

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 18 August 2011

Public Authority: Cambridgeshire and Peterborough NHS Foundation Trust

**Address: Elizabeth House
Fulbourn Hospital
Fulbourn
Cambridge
CB21 5EF**

Summary

The complainant requested that Cambridgeshire and Peterborough NHS Foundation Trust (the 'Trust') should provide her with all the information it held in relation to her deceased mother. The Trust confirmed that it held a health care file but refused to disclose it under section 41(1) of the Freedom of Information Act 2000 (the 'Act'). The complainant argued that the information should have been refused under section 21 of the Act as she believes she should have access to the information under the Access to Health Records Act 1990 (the 'AHRA'). The Trust does not consider that the complainant is the personal representative of the deceased and has the right of access to the health care file under the AHRA. The Commissioner finds that the Trust was correct to apply section 41(1).

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. This Notice sets out his decision.

Background

2. The complaint has been submitted by a married couple who are in the process of contesting the last will made by the deceased mother of the requester. The complaint was made to the Information Commissioner's Office (the 'ICO') by the requestor's husband and he has written many of the letters to the public authority; however for the purposes of this Decision Notice, the complainant is held to be the requester herself.
3. The contested will named the complainant's two younger sisters as the executors and trustees of the will. The complainant has lodged a caveat to contest the will and has a formal probate claim in the Chancery Division of the High Court. She therefore argues that she has a 'claim arising from a patient's death' and should be given access to her late mother's health care files under the AHRA.
4. However, the Trust does not recognise the complainant as the personal representative of the deceased and does not consider that the complainant has a right to access her deceased mother's health care file under the AHRA.

The Request

5. On 27 September 2009 the complainant made the following information request to the Trust:

'Please provide me with all the information I am entitled to under the FOIA, DPA98 & Access to Health Records Act 1990 in respect of my late mother [name redacted].'
6. The complainant explained that she is the deceased's eldest daughter and nearest relative as defined under section 26 of the Mental Health Act. She also has a formal claim in the Chancery Division of the High Court against her father and mother's estate.
7. On 19 October 2009 the Information Governance and Legal Manager of the Anglia Support Partnership (the 'ASP') Risk Support Team responded to the request on behalf of the Trust. ASP confirmed that the only information that the Trust held with regard to the complainant's mother is a healthcare file.
8. ASP explained that the AHRA provides an access right to information contained within a deceased person's health record once the requester has satisfied the criteria of application within the Act.

9. It explained that as the complainant is not the personal representative of the deceased her request appeared to fall under the 'claim arising out of death' criterion.
10. ASP explained that the Trust is entitled to request more detail about any claim to assist it in assessing whether it holds any relevant information. It considered that the complainant had declined to provide this detail, despite having been given the opportunity to do so.
11. The Trust therefore did not consider that the complainant had the right to the requested information under the AHRA.
12. ASP informed the complainant that the Trust considered the health file to be exempt under section 41 of the Act (information provided in confidence). This was because the health file contained personal and sensitive information which concerned direct health care.
13. ASP quoted the Commissioner's guidance which states that 'most information in medical records is likely to be confidential and exempt under section 41' and that 'some people may have rights of access under the Access to Health Records Act 1990'.
14. ASP explained that it was not satisfied that the complainant had the right of access to her late mother's health care file under the AHRA. It therefore considered that the health file was exempt from disclosure under section 41 of the Act.
15. On 22 May 2010 the complainant wrote again to the Trust regarding this matter.
16. On 25 May 2010 the Trust wrote to the complainant and confirmed that the ASP is the body that deals with requests concerning health files from the Trust. It confirmed the detail given in the above response and suggested that the request needed to be progressed under the AHRA via the ASP.
17. On 26 May 2010 the complainant wrote to the Trust and pointed out that the Commissioner's guidance concerning medical records of the deceased explained that some people have access rights to such records under the AHRA. This applies if they are the deceased's personal representative or might have a claim arising from the death.
18. The complainant explained that the guidance states that if the applicant has access rights under the AHRA, the section 21 exemption (information available via other means) would apply to the freedom of information request and access should be dealt with under the AHRA.

