

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 March 2013

Public Authority: Ministry of Defence
Address: Main Building (Level 1 Zone N
Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant has requested information about his late father's time in the Royal Navy, including medical notes.
2. The Commissioner's decision is that the Ministry of Defence has applied section 41 appropriately to the withheld medical information.
3. The Commissioner does not require the Ministry of Defence to carry out any steps.

Request and response

4. On 20 December 2011, the complainant wrote to Ministry of Defence (the MoD) and requested information in the following terms:
'Where was my father on 9 March 1952? Where was my father on 29 September 1952? Where was my father on 30 October 1952? Can I please have the medical records for the dates above in items 1, 2, 3. Where was my father 1 April 1952 to 5 June 1952 (inclusive)? MMS on his service record 26 Feb 1952. Is this re MMS film badge, used in atomic tests? 2030 on his service record 26 Feb is this complex 2030 (atomic tests)? Was my father in 1952, involved with any atomic tests (anywhere on the globe)? Why did he go to HMS HORNBILL in 1951? Why is there the initials DNA on his service record and medical records. DNA in the naval abbreviation dictionary is defence nuclear agency?'

5. The MoD responded on 19 January 2012, explaining that it was in a position to make a partial response. The MoD answered all of the questions except question 4, which asked for the medical records for the dates in questions 1, 2 and 3. The MoD explained that it was still considering this.
6. On 15 February the MoD contacted the complainant. It confirmed that it was withholding the requested medical information under section 41.
7. Following an internal review, the MoD wrote to the complainant on 8 June 2012. It upheld its decision to withhold the medical information under section 41.
8. The MoD explained that it understood from earlier correspondence which the complainant had had with the Institute of Naval Medicine (INM) (which is part of the MoD) that the medical records for the dates in question related to medical treatment which the complainant's late father received in the Royal Navy Hospital Hong Kong. The MoD also confirmed that the IMN had reiterated to it that, during this period of hospitalisation, the record showed that his father was being treated for an incapacity that was not life threatening and from which he was able to make a full recovery after the normal course of treatment.
9. The MoD explained that when individuals submitted to treatment from doctors and other medical professionals, they do so with the expectation that the information will not be disclosed to third parties without their consent. It also explained that an obligation of confidence is entered into by the very nature of the doctor/patient relationship and the duty of confidence is therefore implicit and continues to apply beyond the death of a patient.

Background

10. The complainant submitted several requests for information to the MoD regarding his late father's service in the Royal Navy. The MoD has disclosed his father's service record to him.
11. Originally the complainant's family made a request in 1997 for the medical record. The MoD confirmed this was passed to the appropriate General Practitioner in Australia, who withheld medical information that he deemed the deceased would not wish to be divulged.

Scope of the case

12. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular, he

complained about the application of section 41 and the lack of answers to questions he sent to the MoD on 24 April and 12 June 2012.

13. The Commissioner contacted the MoD about the outstanding issues. The MoD explained that it did not hold any more recorded information regarding the questions of 24 April and 12 June 2011, as it had already disclosed the complainant's late father's naval service record.
14. The MoD agreed it would now carry out an internal review regarding the questions of both 24 April and 12 June 2012. Therefore, this decision notice will only deal with the application of section 41.

Reasons for decision

15. Section 41 (1) of the FOIA states 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.'*

16. As section 41 is an absolute exemption, it is not subject to the public interest under the FOIA.
17. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
 - whether the information has the necessary quality of confidence;
 - whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information and to the detriment of the confider.
18. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.
19. In this case, the information is the complainant's late father's medical records. The Commissioner accepts that medical records contain

information obtained from a third party. Therefore, the requirement of section 41(1)(a) is satisfied.

