

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 September 2009

Public Authority: Mayday Healthcare NHS Trust
Address: Mayday University Hospital
530 London Road
Croydon
Surrey
CR7 7YE

Summary

The complainant made a request to Mayday Healthcare NHS Trust for the medical records of a deceased patient. The public authority confirmed that it did not hold some of the requested information and refused to disclose the rest on the basis of the exemption contained in section 41 of the Act, information provided in confidence. The Commissioner has investigated the complaint and has upheld the public authority's application of section 41. He has, however, found the public authority in breach of section 1(1)(a) and section 10(1). The Commissioner requires no steps to be taken.

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 17 March 2008 the complainant requested the following information:

"1. Records relating to treatment provided to ... [name redacted]... between November 1997 and 16 June 1998 at Accident and Emergency in respect of two suspected broken elbows. We understand from ... [name redacted]... that at this time his elbows were also X-rayed. We specifically seek all records relating to the dates, times, reason for attendance together with the injuries noted and any treatment received.

2. Any records relating to communication of the above injuries and treatment to ... [name redacted]...’s GP, [name redacted], [address redacted].

3. Any manual medical records relating to ... [name redacted]... prior to the introduction of computerised recording which we understood was introduced in 1999.”

3. Mayday Healthcare NHS Trust (“the Trust”) provided a response on 1 April 2008, within 20 working days, in which it confirmed that it held medical records for ... [name redacted]... but refused to disclose the information requested on the basis of the exemption contained in section 41 – information provided in confidence. The Trust also stated that it did not feel the Freedom of Information Act was an appropriate route to access medical records of a deceased patient, making reference to the Freedom of Information (Scotland) Act 2002 which has a specific exemption for health records at section 38.
4. The complainant requested an internal review of the Trust’s decision on 20 June 2008. The complainant specifically referred to the duty to confirm or deny in accordance with section 1(1)(a) in respect to all three points of his request and challenged the application of section 41, stating that he was already in possession of a large quantity of the medical records (as the result of an inquest) and that therefore the quality of confidence was not applicable and any remaining records should not be withheld.
5. On 30 July 2008, the Trust wrote to the complainant with the details of the result of the internal review it had carried out. It explained that although it held main hospital records for the patient in question, it did not hold any Accident and Emergency department records as these had been stored separately from the main hospital records and had, unfortunately, been destroyed in a flood in 2006. The Trust referred to each point of the request in turn, for all parts the Trust stated that they did not hold any records.
6. On 21 August 2008 the complainant contacted the Trust to query the Trust’s response to part three of the request. The complainant clarified that in relation to part 3 of the request they were referring to all manual records held between the dates requested, not just Accident and Emergency department records.
7. In a letter to the complainant dated 7 October 2008 the Trust confirmed that the internal review response was incorrect and that in fact it did hold a small number of manual records in relation to part 3 of the request. The Trust withheld these records under Section 41.

The Investigation

Scope of the case

8. On 3 December 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 1. The Trust's application of Section 41
 2. That by failing to advise the complainant that the Accident and Emergency department records had been destroyed in the 2006 flood in its initial response of 01 April 2008, the Trust did not provide appropriate advice and assistance as required by section 16 of the Act.
9. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

10. The Commissioner contacted the Trust via telephone on 2 April 2009 to discuss the complaint.
11. On 7 April 2009 the Commissioner contacted the Trust via telephone to discuss the complaint further. During the course of the conversation the Trust confirmed that they still felt section 41 was applicable to the information they held. The Commissioner subsequently wrote to the Trust asking them to provide, in writing, their arguments for withholding information by virtue of section 41.
12. The complainant's representative telephoned the Commissioner on 15 April 2009 to discuss the case further.
13. In a letter dated 23 April 2009 the Trust responded to the Commissioner, they again stated that the information was confidential, the Trust also confirmed that they had had computerised records since 1987, not 1999 as previously stated.

Analysis

Exemptions

14. The full text of the relevant provisions of the Act referred to in this section is contained within the legal annex.
15. In considering whether the exemption is valid, the Commissioner has taken into account that the Act is designed to be applicant blind and that disclosure should be considered in its widest sense, which is to the public at large. In doing this the Commissioner has not taken into account the extent to which disclosures may have already been made, or potentially could be made to the complainant as an individual. This is because if information were to be disclosed under the Act it

would not just be disclosed to the complainant but would, in principle, be available to any member of the public.

