

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 13 December 2007

Public Authority: Walsall NHS Teaching PCT
Address: Chief Executive's Department
Jubilee House
Bloxwich Lane
Walsall
WS2 7JL

Summary

The complainant initially made a request to view the medical records of a deceased person. This request was dealt with under the Access to Health Records Act 1990 and the public authority refused to provide the information. The complainant made a second request asking for full access to the records held by the Trust about the deceased person. The public authority declined to disclose the information relying upon the section 41 exemption. In not dealing with the initial request under the Freedom of Information Act 2000 the public authority did not issue an adequate refusal notice and therefore breached section 17. However the Commissioner has concluded that the information was exempt by virtue of section 41 exemption.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 8 February 2007 the complainant made the following request: *'[named deceased person] was for many years a patient at ... I appreciate that medical records are normally confidential but in view of the length of time since this man's death and the fact that he has no direct descendants I am hopeful that permission to view the records can be granted in this instance.'*

3. On 23 February 2007 the public authority declined to disclose the information and although it mentioned that it should keep the notes confidential it did not clarify which exemption it was relying upon or why.
4. On 1 March 2007 the complainant contacted the public authority as she was unhappy with the response.
5. On 8 March 2007 the complainant contacted the public authority again. The public authority suggested that the complainant should compile a series of questions which it would answer if possible.
6. On 9 March 2007 the complainant made a further request to the public authority: *'Further to our recent conversations I am now making a formal application under the Freedom of Information Act to have full access to the records held by the Trust in respect of the above named'*.
7. On 19 March 2007 the public authority responded to the complainant acknowledging that it had received her request and also acknowledged receipt of her series of questions.
8. On 20 March 2007 the public authority contacted to the complainant, declining to disclose the requested information relying upon the section 41 exemption. It also provided references to the various Information Commissioner's decisions it had taken into account.
9. On 14 May 2007 the public authority confirmed that an internal review had taken place and had upheld the original decision on the same ground.

The Investigation

Background

10. The complainant is a professional writer with a special interest in crime and social history and is currently carrying out research for a book. The deceased person in this case was in the care and supervision of a hospital. He was sent "on license" to work as a gardener for a woman who he robbed and murdered. He confessed to the crime. At his trial the jury decided he was insane.
11. The complainant explained that she proposed to write a book discussing the various issues raised by cases of this nature and that it would be in the public interest to disclose this information.

Scope of the case

12. On 21 May 2007 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

- Would there be an actionable breach of confidence if this information was disclosed.
- The deceased person has been dead since 1985, was unmarried, childless and not survived by parents or siblings.
- Even if an action was brought against the public authority it could argue that it was in the public interest to disclose this particular deceased person's medical records.
- The public authority had acted inappropriately with regard to the complainant's first request by not explaining to her she could appeal the initial decision.

Chronology

13. On 8 August 2007 the Commissioner contacted the complainant asking for a copy of her request of 8 February 2007. The complainant responded providing a copy.
14. On 13 August 2007 the Commissioner contacted the public authority to clarify what records it held. The public authority explained that it held the medical records of the named deceased person but felt they should remain confidential.

Analysis

15. The Commissioner will now deal with this case by considering the public authority's use of the section 41 exemption. A full text of the relevant statutes referred to is contained in the legal annex.

Procedural matters

16. Section 17 (1) of the Act provides that where a request for information is refused upon the basis of an exemption, the public authority must explain what exemption or exemptions have been relied upon. Where it would not otherwise be apparent the public authority must also explain why the exemption is being relied upon.
17. The Commissioner noted that the public authority did not issue a formal refusal notice in response to the request of 8 February 2007 as it did not recognise the complainant's request as a request for information under the Act. Instead it dealt with it under the Access to Health Records Act 1990 (AHRA).
18. The public authority subsequently did issue a formal refusal notice in response to the complainant's second request, citing the section 41 exemption. However the public authority did not give a sufficient explanation of why it had applied the section 41 exemption.
19. Section 17(7)(b) of the Act provides that a refusal notice should contain particulars of the right to appeal under section 50 of the Act. The public authority did not provide this information in its letter to the complainant in response to her first request for information.

