

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 8 August 2007

Public Authority: South Essex Partnership NHS Foundation Trust
Address: Trust Head Office
The Lodge
Runwell Chase
Runwell
Wickford
Essex
SS15 6NX

Summary

The requested information related primarily to complaints files, meetings and reports regarding the treatment and care of the complainant's late son. Initially, the Trust released some information to the complainant under the Access to Health Records Act 1990, withheld some information citing section 42, of the Freedom of Information Act 2000 (legal professional privilege), and claimed that the rest of the information either had been released to the complainant previously or could not be found. Following the intervention of the Commissioner, the Trust agreed to release all the available information to the complainant. The complainant questioned whether all the information the Trust held had been sent and provided the Commissioner with evidence that three firms of solicitors may have been holding information on behalf of the Trust. After the Trust acquired the information held by the solicitors, it released some to the complainant, but chose to withhold some under section 42. The Commissioner is satisfied that the exemption applies and that the public interest in maintaining the exemption outweighs the public interest in disclosure. Additionally, some information is judged to belong to the solicitors, not the Trust and so is outside the scope of the Freedom of Information Act. However initially, the Trust breached the requirements of section 17, by not issuing an adequate refusal notice.

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. Following a previous request for information, which had been dealt with under the Data Protection Act 1998, the complainant made the following request on 26 March 2005, citing the Freedom of Information Act 2000.

'When I finally received eight of the Trust's complaints files relating to my son [name redacted], numerous documents had been removed under the banner of Legally Privileged and replaced by blank pages which just stated removed legally privileged, some contained the date of the document, and the names of the firm's of Solicitors, Beachcroft Wansbroughs or Stanleys & Eversheds, and the names of divisional Solicitors i.e. Richard Collier and Andrew Baum, therefore I request the following.

1. All documents previously withheld under legally privileged.
 2. My son's complaints files regarding the events which took place in 1995, and any others previously withheld.
 3. The Queensway Mental Health department files.
 4. Any statements made by any member or former member of staff in relation to my son or my son's treatment.
 5. All notes, minutes or reports of meetings or investigations regarding my son.
 6. I understand that on 29th November 2000, 11 boxes were found at Runwell Hospital with [named doctor]'s personal effects, these boxes contained numerous patient's records and photographs, I would like copies of all records or photographs regarding or in connection with my son.
 7. Any information what so ever which has previously been withheld.
3. The Trust replied on 26 April 2005 refusing the request in part. The Trust responded to each of the complainant's point in turn.
 1. The Trust exempted this information referring to section 42 of the Act, legal professional privilege.
 2. The Trust claimed that all the information held within the complaints files that had not been withheld under legal privilege or information provided in confidence, had already been provided.
 3. In relation to the Queensway Mental Health department files, the Trust stated that, '*In correspondence dated 19 July 2001 the Trust regrettable (sic) informed you that the Queensway file could not be traced despite exhaustive searches. A copy of this letter is enclosed for your reference.*'
 4. The Trust claimed that all the information relevant to this aspect of the request had already been disclosed.
 5. The Trust claimed that all the information relevant to this aspect of the request had already been disclosed.
 6. The Trust informed the complainant that no information relating to [complainant's son] had been found in the boxes.
 7. The Trust claimed that this information was exempt under section 41, information provided in confidence.

4. However, the Trust did supply some information to the complainant, which it said, '*...does not come within the parameters of the Act.*'
5. The complainant wrote to challenge the decision in a letter dated 7 May 2005. The complainant pointed out: that a freedom of information request is for information not for documents, that the complaint files referred to were ones from 1995 which had not previously been provided, that because the Queensway files were missing in 2001 did not mean they were still missing (indeed the complainant believed that they had been found), that '*medical professionals cannot hide behind data protection when in relation to complaints*', that not all information had previously been disclosed as claimed, and that the boxes did contain information relating to [complainant's son].
6. On 29 June 2005, the Trust responded by letter. This response, which should formally be considered the outcome of the internal review, was written by the same person that dealt with the complainant's original complaint, and there was little to suggest that a formal review of the decision had been undertaken. The letter reiterates the points from the original refusal notice and includes the following additional comments. The Trust now claimed that there were no complaints files from 1995. In respect of the Queensway files, the Trust wrote, '*Some information previously not disclosed, which does not come within the parameters of the Act, is enclosed for your information*'.

