

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 18 August 2011

Public Authority: NHS Cambridgeshire
Address: Lockton House
Clarendon Road
Cambridge
CB2 8FH

Summary

On 27 September 2009, the complainant requested that NHS Cambridgeshire should provide her with all the information that it held in relation to her deceased mother. NHS Cambridgeshire (the 'PCT') informed the complainant that it held a care file which was exempt from disclosure under section 41 of the Freedom of Information Act 2000 (the 'Act'). At that time Cambridgeshire Community Services ('CCS') was a provider arm of NHS Cambridgeshire but in April 2010, CCS became a standalone trust. It held the file and therefore responded to the complainant on its own behalf. The complainant argued that the information should have been refused under section 21 of the Act as she believes she should have access to the information under the Access to Health Records Act 1990 (the 'AHRA'). The Commissioner finds NHS Cambridgeshire was correct to apply section 41(1).

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. This Notice sets out his decision.

Background

2. The complaint has been submitted by a married couple who are in the process of contesting the last will made by the deceased mother of the requester. The complaint was made to the Information Commissioner's Office (the 'ICO') by the requester's husband on his wife's behalf and he has written many of the letters to the public authority; however for the purposes of this Decision Notice, the complainant is held to be the requester herself.
3. The contested will named the complainant's two younger sisters as the executors and trustees of the will. The complainant has lodged a caveat to contest the will and has a formal probate claim in the Chancery Division of the High Court. She therefore argues that she has a 'claim arising from a patient's death' and should be given access to her late mother's healthcare files under the AHRA.
4. The request was made to NHS Cambridgeshire and was responded to by the PCT in October 2009. At this time CCS had been a provider arm of NHS Cambridgeshire and this request had therefore been formally responded to by the PCT as the statutory body. On 1 April 2010 CCS became a standalone trust (The Cambridgeshire Community Service NHS Trust) and established its own freedom of information ('FOI') policy. It was therefore CCS who provided a formal internal review of the response received by the complainant (on 30 July 2010). CCS holds the required care file; however this Decision Notice considers the response of the PCT who was responsible for the file at the time of the request.
5. In the correspondence concerning this request, the PCT has referred to a 'health care file'. CCS has referred to a 'social care file', 'medical records' and 'social care records'. This is the same file and the same information and is the only information covered by the FOI request which NHS Cambridgeshire held at the time of the request.

The Request

6. On 27 September 2009 the complainant made the following information request to NHS Cambridgeshire:

'Please provide me with all the information I am entitled to under the FOIA, DPA98 & Access to Health Records Act 1990 in respect of my late mother [name redacted].'

7. The complainant explained that she is the deceased's eldest daughter and nearest relative as defined under section 26 of the Mental Health Act. She also has a formal claim in the Chancery Division of the High Court against her father and mother's estate.
8. The complainant explained that she required information about the care received by her mother at [named care home] and provided by [named care company] at her home from March 2009 until her death in August 2009. She was particularly interested in the presence of two auxiliary nurses employed by [named care company] at her mother's bungalow on the day before her death.
9. On 21 October 2009 the Information Governance and Legal Manager of the Anglia Support Partnership (the 'ASP') Risk Support Team responded to the request on behalf of the PCT which encompassed CCS.
10. ASP confirmed that the only information the PCT held with regard to the complainant's mother is a health care file. It had made an approach to [named care home] and [named care company] who are separate entities to the PCT and they reviewed their files to assist with the request. The response of the care home and the care company is not part of this case.
11. ASP explained that the AHRA provides an access right to information contained within a deceased person's health record once the requester has satisfied the criteria of application within that Act.
12. It explained that the complainant is not the personal representative of the deceased therefore her request appeared to fall under the 'claim arising out of death' criterion.
13. ASP explained that the PCT is entitled to request more detail about any claim to assist it in assessing whether it holds any relevant information. It considered that the complainant had declined to provide this detail, despite having been given the opportunity to do so.
14. ASP explained that the PCT therefore did not consider that the complainant had the right to the requested information under the AHRA.
15. ASP informed the complainant that the PCT considered the health file to be exempt under section 41 of the Act (information provided in confidence). This was because the health file contained personal and sensitive information which concerned direct health care.
16. ASP quoted the Commissioner's guidance which states that 'most information in medical records is likely to be confidential and exempt under section 41' and that 'some people may have rights of access under the Access to Health Records Act 1990'.

