

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 31 May 2011

Public Authority: Cambridgeshire County Council
Address: Shire Hall
Cambridge
CB3 0AP

Summary

The complainant requested from Cambridgeshire County Council (the council) its most up to date adopted Policy on access to social care, domiciliary care, health and medical records for a deceased individual. The council disclosed its Data Protection Policy and confirmed it complied with the Data Protection Act 1998, the Freedom of Information Act 2000 and Access to Health Records Act 1990. However, it stated that it did not hold an adopted policy on access to a deceased's records. The Commissioner's decision, on the balance of probabilities is that, with the exception of the information supplied, the council does not hold the requested information. He therefore finds that the council complied with section 1(1) of the Act and requires no further steps to be taken.

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. On 22 September 2010 the complainant requested from the council in electronic format copies of its;

'...most up to date adopted Policy on Access to:-

1. *Social Care Records of the Deceased*
 2. *Domiciliary Care Records of the Deceased*
 3. *Health Records of the Deceased*
 4. *Medical Records of the Deceased*'.
3. The council responded to the complainant on 19 October 2010. It stated that it held some information within the scope of his request and referred him to a link to its [Data Protection policy](#)¹ which it said set out how it dealt with personal information in line with the Data Protection Act 1998 (the DPA) and 'other relevant legislation'. It pointed out that access to the health records of a deceased person was governed by the Access to Health Records Act 1990 and clarified that the DPA did not apply to a deceased person's personal data which was normally excluded under section 41 of the Act.
4. On 24 October 2010 the complainant requested an internal review as he was unhappy with the council's response. He made reference to the DPA and the Access to Health Records Act 1990 (AHRA) and pointed out that access to the health records of a deceased relative under the AHRA would allow a public authority to apply section 21 of the Act.
5. On 3 November 2010 the council wrote to the complainant with the outcome of its internal review. It said it had carried out further searches but stated these failed to reveal any additional information within the scope of the request apart from that already disclosed. It reiterated the points concerning the DPA and section 41 of the Act and pointed out that section 21 of the Act would only apply in limited circumstances.

The Investigation

Scope of the case

6. On 17 January 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

Chronology

7. On a number of occasions in February and March 2011 the Commissioner wrote to the council and requested a copy of its internal

¹ <http://www.cambridgeshire.gov.uk/council/access/dp/>

review response to the complainant which the Commissioner had not seen.

8. On 29 March 2011 the council provided the Commissioner with a copy of its internal review response to the complainant dated 3 November 2010.
9. On 5 April 2011 the Commissioner wrote to the council and asked it to clarify exactly what searches it had carried out in an attempt to locate any recorded information within the scope of the complainant's request. The Commissioner pointed out that his cursory inspection of the council's website had revealed some general information concerning access to a deceased person's medical records. In particular, he referred to two specific documents:
 1. [Access to Information](#) dated August 2000²
 2. [General protocol for protecting and using personal information within Cambridgeshire & Peterborough'](#) dated August 2002³
10. On 18 April 2011 the council wrote to the Commissioner and clarified the extent of the searches it carried out to locate any recorded information held within the scope of the complainant's request. It explained that as part of its review process an officer would, where appropriate, undertake an independent search for the requested information. In other words, the officer would be tasked with carrying out a search as if the information request had only been received. In this case, the council clarified that the search involved the officer speaking with various members of the legal services for social care, members of the social care teams (both for adults and children) and the Caldicott Guardian at the time. In addition, the council said that a further review would have been carried out of the policies held by the Information Governance Team and also a search undertaken of the internet and intranet.
11. In relation to the documents identified by the Commissioner in paragraph 9 above, the council said that these were uncovered during its initial and subsequent searches but discounted because it did not consider that they fell within the scope of the complainant's request. It said that the 'Access to Information' document was an operational manual to assist officers in providing access to records when requested by explaining what steps to take. Rather than an adopted Policy (which

² <http://www.cambridgeshire.gov.uk/NR/ronlyres/463D6172-8FDA-45DC-B320-470FD511C856/0/general51.pdf>

³ <http://www.cambridgeshire.gov.uk/NR/ronlyres/8F0F78EA-71A1-4DF5-B39B-4062233A1E82/0/cambsinfosharing.pdf>

the complainant had specifically requested) the council explained that the 'Access to Information' document was a background one used for ensuring that it followed the requirements of general access to information and Data Protection. With regard to the 'General Protocol' document, the council explained that this was an Information Sharing protocol of the NHS Trust with whom it was a partner agency. It pointed out that the protocol was clearly marked as being that of the NHS with the County Council's social services being an interested party. The council said that this was also a background document to support the protection of information while making sure that service user information was used in an appropriate way to ensure the best service available. It added that it was not a policy for accessing information.

12. On 19 April 2011 the Commissioner advised the complainant that the test to be applied to determine whether the council held any further information in addition to that already disclosed was one of a balance of probabilities. He clarified the extent of the searches carried out by the council which it said did not reveal any further information apart from that already disclosed. The Commissioner also explained that the two documents identified during his cursory inspection of the council's website did not appear to fall within the scope of the complainant's information request based on an objective reading of it.
13. On 24 April 2011 the complainant suggested to the Commissioner that the two documents identified by his search contained out dated data and incorrect references drawn from ambiguous, incomplete and misleading information about access to the records of a deceased and requested an Decision Notice which he said would improve the services provided by NHS Trusts and Social Services.
14. On 26 April 2011 the Commissioner explained that the Act was concerned with access to recorded information held by public authorities and not the accuracy, adequacy and quality of that information. The Commissioner reiterated that the test he would apply to determine whether information was held by the council was that of a balance of probabilities and not absolute certainty and referred to the Information Tribunal decision's in the cases of [*Linda Bromley & Others and Information Commissioner and the Environment Agency \(EA/2006/0072\)*](#) and [*Martyres and the Information Commissioner and Huntingdonshire District Council \(EA2009/0101\)*](#). He also asked the complaint for any evidence to support his belief that the council held further information within the scope of his request.
15. On 26 April 2011 the complaint said that he suspected that the council had more up to date protocols, procedures or policies than those already disclosed.