The Investigation

Scope of the case

7. On 8 July 2005, the complainant contacted the Commissioner to complain about the way the request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - That to comply with NHS rules, the Trust is required to keep files regarding complaints and therefore, a complaint file in relation to the complaint made in 1995 must exist.
 - That now the Queensway files have been found, the information should be provided.
 - That, in relation to points 4 and 5 of the request, all information has not previously been disclosed, as claimed by the Trust.
 - That the Trust was referring to different / the wrong boxes when it claimed that they contained no information regarding [complainant's son].
 - The complainant was also particularly concerned that, considering the amount of time that had passed, there was a risk that the Trust's records management procedure would result in the information being destroyed / disposed of before the Commissioner was able to complete his investigation and reach a decision.
8. The Commissioner contacted the Trust by letter on 9 June 2006 and addressed a number of points in relation to the Trust's handling of the request. However, early telephone communications between the Commissioner and the Trust established

that the Trust was willing to release information to the complainant and so the investigation's focus moved to ensuring that all the relevant information available was obtained and supplied to the complainant.

Chronology

9. The Trust provided some background, documentary evidence, previously withheld information, and explanation in a letter dated 13 July 2006, in which it detailed the steps it had taken to satisfy the complainant both before, and as a result of, the submission of the Freedom of Information request. This included inviting the complainant to visit the Trust and view the information it held on two separate occasions. However, the complainant remained dissatisfied mainly as a consequence of the Trust's poor records management, which it claimed was a result of the formation of the Trust following the merger of Thameside Community Healthcare NHS Trust and Southend Community Care Trust in April 2000.
10. The Trust explained that although the refusal and review letters to the complainant were written by the same person, others were involved in the handling of both the original request and the subsequent appeal. Regarding the information that the Trust claimed did not fall 'within the parameters of the Act', the Trust clarified that some of the information requested comprised of health records of the deceased, which falls within the scope of the Access to Health Records Act 1990 rather than the Freedom of Information Act 2000.
11. Furthermore, the Trust explained that it had not found the Queensway files, but had searched for any information created electronically or held in any other area that may have been of relevance and that it was this information that it subsequently provided to the complainant. The Trust confirmed that the original Queensway files had still not been found.
12. In an email dated 18 July 2006, the Trust confirmed its willingness to release previously exempted information to the complainant. The Trust emailed again on 19 July 2006 expressing its concern that the information it was now providing to the complainant contained personal information and requesting the Commissioner's advice before the information was released. On inspection, it became clear that the vast majority of the personal information the Trust was referring to were simply the names of those sending or receiving correspondence, individuals acting in their official capacity. However, the Commissioner was unsure as to the status of one of the names. A telephone call on the 24 July 2006 confirmed that this person was not, and never had been an employee of the Trust and so release would likely breach the first data protection principle. The Trust also agreed that releasing the information without redacting the names of its employees, in this instance, would not breach the data protection principles. Therefore, the Trust agreed that the information would be released subject to the redaction of one name.
13. On 7 August 2006, the complainant telephoned to confirm receipt of the information. However, the complainant also expressed misgivings about whether the Trust had in fact sent all the information that was available to it and agreed to send a copy of a letter that showed that at least one firm of solicitors were holding information on behalf of the Trust.

