

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 September 2023

Public Authority: Ministry of Defence

Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence ('MOD') seeking a copy of his late father's medical record for a particular period in 1944. The MOD confirmed that it held information falling within the scope of the request but refused to disclose this on the basis of section 41(1) (information provided in confidence) of FOIA.
2. The Commissioner's decision is that the MOD is entitled to refuse to disclose the information on the basis of section 41(1) of FOIA.
3. No steps are required as a result of this decision.

Request and response

4. The complainant contacted the MOD on 16 February 2023 and sought the following information:

“Two questions please:-

1. According to my father's service records you sent me, at the time of that accident my father was assigned to 11 Base, which I understand is No 11 Group Heavy Conversion Base at Lindholme hosting No.1 Lancaster Finishing School. So why was he at I what was he doing at 1481 flight at RAF Ingham?
 2. (name redacted by ICO) advises me that RAF Medical Records are held by RAF Disclosures. therefore, I wonder if you could provide me with a copy of my father's medical records from his time at Lincoln Military Hospital and then at No. 4 RAF Hospital Rauceby from 18 July to 8 August 1944 inclusive. I am particularly interested in what treatment he might have received at Rauceby possibly from (name redacted by ICO), because during the Great War my maternal grandfather effectively had his face rebuilt by the famous (name redacted by ICO), and incredibly I received a copy of his medical notes from 1917 to 1924 - see attached one page of those notes.”
5. The MOD responded to the complainant on 17 March 2023. It explained that the information was held but it was unable to release the requested records citing section 41(1) of FOIA to do so. The MOD went on to say that if the complainant believed there was information in the medical record to assist the ongoing treatment of a family member, the complainant's health consultant could write to the MOD and its Medical Governance Officer would ascertain whether it held any information which would assist.
6. On 30 March 2023, the complainant expressed their dissatisfaction with the MOD's response.
7. On 13 July 2023, the MOD responded with an internal review. It confirmed that it held information falling within the scope of the request. However, it upheld the MOD's original decision that the information was considered to be exempt from disclosure under FOIA on the basis of section 41(1) (information provided in confidence).

Scope of the case

8. The complainant contacted the Commissioner on 18 July 2023 to complain about the MOD's decision to withhold the requested information on the basis of section 41(1) FOIA. He said:

"Whereas I very reluctantly concede that perhaps the RAF and MOD may be correct in a very strict interpretation of that Freedom of Information Act 2000, I cannot believe it was ever the intention of that Act to deprive close family members (in my case my father's oldest son - ie me) of having sight of such uncontentious records from a simple motor accident that happened 79 years ago, had no fatalities, and indeed had a very praiseworthy outcome."

Reasons for decision

Section 41 – information provided in confidence

9. Section 41(1) of FOIA states 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.'

10. Therefore, for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party **and** the disclosure of that information has to constitute an actionable breach of confidence.
11. With regard to whether disclosure would constitute an actionable breach of confidence the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:
- whether the information had the necessary quality of confidence;
 - whether the information was imparted in circumstances importing an obligation of confidence; and,

- whether an unauthorised use of the information would result in detriment to the confider.
12. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure. Although, it is still necessary to show that disclosure of such information would be an unauthorised use of the information.
13. The Commissioner has assessed each of these criteria in turn, taking into account the submissions provided to him.

Was the information obtained from another person?

14. With regard to the requirements of section 41(1)(a), the Commissioner accepts that medical records will constitute information which was received by a third party. Therefore, the Commissioner is satisfied that section 41(1)(a) of FOIA is met.¹

Does the information have the necessary quality of confidence?

15. In the Commissioner's view information will have the necessary quality of confidence if it is not otherwise accessible and it is more than trivial.
16. The Commissioner is also conscious of the comments of Eady J in a case involving a request to the Home Office to which section 41 of FOIA was applied: '... [it was] beyond question that some information, especially in the context of personal matters, may be treated as private, even though it is quite trivial in nature and not such as to have about it any inherent "quality of confidence".²
17. The Commissioner is satisfied that the requested information has the quality of confidence. The information is clearly not trivial, nor is it in the public domain.