19. The complainant also quoted the Department of Health's Guidance on the matter which states that the AHRA "provides a small cohort of people with the statutory right to apply for access to information contained within a deceased person's health record."
20. On 29 May 2010 the complainant wrote to the Trust and complained that she had not been provided with a valid reason for the refusal of the request, as required under section 17 of the Act.
21. The complainant asked the Trust to seek specialist legal advice on its handling of requests for access to deceased patients health records from external solicitors. She asked for an evidence based and valid refusal notice to the information request.
22. On 9 June 2010 the Chief Executive of the Trust wrote to the complainant and explained she was satisfied that the request had been appropriately dealt with by the Trust.
23. On 11 June 2010 the complainant explained that with regard to the Act, she considered the Trust had wrongly applied section 41 to this request. She argued it should have applied section 21.
24. On 18 June 2010 the complainant wrote to the ASP and explained that the request should have been handled under section 21 of the Act and that the information should have been provided under the provisions of section 3(1)(f) of the AHRA.
25. The complainant believed that the Trust was under a legal obligation to release records under the AHRA. She accepted that any disclosure would be at the discretion of the Trust. If it had elected not to exercise that discretion in her favour, she argued the Trust must give legitimate and clear reasons for not doing so.
26. On 30 June 2010 the complainant wrote to the Chief Executive of the Trust and requested a copy of legal advice that had been obtained by the Trust. This advice had been sought and received on the interpretation of section 3(1)(f) of the AHRA. With regard to the Act, she reiterated her view that section 41 had been wrongly applied.
27. On 20 July 2010, in an attempt to clarify matters, the Chief Executive of the Trust addressed the requests the complainant had made.
28. With regard to the Act, the Trust confirmed that it held certain health records relating to the deceased but explained that it considered them to be exempt from disclosure under section 41(1) of the Act.

29. On the same date, the Chief Executive wrote to the complainant and refused to provide her with the legal advice she had requested on 30 June 2010. The Trust considered that section 42(1) (legal professional privilege) applied to the information.

Scope of the case

30. On 5 August 2010 the complainant contacted the Commissioner to complain about the way this request for information had been handled. The complainant specifically asked the Commissioner to consider whether section 21 or section 41 should have been applied to this request.
31. The refusal of the Trust to provide the requested legal advice under section 42(1) is therefore not part of the scope of this case and will not be considered further.
32. Information held by the Trust about the complainant is her personal data and falls under the Data Protection Act 1998. It is not part of this complaint and is not included in the scope of this case.

Chronology

33. On 3 September 2010 the Trust again wrote to the complainant and explained its position. It explained that until it was provided with more information regarding the claim arising out of death, it was unable to evaluate if the information that it held would be relevant in assisting this claim.
34. On 16 February 2011 the complainant's husband submitted further arguments to the Commissioner. He argued that the policies and guidance on Access to Records of the Deceased published by the Department of Health had not been correctly interpreted in this case. He argued that the Trust had not correctly interpreted or implemented its policies on Access to Records of the Deceased and that the Commissioner's Line to Take (LTT37) had not been correctly implemented. This can be found on the Commissioner's website at:
<http://www.ico.gov.uk/foikb/PolicyLines/FOIPolicyAccesstomedicalrecordsofthedeceased.htm>
35. The complainant's husband has argued that as his wife is the Sealed Caveator granted by the High Court she should be granted equal rights of access to the records of her deceased mother as those granted to the executors named in her disputed will.

36. On 28 February 2011 the complainant's husband argued that neither probate nor letters of administration had been granted to his sister-in-law. He argued that she did not have Power of Attorney and had not been appointed a Welfare Deputy by the Court of Protection. He believed that his wife ought to be granted the same access to their late mother's healthcare plan as she was her nearest relative (as defined under section 26 of the Mental Health Act 1983) and was a Trustee for her mother.
37. On 2 March 2011 the complainant's husband argued that his wife had a valid claim under section 3(1)(f) of the AHRA.
38. On 3 March and 8 March 2011, he argued that his wife was the nearest relative to her deceased mother. As such she should have had access to her late mother's healthcare assessments before she died and should have been provided with them after she died.
39. On 4 March 2011 he argued that the only person of legal standing with respect to the health records of the deceased was her nearest relative, his wife. This applied before and after her death.
40. On 14 March 2011 the complainant's husband provided the Commissioner with further detail concerning the definition of the 'nearest relative' under section 26 of the Mental Health Act 2003. He provided case law references on the subject.
41. On 17 March 2011 he reiterated that under section 26 of the Mental Health Act 2003 his wife was the nearest relative of her deceased mother. He argued that the issue was how to reconcile the confidentiality of the personal information of the deceased with the interests of the nearest relative in having access to information which would allow her to exercise her statutory functions under the Mental Health Act.
42. Between 6 April 2011 and 22 June 2011 the complainant's husband continued to provide further arguments to the Commissioner. In particular he argued that he should have the right to access the social care records of his late mother-in-law (case reference FS50328160). He argued that these records were being withheld as the bodies involved wished to cover up mistakes which had been made (NHS Cambridgeshire, Cambridge and Peterborough NHS Foundation Trust and the Local Social Services Authority).
43. On 23 June 2011 the complainant's husband argued that the Trust was not complying with the Departments of Health's guidelines on the AHRA.
44. On 2 July 2011 the complainant's husband provided the Commissioner with a list of medical reports and letters which he held regarding his late

mother-in-law's medical history. He has explained that the majority of the health and medical records of his wife's deceased mother have been provided to them by her General Practitioner. However they do not have all the information that has been requested.