20. The Commissioner notes that the complainant has been given some medical information about his late father in that he was reassured that his father had suffered from a non-life threatening illness from which he recovered.
21. No evidence has been put before the Commissioner that the specifically withheld medical information in question has been put into the public domain. The Commissioner would not generally expect the requested information to be put into the public domain, since access to the withheld information is restricted to medical staff and others who, within their professional capacity and remit, can examine the deceased's records. He is therefore satisfied that the information is not accessible by other means.
23. The MoD explained that the withheld information was very sensitive and sent the Commissioner an overview of it. It confirmed that there was information about the deceased's health, and medical opinions of the relevant medical officers in charge at the time. Given the nature of the information the Commissioner is satisfied that the information is not trivial.
24. The Commissioner is therefore satisfied that the withheld medical information has the necessary quality of confidence.
25. The Commissioner has gone on to consider whether the information was imparted in circumstances importing an obligation of confidence.
26. The information relates to the medical care of the deceased patient and includes information provided in confidence by the patient to the health professionals involved in his care. When patients receive treatment from doctors and other medical professionals, they do so with the expectation that information will not be disclosed to third parties without their consent. The Commissioner is satisfied that an obligation of confidence is created by the very nature of the doctor/patient relationship and that the duty of confidence is therefore implicit.
27. The Commissioner went on to consider whether disclosure of the information would be to the detriment of the confider.

28. The loss of privacy can be a detriment in its own right.¹ The Commissioner considers that, as medical records constitute information of a personal nature, there is no need for there to be any detriment to the confider in terms of tangible loss, in order for it to be protected by the law of confidence.
29. In this case, the Commissioner considers that disclosure would be contrary to the deceased person's reasonable expectation of maintaining confidentiality in respect of his private information. He therefore considers the absence of detriment would not defeat a cause of action.
30. The Commissioner also considers that, while disclosure would cause no harm to the confider, knowledge of the disclosure of the deceased person's medical record could distress surviving relatives. He notes that the complainant has stated to him that he does not mind about his late father's medical information being made public. However, the Commissioner considers that the knowledge that confidential information has been passed to those whom the confider would not willingly convey it to, may be sufficient detriment.² The Commissioner notes that in this case the General Practitioner in Australia also withheld medical information which he did not consider the deceased person would wish to be divulged.
31. The Commissioner then considered whether there is a public interest defence for a breach of confidence. Disclosure of confidential information will not constitute an actionable breach of confidence if there is a public interest in disclosing the information which outweighs the public interest in keeping the information confidential.
32. The complainant stated that he wanted the truth about his father. He explained that he did not have a lot of information about his father and that he had a lot more questions to ask.
33. The Commissioner accepts that there is a public interest in understanding why someone who had served in the Navy had subsequently committed suicide, in case it was connected to his time in the Navy. He also accepts that the complainant has a strong personal interest in the information.

¹ *Bluck v ICO & Epsom and St Helier University Hospital NGHS Trust* [EA/2006/0090] para 15.

² *EY v ICO & Medicines and Healthcare Products Regulatory Authority* [EA/2010/0055] para 13.

34. In weighing this against the public interest in keeping the information confidential, the Commissioner has been mindful of the wider public interest in preserving the principle of confidentiality.
35. It is in the public interest that confidences should be respected. The encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence.³ The Commissioner is mindful of the need to protect the relationship of trust between confider and confidant; and the need not to discourage or otherwise hamper a degree of public certainty that such confidences will be respected by a public authority.
36. The Commissioner considers that the public interest in disclosing the information does not outweigh the public interest in maintaining trust between the doctor and patient. He finds that the public interest in preserving the trust between doctor and patient to be particularly weighty.
37. The Commissioner considers that the MoD would not have a public interest defence for breaching its duty of confidence. Therefore, he finds that the request information is exempt under section 41 and the MoD applied this exemption appropriately.

Other matters

38. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information and that the procedure should encourage a prompt determination of the complaint.
39. As he has made clear in his '*Good Practice Guidance No 5*', the Commissioner considers that internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.

³ *Bluck v ICO & Epsom and St Helier University Hospital NGHS Trust* [EA/2006/0090] para 8.

The Commissioner is concerned that in this case, the MoD took 32 working days for an internal review to be completed, despite the publication of his guidance on the matter.

Right of appeal

40. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

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

Signed

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