20. Accordingly the Commissioner finds that the public authority has failed to meet the obligations imposed upon it by section 17 of the Act.

Access to Health Records Act 1990

21. The public authority dealt with the first request under the Access to Health Records Act 1990 (AHRA). Section 3(1)(f) of the AHRA provides that an application for access to a health record, or any part of a health record, may be made by a deceased person's personal representative and any person who may have a claim arising out of the patient's death.
22. The Commissioner has considered the accessibility of the requested information in the freedom of information request through the two access regimes of the AHRA and the Act. The AHRA allows disclosure to certain categories of person as defined in section 3(1).
23. The Commissioner noted that the public authority was not aware of any obvious litigants and that the complainant has also pointed out that the deceased person appears to have no remaining family or personal representatives.
24. The Commissioner has no jurisdiction over the application of the AHRA. He has however issued a number of Decision Notices which clarify the overlap between the two access regimes. He considers where it can be established that the information is reasonably accessible to the complainant through the AHRA, it is exempt under section 21 of the Act.
25. In this case the Commissioner considers that, as the complainant cannot obtain the necessary consent from the personal representatives/executors of the deceased, it is reasonable to conclude that the requested information would not be reasonably accessible to the complainant under the AHRA and therefore is not exempt under section 21 of the Act.

Exemption

Section 41 - information supplied in confidence

26. Section 41 provides an exemption from disclosure if the information was obtained by the public authority from any other person (including another public authority) and disclosure to the public would constitute an actionable breach of confidence.
27. In considering whether this exemption is valid, the Commissioner has taken into account the fact that the Act is designed to be applicant blind and that disclosure would be to the public at large. Therefore he has had to consider that if the information was disclosed it would in principle be available to any member of the public.
28. The Commissioner has also taken into account previous decisions he has reached on this issue particularly the following cases: FS50071069 and FS50111780. These cases dealt with situations where a request for information had been received from an individual who was not the deceased person's

personal representative or somebody who may have a claim arising out of the patient's death. In both of these decisions the Commissioner upheld the public authority's decision to withhold the information under the section 41 exemption. He has also taken into account the guidance he has issued on access to information about the deceased which can be accessed at:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/access_to_information_about_deceased_220307_v1.1.pdf

29. In considering whether or not the exemption is engaged, the Commissioner must determine whether the information was obtained by the public authority from any other person. The Commissioner is satisfied that information was provided by a third party.
30. Having satisfied the first part of the section 41 exemption the Commissioner proceeded to consider whether disclosure of the information would give rise to an actionable breach of confidence. The Commissioner considers that for a breach of confidence to be actionable it must meet the test laid down in *Coco v Clarke* [1969] RPC 41: the information must have the necessary quality of confidence; the information must be imparted in circumstances giving rise to an obligation of confidence; and there is an unauthorised use of the information.
31. In order for information to have the necessary quality of confidence, it must be something worthy of protection that is, it must be something that is not trivial and not generally known or publicly available by other means.
32. The Commissioner is of the view that the information is not trivial in nature. The complainant pointed out that some information is available about the deceased in connection with the trial, including some psychiatric reports, from the National Archives. However the Commissioner notes that this information is not the whole of the deceased person's medical records. Further the Commissioner is satisfied that an obligation of confidence is created by the very nature of the doctor/patient relationship and the duty is therefore implicit. This is further supported by the oath which doctors take, guaranteeing to protect doctor/patient confidentiality.
33. The Commissioner has also considered whether the duty of confidence can survive the death of the individual to whom the duty is owed. The argument is considered on the basis of both principle and authority contained in relevant case law.
34. The argument of principle is that the breach of confidence would affect the conscience of the defendant. Where the disclosure of such information could be said to be unconscionable, it may be restrained by the Court even where it would not damage the confider. The Commissioner finds the argument of principle to be a reasonable one, particularly given the fact that disclosure under the Act is disclosure to the world at large.
35. Having considered the argument of principle, the Commissioner has examined the argument of authority. While this may be less powerful than the argument of principle, there would appear to be no binding authority against the argument of principle.

