2006 the Commissioner wrote to the Trust's solicitors again and asked for confirmation of a number of further issues about how the Trust had handled the complainant's request.
28. On the 24 November 2006 the Trust's solicitors replied to the Commissioner's letter and confirmed that the Trust had provided the complainant with copies of her husband's medical records under the Access to Health Records Act 1990.

## Analysis

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29. In analysing the issues raised by the complainant in this case the Commissioner has reviewed the right of access provided to the requested information by the Access to Health Records Act 1990 ('AHRA'). The Commissioner has paid particular attention to the interaction of the AHRA and right of access provided by the FOI Act.

## Complaint (i)

30. The complainant complained to the Commissioner that the Trust did not respond to her request of 9 June 2005 until 11 August 2005, outside of the 20 working day limit stipulated by the Act.
31. Section 1 of the Act provides a general right of access to information held by public authorities. Section 1 states:
  - (1) 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.
32. The time period in which public authorities have to comply with the duty imposed by section 1 is specified in section 10. Section 10 states that:
  10. - (1) 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.
33. The Commissioner notes that the complainant's request of 9 June 2005 did not make any reference to which access regime (the Act or AHRA) under which she was requesting this information. The Commissioner also notes that the Trust's



response of 11 August 2005 made no specific reference to which access regime that this information was being supplied under.

34. In this case the Commissioner believes that AHRA was a more appropriate access regime under which to supply the requested information. Section 3(f) of AHRA provides a right of access to a health record, or to any part of a health records to a deceased person's medical representative and any person who may have a claim arising out of the patient's death. The Trust had previously disclosed copies of the complainant's husband's medical records to the complainant under AHRA.
35. As the Commissioner considers that as the appropriate access regime under which the information should have been supplied was the AHRA, the information was exempt from disclosure under the Act by virtue of the exemption at section 21. Section 21 of the Act states that information is exempt from disclosure if it is reasonably accessible to the applicant by other means. In this instance, the requested information was reasonably accessible to the applicant under the right of access provided by AHRA. As noted in paragraph 28, the Commissioner has now established that the Trust considered that they were disclosing the x-rays under AHRA.
36. However, the Commissioner considers that the Act places an overarching duty on public authorities to respond to all information requests within 20 working days, even if the requested information is disclosed under a different access regime, (e.g. AHRA). Section 17 of the Act explains that if a public authority intends to refuse to disclose information on the basis of any the exemptions contained with part II of the Act (including section 21), then it must provide the applicant with a refusal notice which states which exemption the public authority is relying on and why it considers that the exemption applies. Section 17 of the Act states that this refusal notice must be provided within the time for complying with section 1(1), i.e. twenty working days.
37. The Commissioner has established that the Trust failed to provide the complainant with the information requested or a refusal notice stating that the information was exempt from disclosure within 20 working days of the request. Therefore, the Commissioner believes that the Trust breached section 17 of the Act.

### **Complaints (ii) and (iii)**

38. The Commissioner notes that unlike the other exemptions contained within Part II of the Act, section 21 does not remove the duty placed on public authorities at section 1(1)(a) to confirm or deny whether it holds the information requested. Practically, even if the public authority considers the information exempt from disclosure under the Act by virtue of section 21 and is prepared to supply the information under a different access regime, under the Act it must still confirm or deny whether it holds the information requested.
39. With regard to complaint (iii), the complainant was essentially complaining that the Trust had incorrectly confirmed or denied whether it held the information

requested. The basis of this complaint focussed upon whether the x-ray was provided by the Trust was in fact the post-placement x-ray as requested. The Commissioner does not accept the complainant's assertion that because a patient leaflet suggests that the line should be visible on the post-placement x-ray and she cannot identify the line, the x-ray cannot therefore be the post-placement line. Furthermore, the Commissioner accepts the Trust's explanation and checks that the x-ray provided must be the post-placement one requested by the complainant. Therefore, the Commissioner has concluded that there is no clear evidence to suggest that the x-ray provided to the complainant is the pre- rather than the post-placement x-ray requested.

40. For the above reasons, the Commissioner is satisfied that in response to her request for a copy of the post-placement x-ray of 27 June 2002, the Trust did provide a copy of the post-placement, rather than the pre-placement x-ray as the complainant had alleged. Therefore, the Commissioner is satisfied that the Trust met its obligations under section 1 of the Act when dealing with the request for a copy of the post-placement x-ray.
41. With regard to complaint (ii), the Commissioner understood the complainant's dissatisfaction not to be based around whether the information provided was that requested. Rather, the complainant's complaint about the x-ray of 12 December 2002 was that the copy of the x-ray provided was not clear because the identity tag was obliterated. However, the Commissioner considers the Trust's explanation of why the identity tag on the original x-ray of 12 December 2002 was obliterated to be plausible. Obviously, if the information contained on the original x-ray is unclear, the Commissioner accepts that it is logical to expect that the information contained on any copy will also be unclear. Consequently, the Commissioner is satisfied that the copy x-ray provided to the complainant is an accurate representation of the original. With regard to its obligations under the Act at section 1(1)(a) the Commissioner considers that the Trust accurately confirmed that it held the x-ray of 12 December 2002.

## The Decision

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42. The Commissioner's decision is that the Trust dealt with the request of 7 June 2006 for information in accordance with section 1 of the Act because it accurately confirmed or denied whether it held the information requested.
43. In relation to the request of 9 June 2005 the Commissioner's decision is that the Trust breached section 17 of the Act because it failed to provide the complainant with a refusal notice citing section 21. In relation to the request of 28 December 2005 the Commissioner has also decided that the Trust breached section 17 by failing to provide a refusal notice citing section 21.
44. In relation to the information provided to the complainant, the Commissioner has decided that this information was exempt from disclosure under section 21 of the Act as it was accessible to the complainant by other means.



## Other matters

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45. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters:
46. The Commissioner wishes to make clear that he has considered the implications of this particular request being made under the Act by anyone other than the complainant. The Commissioner considers that in any other situation it is likely that the information would be exempt by virtue of section 41 and possibly section 44 of the Act. In his decision note reference FS50071069 which also concerns a request for health records of a deceased patient by the deceased's mother the Commissioner decided that the information was exempt from disclosure by virtue of section 41.
47. The Commissioner also wishes to note that in reviewing the correspondence on this case, it was not always clear under which access regime the complainant was asking for information and it was not always clear which access regime the Trust was releasing information under. As the Commissioner has stated in this notice, he considers that the most appropriate access regime for disclosure of this information to this applicant was the AHRA rather than the Act. The Commissioner considers that the Trust could have made it clearer to the complainant that this information was being provided to her under the AHRA rather than the Act. The Commissioner considers that this approach may have helped prevent the confusion which arose in this case over whether information of this type could be disclosed under the Act. The Commissioner notes that there is no obligation on the applicant to state which access regime they are requesting information under, and therefore the obligation is on the public authority to explicitly state under which access regime the information is being disclosed under.
48. Whilst the Commissioner is obviously keen to promote the general right of access that the Act grants, the Commissioner is also keen to draw potential applicants' attention to other access regimes (e.g. AHRA) which may more a more appropriate route under which to access information such as that requested in this case.

## Right of Appeal

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49. 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@dca.gsi.gov.uk](mailto:informationtribunal@dca.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 5<sup>th</sup> day of February 2007**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

**Information Commissioner's Office  
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