Section 41

16. The Commissioner has considered whether the Trust was correct to apply the exemption under section 41 of the Act. Section 41 applies to information obtained from a third party whose disclosure would constitute an actionable breach of confidence.
17. When considering whether or not a breach of confidence is itself actionable in this case, the Commissioner has decided that it is appropriate to follow the test set out by Megarry J in *Coco v A N Clark (Engineers) Limited* (1968) FSR 415 (*Coco v Clark*) and cited by the Information Tribunal (Tribunal) in *Bluck v The Information Commissioner & Epsom St. Helier University NHS Trust* (EA/2006/0090). According to Megarry J:

'...three elements are normally required, if apart from contract, a case of breach of confidence is to succeed. First, the information itself must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of the information to the detriment of the party communicating it...' (See paragraph 7 of the Tribunal's decision).
18. Later in the same judgement however, Megarry J made it clear that the element of detriment may not be necessary in every case. In the Commissioner's view, information on personal matters can still be protected under the law of confidence, even if disclosure may not be detrimental in terms of any tangible loss.
19. Although section 41 is an absolute exemption, the law of confidence does contain its own inbuilt public interest in that one defence to an action for breach of confidence is that the disclosure is in the public interest. The Commissioner therefore also considered whether the public authority could rely on a public interest defence so that a breach of confidence in the event of disclosure would not be actionable.
20. Finally the Commissioner has considered whether a breach of confidence can remain actionable after the death of the confider.

Was the information obtained from any other person?

21. The investigation established that the requested information was indeed obtained from a third party, as it originated from the deceased. In the Commissioner's view information contained within medical records will qualify as information obtained from a third party.

Does the information have the necessary quality of confidence?

22. 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. As stated at paragraph 15 above, disclosure under the Act would be disclosure not just to the complainant but to the public as a whole. For this reason the Commissioner has considered whether the information is otherwise accessible to the public, rather than just to the individual complainant in this case. He has concluded that the information in this case is neither trivial nor otherwise accessible to the public. The Commissioner is therefore satisfied that the medical records requested in this case have the necessary quality of confidence required to sustain an action for breach of confidence.

Was the information obtained in circumstances importing an obligation of confidence?

23. The Commissioner considers that when patients submit to treatment from doctors and other medical professionals, whether that is in surgeries, hospitals or other institutions, they do so with the expectation that the information will not be disclosed to third parties without their consent. In other words, he 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 taken by doctors guaranteeing to protect doctor/patient confidentiality. He therefore concludes that this information was obtained in circumstances importing an obligation of confidence.

Would disclosure be to the detriment of the confider?

24. 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 any tangible loss, in order for it to be protected by the law of confidence. He has not therefore considered this issue any further.

Would there be a defence to disclosure in the public interest?

25. In the Commissioners view disclosure will not constitute an actionable breach of confidence if there is a public interest in disclosure which outweighs the public interest in keeping the information confidential.
26. Although the public authority did not provide any public interest arguments in this case, the Commissioner would concur with the comments of the Information Tribunal in *Bluck v the Information Commissioner & Epsom St Helier University NHS Trust (EA/2006/0090)* that it is in the interest of *"patients to have confidence that medical staff will not disclose sensitive medical data before they divulge full details of their medical history and lifestyle. Without that assurance patients may be deterred from seeking advice and without adequate information doctors cannot properly diagnose or treat patients."* The Commissioner has not been presented with any compelling argument as to a particular public interest in disclosure into the public domain in this case sufficient to outweigh the considerable public interest in maintaining the confidentiality of medical information. He therefore considers the Trust would not have a public interest defence for breaching the confidence in this case.

Does the breach remain actionable after the death of the confider?

27. In Bluck the Tribunal confirmed the ICO's position, that even though the person to whom the information relates may have died; action for a breach of confidence could 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 "

28. The Commissioner considers that in the circumstances of this case the duty of confidence is similarly capable of surviving the death of the confider. It is the Commissioner's view that in determining whether disclosure would constitute an actionable breach of confidence, it is not necessary to establish that, as a matter of fact, the deceased person has a personal representative who would take action.

