

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 8 August 2007

Public Authority: Dr IM Gilmour
Address: Deerness Park Medical Centre
Suffolk Street
Hendon
Sunderland
SR2 8AD

Summary

The complainant made a request for a copy of the complete medical records of a deceased patient of the surgery. This request was originally made by reference to the Access to Health Records Act. The public authority refused the request on the basis that the complainant had not provided evidence that the personal representatives or executors of the deceased patient had given consent for the information to be disclosed to him and the information was confidential. It also pointed out that the family of the deceased had expressly refused consent to disclosure of the information. In refusing the request the public authority failed to consider the request as a request for information under the Act and in doing so it therefore breached section 17 of the Act. However the Commissioner has concluded the information was exempt by virtue of section 41 of the Act.

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. The complainant made a request to Dr I Gilmour at Deerness Park Medical Centre on 31 January 2005 for the complete health records it held on a particular deceased patient (the "patient") from the date the GP to whom the request was directed became the patient's GP. The complainant specified his request was made under the Access to Health Records Act 1990 (AHRA). The Commissioner understands that the complainant had made previous requests for this information prior to this date also under the AHRA but the Commissioner has not had sight of this correspondence in order to confirm the dates of these previous requests.
3. The Commissioner notes that under the Act a medical centre is not a public authority in its own right. The public authority in this case is the general medical practitioner (GP) named above who is practising in partnership with other GPs at Deerness Park Medical Centre.
4. The public authority responded to the request on 31 January 2005 following advice from its defence union. In this letter the public authority refused the complainant's request and advised him to seek consent from the personal representative or executor of the patient's estate.
5. On 11 April 2005 the public authority wrote again to the complainant confirming that it could not release the health records of the patient without the consent of the personal representative / executor of the patient's estate as it had an obligation to keep personal information confidential.

The Investigation

Scope of the case

6. On 31 August 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically complained about the public authority's delay in responding to his request and its refusal notice which failed to fully explain why it could not provide the information.
7. The Commissioner has therefore considered the application of the exemption and the procedural aspects of the public authority's handling of the request for information.

Chronology

8. On 22 September 2005 the Commissioner wrote to the complainant requesting a copy of his original request for information, and any responses received from the public authority.
9. The complainant responded on 27 September 2005 and confirmed that he remained dissatisfied with the public authority's response.
10. On 23 January 2006 the Commissioner wrote to the complainant asking whether he had now received a substantive response from the public authority. The Commissioner also repeated his request for a copy of the complainant's original request and any responses received from the public authority.
11. The complainant responded on 30 January 2006 again expressing his views on why the information should be disclosed to him and his concern over the lack of progress with his complaint. He did not however provide copies of the correspondence requested on two previous occasions.
12. The Commissioner wrote again to the complainant on 14 March 2006 indicating that he could not proceed with his investigation until he had the relevant documents.
13. Following further correspondence from the complainant dated 17 April 2006, the complaint was reviewed again and was put on hold pending allocation to another Complaints Officer.
14. On 29 January 2007 the Commissioner wrote to the public authority asking for clarification as to how it dealt with the request and in particular whether it had considered the request in accordance with the Act as well as the AHRA. The Commissioner accepted that requests of this nature can straddle different access regimes and that at the time of the request no clear guidance or Decision Notices had been issued by him which would have provided clarification on the approach public authorities should take in considering these type of requests. However the Commissioner explained to the public authority that although the complainant did not appear to make reference to the Act until he wrote to the public authority in December 2006, the Commissioner considered that the public authority should have considered the application of the Act when initially responding to the complainant. The Commissioner explained that a complainant does not have to specify that the request is being made under the Act but a public authority is obliged to consider any request for information as a potential request under the Act. The Commissioner therefore asked the public authority to consider the request in accordance with the Act and should it wish to withhold the information under the Act to should specify