17. ASP explained that it was not satisfied that the complainant had the right of access to her late mother's health care file under the AHRA. It therefore considered that the health care file was exempt from disclosure under section 41 of the Act.
18. It was explained to the complainant that a previous subject access request ('SAR') she had made would be reviewed and extended to include the health files held by the care home and care company. ASP confirmed that the PCT held no further information about the complainant apart from that which had been provided following the SAR.
19. ASP explained that the PCT also considered section 41 applied to the files held by the care home and the care company. ASP clarified that these two organisations are separate formal organisations and explained that it considered they had been generous in their agreement to review their own files as part of this request.
20. On 24 December 2009 ASP confirmed to the complainant that the PCT had written to her to state that it was satisfied that the request for information had been dealt with appropriately and to refer her to the ICO.
21. On 1 April 2010 CCS became a standalone Trust and established its own FOI policy. Up until this point, CCS had been a provider arm of NHS Cambridgeshire and this FOI request had therefore been formally responded to by NHS Cambridgeshire as the statutory body. CCS now provided a formal internal review on 30 July 2010. It reiterated the response of the PCT.
22. CCS and the complainant continued to correspond between May and August 2010 when the complainant referred the matter to the Commissioner.

Scope of the case

23. On 5 August 2010 the complainant contacted the Commissioner to complain about the way this request for information had been handled. The complainant specifically asked the Commissioner to consider whether section 21 or section 41 should have been applied to that part of the request which asked for health and social care records.
24. Information held by CCS and the PCT about the complainant is her personal data and falls under the Data Protection Act 1998. It is not part of this complaint and is not included in the scope of this case.

Chronology

25. On 16 February 2011 the complainant's husband submitted further arguments to the Commissioner. He argued that the policies and guidance on Access to Records of the Deceased published by the Department of Health had not been correctly interpreted in this case. He argued that the PCT had not correctly interpreted or implemented its policies on Access to Records of the Deceased and that the Commissioner's Line to Take (LTT37) had not been correctly implemented. This can be found on the Commissioner's website at:

<http://www.ico.gov.uk/foikb/PolicyLines/FOIPolicyAccesstomedicalrecordsofthedeceased.htm>
26. The complainant's husband has argued that as his wife is the Sealed Caveator granted by the High Court she should be granted equal rights of access to the records of her deceased mother as those granted to the executors named in her disputed will.
27. On the same date, the complainant explained that shortly before her mother died, an Assessment for Eligibility for NHS Continuing Healthcare was carried out. This was not disclosed to the complainant.
28. On 28 February 2011 the complainant's husband argued that neither probate nor letters of administration had been granted to his sister-in-law. He argued that she did not have Power of Attorney and had not been appointed a Welfare Deputy by the Court of Protection. He believed that his wife ought to be granted the same access to their late mother's healthcare plan as she was her nearest relative (as defined under section 26 of the Mental Health Act 1983) and was a Trustee for her mother.
29. On 2 March 2011 the complainant's husband argued that his wife had a valid claim under section 3(1)(f) of the AHRA.
30. On 3 March and 8 March 2011, he argued that his wife was the nearest relative to her deceased mother. As such she should have had access to her late mother's healthcare assessments before she died and should have been provided with them after she died.
31. On 4 March 2011 he argued that the only person of legal standing with respect to the health records of the deceased was her nearest relative, his wife. This applied before and after her death.
32. On 14 March 2011 the complainant's husband provided the Commissioner with further detail concerning the definition of the 'nearest relative' under section 26 of the Mental Health Act 2003. He provided case law references on the subject.