Conclusion

29. In light of the above the Commissioner concludes that the public authority correctly withheld this information under section 41 of the Act.

Procedural Requirements

Section 1

30. The Commissioner has considered whether the Trust has complied with section 1(1)(a) of the Act.

31. Section 1(1)(a) states:

*"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"*

32. The refusal notice dated 1 April 2008 confirmed that the Trust held medical records but did not specify, in accordance with section 1(1)(a), whether it held information to satisfy each individual part of the request.
33. In the request for an internal review the complainant's representative asked the Trust to apply section 1(1)(a) to every point of their original request.
34. The internal review result dated 30 July 2008 applied section 1(1)(a) to all points of the request specifically. The Trust stated that it did not hold any of the information requested as the records had been destroyed in a flood which occurred in 2006.
35. In its letter of 07 October 2008 the Trust acknowledged that it did hold information in relation to part 3 of the request, and that this information was exempt under section 41 of the Act.

36. The Commissioner finds that the Trust has breached section 1(1)(a) for failing to confirm, by the date of completion of its internal review, that information was held in respect of part 3 of the request.

Section 10

37. Section 10(1) of the Act states that:

“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.”

38. The Commissioner considers that the Trust has breached section 10(1) of the Act as it failed to confirm or deny whether it held information in relation to parts 1 to 3 of the request within 20 working days following the date of receipt of the request, as required by section 1(1)(a).

Section 16

39. In the complainant's initial complaint to this office on 3 December 2008 he maintained that the Trust did not provide appropriate advice and assistance as required by section 16 of the Act, because it had failed to advise him in its initial response of 01 April 2008 that the Accident and Emergency department records had been destroyed in a flood.
40. Section 16(1) (a full copy is in the legal annex attached to this notice) provides an obligation for a public authority to provide advice and assistance to a person making a request, so far as it would be reasonable to do so. Section 16(2) states that a public authority is to be taken to have complied with its section 16 duty in any particular case, when it satisfies the requirements of the Section 45 Code of Practice in relation to the provision of advice and assistance. The provision of advice and assistance is covered in Part II of the Code of Practice.
41. The Commissioner has concluded that the public authority did not breach section 16(1). He considers that in the circumstances of this case, advice and assistance was not required to satisfy the Section 45 Code of Practice as none of the provisions of part II of the Code were relevant in the circumstances of this case.
42. In the Commissioner's view the failure to advise the complainant, within 20 working days, that information in relation to parts 1 and 2 of the request was not held, constitutes a breach of section 10 rather than of section 16(1).
43. The Commissioner further considers that, although it is good practice for a public authority to provide an explanation of why information is not held, there is no requirement under either section 1(1)(a) or section 16(1) for a public authority to do this.

The Decision

44. 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:

Section 41 was applied correctly to the withheld information.

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

The Trust breached section 10(1) of the Act in failing to comply with section 1(1)(a) within twenty working days following receipt of the request.

The Trust breached section 1(1)(a) in failing to confirm that information was held in relation to part 3 of the request by completion of its internal review.

Steps Required

46. The Commissioner requires no steps to be taken.

Right of Appeal

47. 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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

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 16th day of September 2009

Signed

**Lisa Adshead
Senior FOI Policy Manager**

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

Legal Annex

Freedom of Information Act 2000

Section 1 - General right of access to information held by public authorities

- (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.

...

Section 10 – Time for compliance with request

(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.

(2) Where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

(3) If, and to the extent that—

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied, the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

(4) The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with, the regulations.

(5) Regulations under subsection (4) may—

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.

(6) In this section—

- “the date of receipt” means—
 - (a) the day on which the public authority receives the request for information, or
 - (b) if later, the day on which it receives the information referred to in section 1(3);
- “working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under

the [1971 c. 80.] Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

Section 16 – Duty to provide advice and assistance

(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

Section 45 Code of Practice - Duty to provide advice and assistance

II The provision of advice and assistance to persons making requests for information

3. The following paragraphs of this Code apply in relation to the provision of advice and assistance to persons who propose to make, or have made, requests for information to public authorities. They are intended to provide guidance to public authorities as to the practice which it would be desirable for them to follow in the discharge of their duty under section 16 of the Act.