14. In a letter dated 14 August 2006, the complainant sent details regarding three firms of solicitors, namely, Beachcroft Wansbrough Solicitors (formerly Beachcroft Stanleys), Bevan Ashford Solicitors and Field Fisher Waterhouse Solicitors that the complainant believed would have information in relation to the request which they would be holding on behalf of the Trust. The Commissioner questioned the Trust about this in a telephone call on 21 August 2006, in which the Trust explained that it had previously asked the solicitors for particular information, but had not explicitly asked them to send copies of everything they had. The Trust agreed to contact the solicitors again to obtain all the information they held in relation to this matter. The complainant had also specifically referred to notes taken during an inter-agency meeting in 1998 and reports sent to Ann Eden (Interim Chief Executive of the Trust) by Southend Social Services. The Trust also agreed to investigate the whereabouts of these documents.
15. Following an exchange of emails and a telephone call (between 12 September and 1 November) by which the Trust explained that there had been a delay due to problems with contacting the solicitors, the Trust sent their response to the Commissioner in a letter dated 25 October 2006.
16. In this letter, the Trust stated that it had not been able to locate the inter-agency meeting notes from 1998, nor any reports sent to Ann Eden by Southend Social Services. The Trust had received replies from two of the solicitors contacted, Field Fisher Waterhouse had supplied a small amount of information that was purely administrative, and Beachcroft Wansbrough had supplied the records that it held. Of those records, the Trust was happy to provide copies of some to the complainant, but wished to withhold the remainder. The Trust cited the exemption set out in section 42 of the Act, legal professional privilege. The Commissioner requested sight of the exempted information so that he could satisfy himself that the exemption had been applied appropriately. The Trust duly complied.
17. Some of the information that the Trust sought to withhold, consisted of case notes and a report that had been annotated by a legal advisor. The Commissioner enquired of the Trust whether it would consider supplying these documents to the complainant after redacting the annotations. The Trust informed the Commissioner that the complainant was already in possession of these documents, which was confirmed by the complainant.
18. The Commissioner requested some additional explanation and clarification from the Trust in regard to its claim of legal professional privilege which was supplied in a letter dated 18 December 2006.
19. Furthermore in its letter of 25 October 2006, the Trust also referred to other sections of the Act in its justification for withholding the information, namely sections 12, 40 and 43. However, the Commissioner has not found it necessary to consider the application of these sections.
20. A further exchange of emails and telephone calls followed between the Commissioner and the Trust. The Trust was finding it difficult to contact the remaining solicitor and ascertain whether any relevant information was held by them. During this exchange in a telephone call on 26 March 2007, the Trust informed the Commissioner that it had completed digitising their paper records,

had run a search, and were now very confident that it had supplied the complainant with all the information they held. The Trust indicated that it was so confident about this, that it would be happy for the complainant to visit and run the search to satisfy themselves that nothing was being kept from them.

21. The Trust finally contacted the Commissioner on 16 May 2007, and informed him that it was sending the information that had been received from the remaining solicitor. It also said that it had been very difficult to discover why the papers had been produced in the first place and stated the belief that the information in question actually belonged to the solicitors and not the Trust and therefore, was outside the scope of the complainant's request for information.
22. The Trust provided a further explanation in an email dated 1 June 2007. It claimed that the bundle of papers received from the solicitors were copies used by a solicitor for his own personal purposes during the inquest hearing. The papers had been heavily annotated and the Trust did not possess a similar bundle (although did possess the same information). These points would seem to substantiate the claim that the information belonged to the solicitor rather than the Trust.
23. The Commissioner has viewed the material in question and is satisfied that the information does not belong to the Trust, but is information belonging to the solicitors and therefore, the information is outside the scope of the Freedom of Information request.
24. In a telephone call on 7 August 2007, the Commissioner sought and received confirmation from the Trust that the amount of time it had spent searching for the requested information amounted to significantly more than that required by section 12 of the Act and the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.

Analysis

Procedural matters

25. The Commissioner considered whether the public authority complied with its obligations under section 17 of the Act. The full text of section 17 can be found in the Legal Annex attached to this Notice.
26. Section 17(3) of the Act requires that where an authority has applied a qualified exemption, that is an exemption that is subject to the public interest test, it must state in the refusal notice the reasons why it believes that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
27. In the original refusal notice, dated 26 April 2005, the Trust claimed reliance on sections 42, legal professional privilege and 41, information provided in confidence. Section 42 is qualified and therefore, subject to the public interest