- any exemption(s) that it considers would apply and explain why they apply.
15. The public authority replied on 8 March 2007. It confirmed that it had responded to the first letter received by the complainant on 31 January 2005 as outlined in point 3. It could not however confirm when it received the first letter from the complainant. It added that the complainant made no reference to the Act until his letter to the public authority of 28 December 2006.
 16. The public authority explained to the Commissioner that it took the view that the Act does not apply to the medical records of a deceased patient, and that consideration under the AHRA would be the appropriate action. It added that medical records are personal information and are exempt from the Act under section 40. The public authority also added that the complainant had been unable to express a reason for access to the record or relevant claim that would override its duty of confidentiality.
 17. The public authority also added that although it held some information covered by the request in the form of archived computer records and a small number of consultations recorded on its practise computer system most of the information was returned to NHS storage and are no longer in the possession of the public authority. Finally it also pointed out that it was aware that representatives of the patient's family had refused consent to the release of these records to the complainant.

Analysis

Procedural matters

Section 17

18. Section 17 of the Act details what information a public authority must provide to a complainant when refusing to disclose some or all of the information requested. Section 17(1) requires a public authority which is refusing a request to issue a notice within the time for complying with section 1(1), that is, within twenty working days and that –
 - states that fact
 - specifies the exemption in question, and
 - states why the exemption applies.
19. The Commissioner has noted that the public authority did not issue a formal refusal notice as it failed to recognise the complainant's request as

- a request for information under the Act. The Commissioner has not had sight of the correspondence which the public authority sent to the complainant apart from its letter of 11 April 2005. The Commissioner has therefore treated this letter as its formal refusal notice for the purposes of the Act.
20. Sections 17(7)(a) and (b) of the Act requires a public authority to provide the complainant with details of the public authority's internal review procedure and details of the right to complain to Commissioner.
 21. The refusal notice issued by the public authority did not specify which exemptions the public authority was relying upon to withhold the information, nor any reasoning as to why these exemptions applied. The notice also did not contain details of the public authority's internal review procedures or the details of the Commissioner.
 22. The full text of section 17 can be found in the Legal Annex at the end of this Notice.

Access to Health Records Act 1990

23. The public authority took the view that the request was being made under the AHRA.
24. Section 3(f) of the AHRA provides that an application for access to a health record, or to any part of a health record may be made by a deceased patient's personal representative and any person who may have a claim arising out of the patient's death.
25. The Commissioner has considered the accessibility of the information requested by the complainant through the two access regimes of the AHRA and the Act. The AHRA only allows disclosure to certain categories of persons as defined in section 3(1).
26. The public authority offered to consider the request provided the complainant could obtain the consent of the personal representative /executor of the patient's representative. The complainant has however never provided the necessary consent and it is clear no consent would be forthcoming from the personal representatives.
27. As no consent was provided the public authority refused to disclose the information.
28. 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 and 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. In this case the Commissioner considers that as the complainant has been unable to obtain the necessary consent from the personal representatives/executors of the deceased the Commissioner considers it is reasonable to conclude the information requested would not be reasonably accessible to the complainant under the AHRA and therefore not exempt under section 21 of the Act. Therefore section 21 does not provide a basis for withholding the information requested in this case.

Exemptions

Section 40

29. The public authority did not cite any exemptions to refuse the information under the Act other than its reference to section 40 in its correspondence with the Commissioner.
30. Section 40(2) of the Act states that any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is not the data subject and its disclosure would breach any of the data protection principles. The full text of section 40 can be found in the Legal Annex at the end of this notice.
31. The public authority referred to section 40 in its letter to the Commissioner of 8 March 2007. It indicated that medical records are personal information and exempt from the Act under section 40. However the interpretative provisions outlined in section 1(1) of the Data Protection Act 1998 makes it clear that data must relate to a living individual. As the information requested in this case relates to the medical records of a deceased person the public authority cannot therefore apply section 40 of the Act in this situation.

