

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 07 January 2010

Public Authority: Calderdale & Huddersfield NHS Foundation Trust
Address: Huddersfield Royal Infirmary
Lindley
Huddersfield
HD3 3EA

Summary

The complainant submitted a request to Calderdale & Huddersfield NHS Foundation Trust ("the Trust") for the results of an investigation. The public authority refused to disclose the information under section 41 of the Freedom of Information Act 2000 ("the Act"). The Commissioner decided that the information that the public authority did hold was exempt from disclosure under section 41(1) of the Act. He also decided that the Trust had breached sections 1(1)(a), 10(1) and 17(1) 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 Act. This Notice sets out his decision.

The Request

2. On 16 March 2009 the complainant requested the results of the investigation by the Trust into the death of the complainant's brother. This was subsequent to trying to obtain the results of the investigation with the help of Linda Riordan MP during 2008.

The Investigation

Scope of the case

3. On 16 March 2009 the complainant contacted the Commissioner with her request to the Trust as detailed in paragraph 2 above. The Commissioner sought to investigate both the public authority's compliance with section 10(1) of the Act and its reliance on section 41 to refuse the complainant's request for information.

Chronology

4. On 18 May 2009 the Commissioner wrote to the Trust asking it to respond to the complainant within ten working days with either the information requested or the reason for refusing the information.
5. On 26 May 2009 the Trust wrote to the complainant stating that it refused the request as the information was personal and the legal guardian of the deceased refused to give permission for disclosure.
6. On 11 June 2009 the complainant replied to the Trust stating her displeasure with its reasons for refusal and re-stating her request for the result of the investigation.
7. On 25 June 2009 the Commissioner wrote to the Trust stating that its correspondence to the complainant had not contained a refusal notice as required by section 17 of the Act. It further asked the Trust to take the complainant's letter of 11 June 2009 as a request for an internal review.
8. On 28 July 2009 the Trust wrote to the complainant with the result of its internal review. In this letter it apologised for its mishandling of the internal review but refused to give the information requested by invoking section 41 of the Act, pointing out that the legal representative of the deceased had specifically refused to release the information to the complainant; and that an actionable breach of confidence would occur from the investigation's result being released.

Analysis

9. In order to determine whether the Act was correctly applied the Commissioner must consider whether the Trust has employed the section 41 exemption correctly.

Exemptions

Section 41

10. Section 41 of the Act provides an exemption from disclosure if the information was obtained from any other person (including another authority) and disclosure would constitute an actionable breach of confidence. In 2008 the complainant sought the results of the Trust's investigation into the death of her brother with the help of Linda Riordan MP, who confirmed to the complainant that such an investigation could only be divulged if the legal guardian of the deceased gave her consent. This legal guardian is the widow of the deceased, who refused such permission on the 10 October 2008.
11. The full text of the relevant provisions of the Act referred to in this section is contained within the legal annex.
12. 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.
13. 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.
14. 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 AN Clark (Engineers) Ltd* (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).
15. 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.

16. Although section 41 is an absolute exemption, the law of confidence does contain its own inbuilt public interest test 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.
17. 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?

18. 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?

19. 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 11 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.

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

20. 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?

21. 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. The Tribunal in the Bluck case (see paragraph 23 below) also noted that the loss of privacy can be a detriment in its own right. He has not therefore considered this issue any further.

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

22. 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.
23. 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) ("the Bluck case") 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. In the Bluck case it was asserted that the public interest in maintaining confidentiality in medical records of a deceased person outweighs, to a considerable degree, the countervailing public interest in disclosure. He therefore considers the Trust would not have a public interest defence for breaching the confidence in this case.
24. In the Bluck case 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 "
25. 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

26. The Bluck case is highly analogous to this case, and shows very similar circumstances where section 41 of the Act applies. In light of the

above the Commissioner concludes that the public authority correctly withheld this information under section 41(1) of the Act.

Procedural Requirements

27. On 16 March 2009 the complainant made an information request to the Trust. It replied to the complainant on 26 May 2009, outside of the permitted twenty working days, and thus breaching sections 1(1)(a) and 10(1) of the Act. In addition, the reply did not constitute a proper refusal notice under the Act, thus giving a breach of section 17(1).

The Decision

- 28 The Commissioner's decision is that the public authority dealt with the request in accordance with the requirements of the Act in that it correctly applied the section 41(1) exemption.
29. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- It breached section 1(1)(a) for failing to confirm that the information was held within the time for statutory compliance
 - It breached section 10(1) for failing to comply with section 1(1) within 20 days, and
 - It breached section 17(1), in that it did not provide a refusal notice within the time limit for complying with section 1(1).

Steps Required

30. The Commissioner requires no steps to be taken.

Right of Appeal

31. 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 7th day of January 2010

Signed

**Anne Jones
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.”

Time for Compliance

Section 10(1) provides 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.”

Section 10(6) provides that –

“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 Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

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.”

Section 17(6) provides that –

“Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

Section 17(7) provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

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.