33. On 17 March 2011 he reiterated that under section 26 of the Mental Health Act 2003 his wife was the nearest relative of her deceased mother. He argued that the issue was how to reconcile the confidentiality of the personal information of the deceased with the interests of the nearest relative in having access to information which would allow her to exercise her statutory functions under the Mental Health Act.
34. On 22 March 2011 the complainant's husband sent the Commissioner a copy of a letter NHS Cambridgeshire had written to him on 17 March 2011. In this letter the PCT had reiterated that as the complainant's wife is not the personal representative of her late mother she had no right of access to her medical records. It confirmed that it had been responsible for the assessment of eligibility of [name redacted] for NHS Continuing Care and had communicated its decision to the person it understood to be the family contact at the time. It explained that as [name redacted] was not subject to the Mental Health Act 2003, the definition of 'nearest relative' under that Act did not apply.
35. However, the complainant's husband argued that [name redacted] was subject to the Mental Health Act 2003 on the basis that her mental health had been assessed by Cambridgeshire and Peterborough NHS Foundation Trust on a number of occasions. The complainant also reiterated that as the nearest relative she should have been given a copy of the assessment and not the person who was "understood" to be the family contact.
36. Between 6 April 2011 and 22 June 2011 the complainant's husband continued to provide further arguments to the Commissioner. In particular he argued that he required the social care records of his late mother-in-law. He argued that these records were being withheld as the bodies involved wished to cover up mistakes which had been made (NHS Cambridgeshire, Cambridge and Peterborough NHS Foundation Trust and the Local Social Services Authority). He argued that they had instructed [named care home] and [named care company] not to disclose the domiciliary care records to him and his wife. He argued that these two care organisations were commissioned organisations of Cambridgeshire County Council (the 'council').
37. He believed that the social care records must have been passed from the care home to the council and then to NHS Cambridgeshire. He explained that in 2004 the delivery of older people's services for social and domiciliary care was transferred from the council to NHS Cambridgeshire.

38. He has argued that the majority of the health and medical records of his wife's deceased mother have been provided to them by her General Practitioner. He believes that NHS Cambridgeshire holds the social and domiciliary care records.
39. The complainant's husband has argued that NHS Cambridgeshire is withholding End of Life Care ('EoLC') reports and Protection of Vulnerable Adults ('PoVA') records concerning the deceased. He does not accept that section 41 of the Act should be applied to these records.
40. He has argued that the council had commissioned CCS, the care home and the care company to provide EoLC and Safeguarding of a Vulnerable Adult ('SOVA') protection for the deceased. He does not consider that the AHRA should apply to this request as he requires the social and domiciliary records that he believes NHS Cambridgeshire should hold.
41. On 23 June 2011 the complainant's husband argued that NHS Cambridgeshire is not complying with the Departments of Health's guidelines on the AHRA.
42. On 2 July 2011 he provided the Commissioner with a list of medical reports and letters which he held regarding his late mother-in-law's medical history. He has explained that the majority of the health and medical records of his wife's deceased mother have been provided to them by her General Practitioner. However they do not have all the information that has been requested.
43. The complainant's husband has argued that neither probate nor letters of administration will be granted if his wife is not provided with the information she has requested. He has argued that until probate is granted there are no personal representatives to administer the estate. He believes that as the caveator, his wife should have equal access to the records of the deceased as the executors of her will.
44. The complainant's husband has explained that as his wife was the nearest relative of her deceased mother, they could not accept the application of section 41 of the Act to this information request.

Analysis

45. The full text of section 1, section 41 and section 21 can be found in the Legal Annex to this Decision Notice.

Exemptions

46. In the correspondence concerning this request, the withheld information has been described as a 'health care file', a 'social care file', as 'medical records' and 'social care records'. ASP has confirmed that the information the PCT held at the time of the request was a file which was made up of various entries by social care professionals. Given the content, legal advice gained by CCS advised that it should be classed as a social care file.

Section 41

47. Section 41(1) of the Act states that information is exempt if it was obtained by the public authority from any other person and if disclosure of the information would constitute a breach of confidence actionable by that or any other person. The exemption is absolute and therefore not subject to the public interest test.

48. The Commissioner has considered these questions below.

Was the information obtained from another person?

49. The withheld information comprises the social care records concerning the deceased. The Commissioner is satisfied that these records have been produced by social care professionals.

Does the information possess the necessary quality of confidence?