- test. Neither the refusal notice nor the response to the subsequent appeal made mention of the public interest test or the reasoning behind its application.
28. Section 17(1) requires that where an authority chooses to apply an exemption, it should state that fact, specify the exemption in question and state why the exemption applies. The Trust stated that it was supplying information '*which does not come within the parameters of the Act*', without any explanation as to why the information is not caught by the Freedom of Information Act. When questioned on this matter, the Trust informed the Commissioner that the information comprised of health records of the deceased, which it believed did not fall within the scope of the Freedom of Information Act but under the Access to Health Records Act 1990.
 29. The Trust should have made this clear in the refusal notice. After having established that the applicant is the 'personal representative' of the deceased person and therefore entitled to access the health records under that legislation, the Trust should have applied the exemption set out in section 21 of the Act, namely that the information is reasonably accessible to the applicant by other means. The Commissioner recognises that in this instance, the authority supplied the information in question to the applicant and so the matter remains a technical issue, rather than a substantive one.
 30. The Commissioner is satisfied that the Trust has fulfilled its obligation under section 1 of the Act by supplying to the complainant all the information relevant to the request, except that which it has specifically referred to as wishing to withhold. The Commissioner accepts that some information previously held by the Trust has been lost and cannot be supplied.
 31. The Commissioner also accepts that in relation to the information provided by Bevan Ashford Solicitors, that the information is not held on behalf of the Trust and therefore, section 3(2)(b) of the Act does not apply and this information is outside of the scope of the Act.

Exemption

32. The Trust relied on the application of section 42 of the Act that the information it sought to withhold was subject to legal professional privilege. Legal professional privilege exists to protect communications between legal advisor and client. Section 42 is a class-based exemption, which means that it is not necessary to demonstrate that any 'prejudice' may occur to the professional legal adviser / client relationship if information is disclosed. However, it is necessary to show that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.
33. The Commissioner is satisfied that the information withheld was passed to, or created by, a professional legal advisor for the sole or dominant purpose of obtaining, or giving, legal advice and therefore, accepts that the exemption is engaged in relation to these documents..
34. It is the client, in this case the Trust, in which privilege is vested. Any client can choose to waive privilege if they so wish. The Commissioner is satisfied that the

Trust has not waived its privilege in respect of the exempted information. The issue to which the legal advice is relevant is a longstanding one that is still ongoing. In its letter of 25 October 2006, the Trust informed the Commissioner that *'there are still relevant current legal proceedings and further investigations may be starting. The Trust, as is proper and lawful for it, is wary about waiving its privilege in the circumstances.'*

The public interest test

35. Having established that the exemption is engaged, the Commissioner must make an assessment as to whether the public interest is best served through disclosure, or allowing the authority to maintain its reliance on the exemption and continue to withhold the information.
36. It is in the public interest that public authorities are open and transparent and that the public have access to information that gives them the ability to understand the decisions that public authorities make and hold them accountable for those decisions. The Trust explained to the Commissioner that it has undertaken its own investigations into the circumstances surrounding the death of the complainant's son. There has been an inquest and independent investigations by the police and the Health Commissioner. *'Findings have been implemented and the services and multi agency working have improved as a result'*. It could be argued that the public interest has already been served in this respect. The legal advice that is withheld in this instance is specific and related to particular circumstances; it is not of a generalised nature. The Commissioner does not believe that disclosure would further public understanding or accountability.
37. The Commissioner has also considered the timing of the request. The information exempted and the incidents that prompted the generation of the information occurred several years ago. However, as mentioned above (paragraph 26), the matter is not a historic one and the possibility of the Trust being involved in further investigations and proceedings is evidenced by the Trust in its letter of 25 October 2006, in which it states, *'...recently, ..., the Trust has, again, been contacted by the police and is now required not to destroy any papers in relation to this matter, which means further investigation and / or action is ... possible again.'* The Commissioner has also been contacted by the police, in a letter dated 27 June 2007, and is satisfied of the current nature of these matters.
38. The Commissioner recognises the strong inherent public interest in protecting confidential communication between client and legal advisor. As the Trust pointed out, *'[The Trust] needs to ensure that it is able to liaise with its lawyers and deal with them freely and in confidence to discuss its legal obligations, any potential risk and liability and how to deal with them and to receive advice on those issues.'* The Trust also added, *'The Trust will always need to be able to take legal advice and, as to an unavoidable extent there will be an element of repetition in such incidents and the potential types of claim and responses. It would not be in the public interest for the Trust to have to provide details of the type of advice it receives, what it plans for and how it assesses the legal risks involved and decides to deal with them. The Trust is funded by the tax payer and*

cannot justify how it deals with risk, potential legal liability (and the financial consequences of that) becoming publicly available...'