45. The complainant's husband has argued that neither probate nor letters of administration will be granted if his wife is not provided with the information she has requested. He has argued that until probate is granted there are no personal representatives to administer the estate. He believed that as the caveator, his wife should have equal access to the records of the deceased as the executors of her will.
46. The complainant's husband has explained that as his wife was the nearest relative of her deceased mother, they could not accept the application of section 41 of the Act to this information request.

Analysis

47. The full text of section 1, section 41 and section 21 can be found in the Legal Annex to this Decision Notice.

Exemptions

Section 41

48. Section 41(1) of the Act states that information is exempt if it was obtained by the public authority from any other person and if disclosure of the information would constitute a breach of confidence actionable by that or any other person. The exemption is absolute and therefore not subject to the public interest test.
49. The Commissioner has considered these questions below.

Was the information obtained from another person?

50. The withheld information comprises the health care file concerning the deceased. The Commissioner is satisfied that this file has been produced by health care professionals.

Does the information possess the necessary quality of confidence?

51. The Commissioner is satisfied that information such as health records are confidential. As the Commissioner explained in his Decision Notice for the case FS50101567 (East London & the City Mental Health Trust), when patients submit to treatment from doctors and other medical professionals whether this is in surgeries, hospitals or other institutions,

they do so with the expectation that that information would not be disclosed to third parties without their consent.

52. The Commissioner is therefore satisfied that an obligation of confidence is created by the very nature of the doctor / patient relationship and that the duty to respect that obligation of confidence is therefore implicit. In this case, the Commissioner is satisfied that the relationship between a medical professional and patient carries the same obligation of confidence.
53. The Commissioner is also satisfied that the information has the necessary quality of confidence in that it is neither generally accessible nor trivial.
54. However, the duty of confidence is not absolute. The courts have recognised three broad circumstances in which information may be disclosed in spite of a duty of confidence. These include where the disclosure is consented to by the confider, where disclosure is required by law, and where there is a greater public interest in disclosing the information which overrides any duty of confidence which may be owed.
55. There are no issues surrounding consent or law in this case. This leaves a consideration of the public interest defence. The Commissioner must therefore balance the public interest in disclosing the requested information against the public interest in maintaining the duty of confidence, with a view to deciding whether the defence to breach of confidence would succeed.
56. In considering whether the disclosure is in the greater public interest, the Commissioner is mindful that in some circumstances there may be a public interest in the disclosure of such information, such as instances where there were suspicious circumstances surrounding a person's death. However, he considers such circumstances to be rare.
57. The complainant's husband has argued that his deceased mother-in-law was subject to "financial, psychological, professional and institutional" abuse whilst under the care of the Trust and that neither probate nor letters of administration will be granted until the requested information is provided.
58. Although the Commissioner is sympathetic to these arguments, he does not consider that in this case there is an overriding public interest in the disclosure of this file. The complainant's arguments are private arguments and the Commissioner does not consider them to be sufficient to outweigh the public interest in the protection of the confidentiality of health care records. Disclosure under the Act means disclosure to the world at large and the information in these records

should remain confidential. The Act is not the correct mechanism to investigate the alleged abuse.

59. In addition, although the complainant's husband is arguing that section 41(1) does not apply to this request, this is because he considers that the health care records should be accessible to his wife under the AHRA. He is not suggesting that the health care records should be made available to the world at large.
60. The Commissioner therefore considers that the public interest does not override the duty of confidentiality in this case.

Would disclosure constitute an actionable breach of confidence?

61. The Commissioner has also considered whether the duty of confidence can survive the death of the individual to whom the duty is owed.
62. The decision of the Information Tribunal in *Bluck v IC and Epsom & St Helier University Hospitals NHS Trust; EA/2006/0090*, ('Bluck') is relevant here. That case dealt with a request for a deceased person's medical records from an individual who was not the deceased person's personal representative.
63. The Information Tribunal in that case concluded that even though the person to whom the information relates may have died, action for breach of confidence may be taken by the personal representative of that person and that therefore the exemption continues to apply. The Tribunal stated that:

"In these circumstances we conclude that a duty of confidence is capable of surviving death of the confider and that in the circumstances of this case it does survive"
64. The Information Tribunal therefore concluded that action could be brought by the personal representatives of the deceased, namely the executors or administrators of the estate.
65. Although the Commissioner considers the breach of confidence to be actionable, he acknowledges that it is unlikely that damages could 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 information requested.
66. The Commissioner's decision in this case is therefore that the duty of confidence survives the death of [name redacted] and disclosure of information by the Trust would have been a breach of the duty of

confidence owed to her. This would be an actionable breach of confidence on the part of the personal representative of the deceased.