50. The Commissioner is satisfied that social care records are as sensitive and relevant to the deceased as medical records and can therefore be exempt under section 41(1). This is in accordance with his conclusions in the Decision Notice for the case FS50101567 (East London & the City Mental Health Trust).

51. In that case, the Commissioner explained his position. 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.

52. The Commissioner is therefore satisfied that an obligation of confidence is created by the very nature of the doctor / patient relationship and that the duty to respect that obligation of confidence is therefore implicit. In this case, the Commissioner is satisfied that the relationship between a carer and client carries the same obligation of confidence. By its very nature, a social care file contains confidential information.

53. The Commissioner is also satisfied that the information has the necessary quality of confidence in that it is neither generally accessible nor trivial.
54. However, the duty of confidence is not absolute. 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.
55. There are no issues surrounding consent or law in this case. This leaves a consideration of the public interest defence. 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 whether the defence to breach of confidence would succeed.
56. In considering whether the disclosure is in the greater public interest, the Commissioner is 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. However, he considers such circumstances to be rare.
57. The complainant's husband has argued that his deceased mother-in-law was subject to "financial, psychological, professional and institutional" abuse whilst under the care of the PCT and that neither probate nor letters of administration will be granted until the requested information is provided.
58. Although the Commissioner is sympathetic to these arguments, he does not consider that in this case there is an overriding public interest in the disclosure of this file. The complainant's arguments are private arguments and the Commissioner does not consider them to be sufficient to outweigh the public interest in the protection of the confidentiality of social care records. Disclosure under the Act means disclosure to the world at large and the information in these records should remain confidential. The Act is not the correct mechanism to investigate the alleged abuse.
59. In addition, although the complainant's husband is arguing that section 41(1) does not apply to this request, this is because he considers that the social care records should be accessible to his wife under the AHRA. He is not suggesting that the social care records should be made available to the world at large.
60. The Commissioner therefore considers that the public interest does not override the duty of confidentiality in this case.

Would disclosure constitute an actionable breach of confidence?

61. The Commissioner has also considered whether the duty of confidence can survive the death of the individual to whom the duty is owed.
62. The decision of the Information Tribunal in *Bluck v IC and Epsom & St Helier University Hospitals NHS Trust; EA/2006/0090*, ('Bluck') is relevant here. That case dealt with a request for a deceased person's medical records from an individual who was not the deceased person's personal representative.
63. The Information Tribunal in that case concluded that even though the person to whom the information relates may have died, action for breach of confidence may 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 and that in the circumstances of this case it does survive"
64. The Information Tribunal therefore concluded that action could be brought by the personal representatives of the deceased, namely the executors or administrators of the estate.
65. Although the Commissioner considers the breach of confidence to be actionable, he acknowledges that 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. However, he considers that any remedy would most likely be in the form of an injunction to prevent publication of the information requested.
66. The Commissioner's decision in this case is therefore that the duty of confidence survives the death of [name redacted] and disclosure of information by the PCT would have been a breach of the duty of confidence owed to her. This would be an actionable breach of confidence on the part of the personal representative of the deceased.
67. The PCT did not consider the complainant to be the personal representative of the deceased. The Commissioner understands that the complainant's two younger sisters were named as the executors and trustees of the deceased's will. Under such circumstances, it would appear that the breach of confidence which would arise from the disclosure of the requested information would be actionable by the complainant's two sisters.

68. In view of the above, the Commissioner considers that the deceased's social care records were obtained by the public authority from a third party and that disclosure of the information would constitute a breach of confidence actionable by the personal representative of the deceased.
69. The Commissioner is therefore satisfied that the social care records of the late [name redacted] are confidential information and that NHS Cambridgeshire was correct to refuse the complainant's request under section 41(1) of the Act.