¹ Paragraph 13 of the Commissioner's guidance on section 41 notes that information including a doctor's observations of a patient's symptoms recorded during a consultation and an x-ray image of a patient taken by hospital are examples of information which will meet the criterion on section 41(1)(a). <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

² Secretary of State for the Home Office v British Union for the Abolition of Vivisection & Anor [2008] EWHC 892 (QB) (25 April 2008), paragraph 33

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

18. The MOD argued that it attaches great importance to the confidential nature of the relationship between patients and Service medical practitioners and, as medical records relating to a deceased service person contain information which the patient would have expected to remain confidential, it would not wish to undermine that relationship. The Commissioner also appreciates the MOD's previous experience of disclosing information from service records and the potential consequences for relatives of service personnel of doing so. In light of this experience, he understands the MOD's cautious approach to the disclosure of information from historical service records. Further, the MOD argued that it was reasonable to suppose that patients with medical records created before the introduction of the Access to Health Records Act (AHRA) 1990³ had an understanding and expectation that their sensitive medical information would be kept confidential even after their death. The MOD argued that it therefore had an enduring obligation of confidence towards former members of the Armed Forces.
19. The Commissioner appreciates the complainant's position that, given the age of the medical information, he did not understand why he was being refused access to the requested information or as a close relative, his son, why he was unable to gain information to allow his and his families understanding of events at the time of the incident described. However, for the purpose of this decision notice it is vital to distinguish between disclosure of medical records of the deceased to family members (for example under the AHRA) and disclosure of information under FOIA.
20. Under FOIA, disclosure of information is said to be disclosure to the 'world at large.' It is the equivalent of the MOD publishing the information on its website, notwithstanding the fact that the complainant has stated he only wanted the information for himself and his immediate family. Consequently, any rights of access that a specific individual may have to a deceased family member's medical record, under AHRA or other potentially relevant legislation, are not relevant to the application of section 41 of FOIA. Taking this into account, the Commissioner is of the view at the time that the medical records were created the complainant's father would not have expected such information to be disclosed to the world at large.

³ This legislation establishes 'a right of access to health records by the individuals to whom they relate and other persons.' <https://www.legislation.gov.uk/ukpga/1990/23/introduction>

21. The Commissioner is therefore satisfied that this criterion is met.

Would disclosure be of detriment to the confider?

22. As noted above case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure. 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.
23. The Commissioner that the knowledge that confidential information has been passed to those whom the confider would not willingly convey it to, may be sufficient detriment⁴.
24. 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 medical records. He therefore considers the absence of detriment would not defeat a cause of action.

Is there a public interest defence to the disclosure of the information?

25. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under FOIA). British courts have historically recognised the importance of maintaining a duty of confidence, so it follows that strong public interest grounds would be required to outweigh such a duty.
26. The Commissioner is therefore required to consider whether the MOD could successfully rely on such a public interest defence to an action for breach of confidence in this case.
27. The complainant explained that: "I have successfully undertaken considerable research into the Great War active service of both my grandfathers and their 5 brothers. Disappointingly, I have had less success in obtaining extensive information on my father's WW2 service with the RAF. I have obtained an outline of my father's RAF service,

⁴ EY v ICO & Medicines and Healthcare Products Regulatory Authority [EA/2010/0055] para 13.

attempts to find further details from any of the units he served with has proven unsuccessful.”

28. The Commissioner recognises and appreciates the complainant’s strong personal interest for wanting to access the requested information. Some of the information may be considered to be relatively innocuous and was obtained many decades ago. However, as noted above, the Commissioner would again emphasise the distinction between disclosure of such information under FOIA and a private or limited disclosure of information to the next of kin. Whilst the Commissioner acknowledges the complainant’s desire to complete the family history, in terms of a disclosure under FOIA, the Commissioner considers that there is a particularly strong public interest in ensuring that patient confidentiality, and furthermore, that the relationship between patients and Service medical practitioners is not undermined. 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. It is in the public interest that confidences should be respected. The Commissioner also believes there is a public interest in ensuring that an employee can give their employer all necessary private or domestic information about themselves with the certainty that it will be held by the employer in confidence and only used for specific purposes that are within an employee’s reasonable expectations.
29. Overall, 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. He finds that the public interest in preserving the trust between doctor and patient to be particularly weighty.
30. For these reasons, the Commissioner has concluded that there is not a sufficiently compelling argument in support of a public interest defence against an action for breach of confidence.

Other matters

31. FOIA does not impose a statutory time within which internal reviews must be completed albeit the section 45 Code of Practice explains that such reviews should be completed within a reasonable period.⁵ In the
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⁵ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

Commissioner's view it is reasonable to expect most reviews to be completed within 20 working days and reviews in exceptional cases to be completed within 40 working days.⁶

32. In this case, the Commissioner is concerned that the MOD took more than three months to respond to the internal review and therefore failed to meet the timescales set out in the Commissioner's guidance.
33. The Commissioner also notes that MOD advised the complainant that, if he believed that there may be information within the medical record that might assist with the ongoing treatment of a family member, the complainant could request that person's healthcare provider (consultant) to write to the MOD and, if any relevant information is located, it will be sent directly to them. The Commissioner welcomes the fact that the MOD has provided this advice and assistance to the complainant, but he is unable to order disclosure of this information as part of this decision notice for the reasons given above.

⁶ <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/#20>

Right of appeal

34. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. 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.
36. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Deirdre Collins
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