67. The Trust does not consider the complainant to be the personal representative of the deceased. The Commissioner understands that the complainant's two younger sisters were named as the executors and trustees of the deceased's will. Under such circumstances, it would appear that the breach of confidence which would arise from the disclosure of the requested information would be actionable by the complainant's two sisters.
68. In view of the above, the Commissioner considers that the deceased's health care file was obtained by the public authority from a third party and that disclosure of the information would constitute a breach of confidence actionable by the personal representative of the deceased.
69. The Commissioner is therefore satisfied that the health care records of the complainant's late mother is confidential information and that the Trust was correct to refuse the complainant's request under section 41(1) of the Act.

Access to the records under the AHRA

70. The complainant has argued that as the nearest relative to the deceased, the requested information should be available to her under the AHRA. She has argued that as the Sealed Caveator granted by the High Court, she should be granted equal rights of access to the records of her deceased mother as those granted to the executors named in her disputed will.
71. However, the Trust does not consider that the complainant is the personal representative of the deceased and does not consider that the complainant should have access to the requested information as the nearest relative.
72. The Commissioner has no authority to adjudicate rights of access to information under the AHRA. This is a different legislative regime to the Act and access to information under the AHRA is not covered by the Act.
73. The Commissioner therefore cannot judge whether the complainant has a right of access under the AHRA and has no jurisdiction to decide what rights of access the complainant has or whether she is the nearest relative of the deceased. The Commissioner is satisfied that this was a matter for the Trust to decide.
74. Disclosure of information under the Act places the relevant information into the public domain and is effectively disclosure to the world at large. The Trust does not consider that the complainant should have access to

the requested medical care records under the AHRA and does not consider that the complainant has a right of access to the information. The request to see this information is therefore treated by the Commissioner as a request from a member of the public.

75. The conclusions of the Information Tribunal in the case of *Bluck* are again relevant. In that case the request was made for records held by the NHS Trust relating to an individual, now deceased. The request was refused on the grounds that a duty of confidence was owed to the deceased and that this would still be actionable; therefore the information was exempt under section 41(1) of the Act.
76. The Information Tribunal concluded that the section 41(1) exemption was valid. This was because the public authority did not consider the applicant to be the deceased person's representative and next of kin. The public authority did not consider that the applicant was covered by the relevant provisions in the AHRA which allowed it to disclose documents in certain situations.
77. The Commissioner considers that the circumstances of the present case are similar. In both instances the public authorities involved did not accept that the applicant has access to the requested information under the AHRA.
78. The Commissioner's guidance to section 41(1) 'Access to information about the deceased' explains the right of access to medical records:

'Most information in medical records is likely to be confidential and exempt under section 41. However, this exemption may not apply to any information already made public, for example on the death certificate or in an inquest or coroner's court, especially if publication was very recent or widely reported.'

You should also remember that some people may have rights of access under the Access to Health Records Act 1990 (AHRA) or Access to Health Records (Northern Ireland) Order 1993, essentially if they are the deceased's personal representatives or might have a claim arising from the death. The right is for personal representatives, not simply for surviving family members or next of kin.'

If the applicant has access rights under the AHRA, the section 21 exemption (information available by other means) would apply to the freedom of information request and access should be dealt with under the AHRA'.

This can be found on the ICO website at:

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

79. The complainant has also argued that the Trust should have refused the request under section 21 of the Act (reasonably accessible to the applicant by other means).
80. However, as stated in the guidance, section 21 is only applicable if the information is accessible to the applicant otherwise than under the Act, for example, if the applicant has a right to the requested records under the AHRA.
81. In this case the Trust does not consider that the complainant has a right to the requested health care records under the AHRA.
82. The complainant has referenced the following Decision Notices in support of this request:

 FS50127442
 FS50063716
 FS50128269
 FS50125530
83. However, these Decision Notices do not support this complaint. In each of those cases, the Commissioner found the requested information to be exempt from disclosure under section 21 of the Act. However, in each instance, the requested information was reasonably accessible to the applicant under the right of access provided by the AHRA.
84. In contrast, in this case the Trust does not accept that the information is available to the complainant under the AHRA. Because of this the Commissioner cannot find that the information is reasonably accessible via other means and cannot find that section 21 should have been applied to this request.
85. Under such circumstances, the Commissioner is satisfied that the health care file of the complainant's deceased mother is confidential information and exempt under section 41(1) of the Act. The Commissioner is therefore satisfied that the Trust was correct to refuse the complainant's request under section 41(1) of the Act.

The Decision

86. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

87. The Commissioner requires no steps to be taken.

Right of Appeal

88. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

89. 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.
90. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 18th day of August 2011

Signed

**Pamela Clements
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Cheshire
SK9 5AF**

Legal Annex

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.”

Information Accessible by other Means

Section 21(1) provides that –

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

Information provided in confidence

Section 41 provides that:

(1) 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.
- (2) 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.