39. The Commissioner finds these arguments persuasive. In making his assessment of where the balance lies, the Commissioner is also mindful of the Tribunal's decision in *Bellamy v the Information Commissioner and the DTI* (3 April 2006) Appeal Number: EA/2005/0023 (para. 35), the Tribunal stated, '*...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest*' and, '*...it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case...*'
40. Whilst it will sometimes be appropriate to overturn legal professional privilege where strong public interest exists in disclosure, it is the Commissioner's judgement that, in the circumstances of this case, the public interest in maintaining the exemption overrides the public interest in disclosure.

The Decision

41. The Commissioner's decision is that, in respect of the information now exempted under section 42, the public authority has dealt with the request for information in accordance with section 1 of the Act.
42. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- By failing to refer to section 21, provide adequate explanation and by not referring to, or explaining, the public interest test in relation to the qualified exemption, the authority breached section 17 of the Act.

Steps Required

43. The Commissioner requires no further steps to be taken.

Other matters

44. Although they do not form part of this Decision Notice, the Commissioner wishes to highlight the following matters of concern:
45. The appeal response, which should formally be considered the outcome of the internal review, was written by the same person that dealt with the complainant's original complaint. When questioned, the Trust informed the Commissioner that

the signatory oversaw the original request and senior Trust members undertook and oversaw the review. However, the fact that the same person wrote the correspondence with the complainant did not make that clear and so the complainant would have been justified in thinking that the review had not been undertaken correctly and had not followed the recommended procedure as set out in the section 45 Code of Practice.

46. The lack of explanation in the refusal notice and the appeal response contributed to the complainant's sense of dissatisfaction over the handling of the request. For example, the Trust supplied information from files that they stated in the refusal notice they couldn't find, with no explanation as to how they found this information, when it had become available, whether all the information they had found was being provided and if not, why some was being withheld. There was no explanation again, as to why some information did not come under the Act.
47. Poor records management and the fact that some information was missing, and that the present Trust was unable to locate it, exacerbated the complainant's mistrust and suspicion that information was being deliberately withheld.
48. The complainant's dissatisfaction with the authority has been further compounded by the fact that at different times, the Trust has discovered more information and this has added to the complainant's perception that it has deliberately 'misaid' information. The fact that the Trust has repeatedly informed the complainant that all information has been provided, and yet subsequently has released further information has understandably led the complainant to doubt the Trust's sincerity. The Trust has assured Commissioner that they are rectifying these problems.
49. The Commissioner also notes the willingness of the Trust to disclose to the complainant information that it had previously exempted as legally privileged. The Commissioner accepts that the Trust have demonstrated a desire to be open and transparent in regards providing the complainant with the information requested.
50. As a result of the above, the Commissioner intends to monitor the performance of the Trust to ensure future compliance with access to information legislation as well as conformity with the section 45 and section 46 Codes of Practice.

Right of Appeal

51. 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

Steve Wood
Assistant Commissioner

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

Public Authorities

Section 3(1) provides that –

“in this Act “public authority” means –

- (a) subject to section 4(4), any body which, any other person who, or the holder of any office which –
 - (i) is listed in Schedule 1, or
 - (ii) is designated by order under section 5, or
- (b) a publicly-owned company as defined by section 6”

Section 3(2) provides that –

“For the purposes of this Act, information is held by a public authority if –

- (a) it is held by the authority, otherwise than on behalf of another person, or
- (b) it is held by another person on behalf of the authority.”

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(2) states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

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.”

Section 17(4) provides that -

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

Legal Professional Privilege

Section 42(1) provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

Section 42(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”