36. Further the Commissioner noted the recent Information Tribunal's decision in the case of *Bluck v The Information Commissioner and Epsom & St Helier University NHS Trust (EA/2006/0090)* which dealt with whether a duty of confidence survived the death of the confider. The Tribunal found that "... a duty of confidence is capable of surviving death". The Commissioner also noted that the Tribunal agreed with his arguments that as a matter of principle the basis of the duty in respect of private information lies in conscience and that if the duty of confidence came to an end on death, a medical practitioner would be legally entitled to publish information from the records of deceased people, possibly for financial gain. The Tribunal considered the latter argument to be a "powerful point".
37. In view of this the Commissioner is satisfied that the duty of confidence attached to medical/health records can survive the death of the person to whom the records relate. In this case, the Commissioner is satisfied that the information has the necessary quality of confidence for a duty to be owed.
38. The Commissioner then looked at whether disclosure would constitute an actionable breach of confidence. Given that he accepts that in this case a duty of confidence exists the questions to be addressed are whether such a disclosure would be actionable and if so, by whom.
39. He considers there could be an actionable breach of confidence in this instance and considers that it would be unlikely that damages would be awarded for a breach of the duty of confidence to the deceased person, as there is no obvious financial loss. However, he considers that any remedy would most likely be in the form of an injunction to prevent publication of the requested information.
40. Section 41 is an absolute exemption and as such does not have to consider the public interest. However the law of confidence provides its own in-built public interest test in that a public interest defence can be made in cases of breach of confidence. In *Derry City Council v Information Commissioner (EA/2006/0014)* the Information Tribunal has ruled that a similar balancing exercise should be applied in section 41 cases as that used in qualified exemptions. The Commissioner has therefore considered whether the public authority could adopt any public interest defence to any action taken against it if the information was disclosed.
41. The Commissioner must balance the public interest in disclosing the requested information against the public interest in maintaining the duty of confidence, with a view to deciding if the duty of confidence should be maintained. The Commissioner is aware that in some circumstances there may be a public interest in the disclosure of such information for example where there are suspicious circumstances surrounding a person's death but he considers such circumstances will be rare.
42. The Commissioner notes that the complainant has explained that she is writing a book that will examine the issues around juries having to decide if defendants are sane or not. Further she has argued that it is in the public interest to discuss the various issues concerning cases of this nature. However the Commissioner also

notes that information has been disclosed about the court case by the National Archives as discussed in paragraph 32.

43. In the circumstances the Commissioner is satisfied that in this case there is no overriding greater public interest and therefore the duty of confidentiality should be maintained.
44. The Commissioner proceeded to establish who would be able to bring the action if the duty of confidence was breached.
45. The Commissioner notes that in this particular case, the complainant has argued that the deceased person is not survived by family or siblings. He further notes that the public authority has argued that even though the subject of the medical records was deceased, the records should remain confidential and that ethically this principle should be followed even if there are no apparent close relatives or descendants. The public authority also argued that there should be no difference between a deceased person's medical records with apparent relatives or descendants and as in this case, a deceased person's records with no apparent relatives or descendants.
46. The Commissioner considers that it is not necessary for a public authority to establish that, as a matter of fact, the deceased person has a personal representative who would be able to take action. This is because a public authority should not lay itself open to legal action because at the time of the request it was unable to determine whether or not a deceased person had a personal representative.
47. In view of the above the Commissioner considers that the requested information is exempt under section 41 of the Act and that in this case the public interest in the disclosure of the information does not outweigh the public interest in maintaining the duty of confidence.

The Decision

48. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- the application of the section 41 exemption.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- the obligations placed upon it under s17 of the Act as discussed in paragraphs 16 – 20.

Right of Appeal

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

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 13th day of December 2007

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

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(7) provides that-

A notice under subsections (1), (3), or (5) must –

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

Section 41(1) provides that –

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.

Section 41(2) provides that –

The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.