Advice and assistance to those proposing to make requests:

4. Public authorities should publish their procedures for dealing with requests for information. Consideration should be given to including in these procedures a statement of:
 - o what the public authority's usual procedure will be where it does not hold the information requested (see also III - "[Transferring requests for information](#)"), and
 - o when the public authority may need to consult other public authorities and/or third parties in order to reach a decision on whether the requested information can be released (see also IV - "[Consultation with third parties](#)"),
5. The procedures should include an address or addresses (including an e-mail address where possible) to which applicants may direct requests for information or for assistance. A telephone number should also be provided, where possible that of a named individual who can provide assistance. These procedures should be referred to in the authority's publication scheme.
6. Staff working in public authorities in contact with the public should bear in mind that not everyone will be aware of the Act, or Regulations made under it, and they will need where appropriate to draw these to the attention of potential applicants who appear unaware of them.
7. Where a person is unable to frame his or her request in writing, the public authority should ensure that appropriate assistance is given to enable that person to make a request for information. Depending on the circumstances, consideration should be given to:

- advising the person that another person or agency (such as a Citizens Advice Bureau) may be able to assist them with the application, or make the application on their behalf;
- in exceptional circumstances, offering to take a note of the application over the telephone and then send the note to the applicant for confirmation (in which case the written note of the telephone request, once verified by the applicant and returned, would constitute a written request for information and the statutory time limit for reply would begin when the written confirmation was received).

This list is not exhaustive, and public authorities should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant.

Clarifying the request:

8. A request for information must adequately specify and describe the information sought by the applicant. Public authorities are entitled to ask for more detail, if needed, to enable them to identify and locate the information sought. Authorities should, as far as reasonably practicable, provide assistance to the applicant to enable him or her to describe more clearly the information requested.
9. Authorities should be aware that the aim of providing assistance is to clarify the nature of the information sought, not to determine the aims or motivation of the applicant. Care should be taken not to give the applicant the impression that he or she is obliged to disclose the nature of his or her interest as a precondition to exercising the rights of access, or that he or she will be treated differently if he or she does (or does not). Public authorities should be prepared to explain to the applicant why they are asking for more information. It is important that the applicant is contacted as soon as possible, preferably by telephone, fax or e-mail, where more information is needed to clarify what is sought.
10. Appropriate assistance in this instance might include:
 - providing an outline of the different kinds of information which might meet the terms of the request;
 - providing access to detailed catalogues and indexes, where these are available, to help the applicant ascertain the nature and extent of the information held by the authority;
 - providing a general response to the request setting out options for further information which could be provided on request.

This list is not exhaustive, and public authorities should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant.

11. In seeking to clarify what is sought, public authorities should bear in mind that applicants cannot reasonably be expected to possess identifiers such as a file reference number, or a description of a particular record, unless this information is made available by the authority for the use of applicants.

Limits to advice and assistance

12. If, following the provision of such assistance, the applicant still fails to describe the information requested in a way which would enable the authority to identify and locate it, the authority is not expected to seek further clarification. The authority should disclose any information relating to the application which has been successfully identified and found for which it does not propose to claim an exemption. It should also explain to the applicant why it cannot take the request any further and provide details of the authority's complaints procedure and the applicant's rights under section 50 of the Act (see "[Complaints Procedure](#)" in section VI).

Advice and assistance and fees

13. Where the applicant indicates that he or she is not prepared to pay the fee notified in any fees notice given to the applicant, the authority should consider whether there is any information that may be of interest to the applicant that is available free of charge.
14. Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying would exceed the "appropriate limit" (i.e. cost threshold) the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee.
15. An authority is not expected to provide assistance to applicants whose requests are vexatious within the meaning of section 14 of the Act. Guidance on what constitutes a vexatious request can be found in the DCA Handbook - 'Guidance on Processing Requests'. The Information Commissioner has also issued advice on dealing with vexatious and repetitious requests.

Section 41 - Information provided in confidence

(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.