Section 41

32. The Commissioner notes that the public authority refers to the issues of confidentiality as its main justification for refusing the information. In its letter of 8 March 2007 the public authority states that the complainant has been unable to express any reason for access to the record or relevant claim that would override its duty of confidentiality. Although not expressly cited by the public authority, the Commissioner considers the public authority was by implication referring to section 41 of the Act. The Commissioner therefore considers it appropriate to consider this exemption as part of his investigation of the case. In particular he has done so on the basis that a failure to do so would be inconsistent with his decisions in respect of the following cases: FS50071069 and FS50111780. The Commissioner has also taken into account the

guidance he has now 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

33. 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 under the Act should be considered in the widest sense – that is, to the public at large. Therefore, the Commissioner has had to consider that if the information were to be disclosed, it would in principle be available to any member of the public.
34. The decision notices referred to in paragraph 32 dealt with situations where a request had been received for a deceased person's medical records from an individual who was neither the deceased person's personal representative nor someone who may have a claim arising out of the patient's death. In those decision notices the Commissioner upheld the public authority's decisions to withhold the requested information under section 41 of the Act.
35. The Commissioner has therefore considered the applicability of the exemption under section 41 of the Act in this case.
36. The full text of section 41 can be found in the Legal Annex at the end of this Notice.
37. In considering the application of section 41 in this case, the Commissioner is satisfied that the requested information was indeed obtained from a third party.
38. The Commissioner is also satisfied that medical records have the necessary quality of confidence required to sustain an action for breach of confidence. 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. 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.
39. The Commissioner has gone on to consider 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.

40. 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 the disclosure under the Act is disclosure to the world at large.
41. 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. 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.
42. The Commissioner's decision is therefore that the information has the quality of confidence necessary for a duty to be owed.
43. One of the requirements for section 41 to apply is that the disclosure of the information would constitute an actionable breach of a duty of confidence. Given that the Commissioner 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, who could bring the action?
44. In relation to whether this disclosure would be actionable, the Commissioner considers this to be the case, though 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. Instead, any remedy would most likely be in the form of an injunction to prevent publication of the information requested.
45. Although section 41 is an "absolute" exemption, 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. The Information Tribunal (*Derry City Council v Information Commissioner-EA/2006/0014*) 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 were to be disclosed. 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.

46. There are no issues surrounding consent or law in this case. This leaves a consideration of the public interest. 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 if the duty of confidence should be maintained.
47. In considering whether the disclosure was in the greater public interest, the Commissioner was 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 – although he considers such circumstances will be rare.
48. The Commissioner is satisfied that in this case there is no overriding greater public interest, and therefore a duty of confidentiality should be maintained. The Commissioner is aware of the complainant's suspicions surrounding the sudden death of the patient but the complainant has not been able to provide any evidence to substantiate these concerns. There is also no indication that the family of the deceased raised any concerns over the patient's death.
49. After reaching this view, it is therefore necessary to establish who would be able to bring the action if the duty of confidence was breached.
50. While again there would appear to be no binding authority on this point, the Commissioner has reached the view that an action could be brought by the personal representatives of the deceased person, namely the executors or administrators of the estate. It would be unlikely that surviving relatives other than the deceased person's personal representatives would be able to bring an action based on a breach of the duty of confidence. As a result of the request the public authority explained that it had contacted the family of the deceased who confirmed that it would completely oppose any release of records about the deceased.
51. In view of the above, the Commissioner considers that this information is exempt under section 41 of the Act, and that in this case the public interest in the disclosure on the information does not outweigh the public interest in maintaining the duty of confidence.

The Decision

52. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act for the following reasons:
- The public authority failed to comply with section 17(1) of the Act in that it did not specify in its refusal notice which exemption(s) it sought to rely on to withhold the information under the Act and why they applied.
 - It also failed to comply with section 17 (3) of the Act in that it did not provide details of its complaints procedure or of complainant's right to make a complaint to the Commissioner.
 - The public authority incorrectly cited section 40 as a basis for withholding the information requested.
53. However, for the reasons stated above the Commissioner has also decided that the information requested by the complainant is exempt under section 41 of the Act.

Steps Required

54. The Commissioner requires no steps to be taken.

Right of Appeal

55. 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 8th day of August 2007

Signed

**Jane Durkin
Assistant Commissioner**

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

Legal Annex

Refusal of Request

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(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Personal information

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –
“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Information provided in confidence

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.”