Access to the records under the AHRA

70. The complainant has argued that as the nearest relative to the deceased, the requested information should be available to her under the AHRA. She has argued that as the Sealed Caveator granted by the High Court, she should be granted equal rights of access to the records of her deceased mother as those granted to the executors named in her disputed will.
71. However, the PCT does not consider that the complainant is the personal representative of the deceased and does not consider that the complainant should have access to the requested information as the nearest relative. In addition, the PCT does not consider that the social care records fall under the AHRA.
72. The Commissioner has no authority to adjudicate rights of access to information under the AHRA. This is a different legislative regime to the Act and access to information under the AHRA is not covered by the Act.
73. The Commissioner therefore cannot judge whether the complainant has a right of access under the AHRA and has no jurisdiction to decide what rights of access the complainant has or whether she is the nearest relative of the deceased. The Commissioner is satisfied that this was a matter for the PCT to decide.
74. Disclosure of information under the Act places the relevant information into the public domain and is effectively disclosure to the world at large. The PCT does not consider that the complainant should have access to the requested social care records under the AHRA and does not consider that the complainant has a right of access to the information. The request to see this information is therefore treated by the Commissioner as a request from a member of the public.
75. The conclusions of the Information Tribunal in the case of *Bluck* are again relevant. In that case the request was made for records held by the NHS Trust relating to an individual, now deceased. The request was refused on the grounds that a duty of confidence was owed to the

deceased and that this would still be actionable; therefore the information was exempt under section 41(1) of the Act.

76. The Information Tribunal concluded that the section 41(1) exemption was valid. This was because the public authority did not consider the applicant to be the deceased person's representative and next of kin. The public authority did not consider that the applicant was covered by the relevant provisions in the AHRA which allowed it to disclose documents in certain situations.
77. The Commissioner considers that the circumstances of the present case are similar. In both instances the public authorities involved did not accept that the applicant has access to the requested information under the AHRA.
78. The Commissioner's guidance to section 41(1) 'Access to information about the deceased' explains the right of access to medical records:

'Most information in medical records is likely to be confidential and exempt under section 41. However, this exemption may not apply to any information already made public, for example on the death certificate or in an inquest or coroner's court, especially if publication was very recent or widely reported.'

You should also remember that some people may have rights of access under the Access to Health Records Act 1990 (AHRA) or Access to Health Records (Northern Ireland) Order 1993, essentially if they are the deceased's personal representatives or might have a claim arising from the death. The right is for personal representatives, not simply for surviving family members or next of kin.

If the applicant has access rights under the AHRA, the section 21 exemption (information available by other means) would apply to the freedom of information request and access should be dealt with under the AHRA'.

This can be found on the ICO website at:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/informationaboutthedeceased.pdf

79. The complainant has also argued that the PCT should have refused the request under section 21 of the Act (reasonably accessible to the applicant by other means).
80. However, as stated in the guidance, section 21 is only applicable if the information is accessible to the applicant otherwise than under the Act,

for example, if the applicant has a right to the requested records under the AHRA.

81. In this case the PCT does not consider that the complainant has a right to the requested social care records under the AHRA.
82. The complainant has quoted the Decision Notice for the case FS50133293 in support of her argument. However in that case the Commissioner found that the public authority was correct to withhold documents on the basis of section 41.
83. The complainant has also referenced the Decision Notices for the cases FS50127442 and FS50128269 in support of this request.
84. These Decision Notices likewise do not support this complaint. In each of those cases, the Commissioner found the requested information to be exempt from disclosure under section 21 of the Act. However, in each instance, the requested information was reasonably accessible to the applicant under the right of access provided by the AHRA.
85. In contrast, in this case the PCT does not accept that the information is available to the complainant under the AHRA. Because of this the Commissioner cannot find that the information is reasonably accessible via other means and cannot find that section 21 should have been applied to this request.
86. Under such circumstances, the Commissioner is satisfied that the social care records of the late [name redacted] are confidential information and exempt under section 41(1) of the Act. The Commissioner is therefore satisfied that NHS Cambridgeshire was correct to refuse the complainant's request under section 41(1) of the Act.

The Decision

87. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

88. The Commissioner requires no steps to be taken.

Right of Appeal

89. The Commissioner requires no steps to be taken. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

90. 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.

91. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 18th day of August 2011

Signed

**Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
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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.”

Information Accessible by other Means

Section 21(1) provides that –

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

Information provided in confidence

Section 41 provides 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.
- (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.