16. On 10 May 2011 the Commissioner asked the council to confirm that its [Data Protection policy](#), [Access to Information](#) and [General protocol for protecting and using personal information within Cambridgeshire & Peterborough](#) that it disclosed were the most up to date versions. The council confirmed this by return. The Commissioner also asked the council to provide him with a copy of its document retention and destruction schedule/policy.
17. On 25 May 2011 the council provided the Commissioner with its 'Electronic Social Care Records – Adult Social Care' record keeping policy.

Analysis

Section 1 – General Right of Access

18. In determining this case, the Commissioner has taken into account the submissions of both the council and the complainant. The full wording of the extracts of the Act included in this Notice can be found in the Legal Annex.
19. Section 1 of the Act states that any person making a request for information is entitled to be informed in writing whether the information is held, and if this is the case, to have the information provided to them.
20. When investigating cases involving a disagreement as to whether or not information is held, the Commissioner has been guided by the approach adopted by the Information Tribunal in the case of *Linda Bromley & Others and the Information Commissioner v Environment Agency* (EA/2006/0072). In that case, the Tribunal indicated that the test for establishing whether information was held by a public authority was not certainty, but rather whether, on a balance of probabilities, the information was held.
21. In discussing the application of the balance of probabilities test, the Tribunal in the *Bromley* case stated that:

"We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these

factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed."

22. The Commissioner has therefore taken this into account in determining whether or not the requested information is held on the balance of probabilities.
23. The Commissioner is also mindful of the case of *Ames v the Information Commissioner and the Cabinet Office* (EA/2007/0110). In this case the complainant had requested information relating to the September 2002 "Iraq's Weapons of Mass Destruction" dossier. The Tribunal stated that the Iraq dossier was "...on any view an extremely important document and we would have expected, or hoped for, some audit trail revealing who had drafted what...". However, the Tribunal stated that the evidence of the Cabinet Office was such that it could nonetheless conclude that it did not "...think that it is so inherently unlikely that there is no such audit trail that we would be forced to conclude that there is one...". Therefore the Commissioner is mindful that even where the public may reasonably expect that information should be held this does not necessarily mean that information is held.

Reasons for believing that further information is held

24. The complainant has expressed his suspicion that the council holds more up to date policies and information on access to a deceased's records than those already disclosed but has not provided the Commissioner with any detailed evidence or arguments to support this suspicion.
25. The Commissioner has noted the complainant's suspicions in this matter and made further enquiries of the council in respect of the extent and quality of its searches to locate any recorded information within the scope of the request.

Attempts made to locate recorded information

26. The council informed the Commissioner that it carried out various searches and made a number of enquiries in an attempt to locate recorded information within the scope of the complainant's request. It said that these searches and enquiries only revealed its [Data Protection policy](#)⁴ which was disclosed to the complainant on 19 October 2010.

⁴ <http://www.cambridgeshire.gov.uk/council/access/dp/>

27. In relation to the actual searches and enquiries carried out the council explained that as part of its review process an officer would, where appropriate, undertake an independent search for the requested information. In other words, it said that the officer would be tasked with carrying out a search as if the information request had only been received. In this case, the council clarified that the search involved the officer speaking with various members of the legal services for social care, members of the social care teams (both for adults and children) and the Caldicott Guardian at the time. In addition, the council said that a further review would have been carried out of the policies held by the Information Governance Team and also a search undertaken of the internet and intranet.
28. The Commissioner also sought details of the council's document retention and destruction policy which it provided. The council said that rather than any policies on access to a deceased records being destroyed, it was probable that they were never created in the first place.

Information within the scope of the complainant's request

29. In addition to the information disclosed to the complainant on 19 October 2010, the Commissioner referred the council to a couple of documents on its website (namely, [Access to Information](#) and [General protocol for protecting and using personal information within Cambridgeshire & Peterborough](#)) within which references were made to access to a deceased's records.
30. The council confirmed that the above two documents were identified during both its initial and internal review searches but discounted them as being outside the scope of the complainant's request. In respect of the [Access to Information](#) document the council said this was an operational manual on its intranet to assist officers in providing access to records when requested by explaining what steps to take. Rather than an adopted Policy (which the complainant had requested) the council explained that the 'Access to Information' document was a background one used for ensuring that it followed the requirements of general access to information and Data Protection. With regard to the 'General Protocol' document, the council explained that this was an Information Sharing protocol of the NHS Trust with whom it was a partner agency. It pointed out that the protocol was clearly marked as being that of the NHS with the County Council's social services being an interested party. The council said that this was also a background document to support the protection of information while making sure that service user information was used in an appropriate way to ensure

the best service available. It added that it was not a policy for accessing information.

31. The Commissioner accepts that the two documents he identified on the council's website are outside the scope of the complainant's request based on an objective reading of it. The complainant requested the council's most up to date policy on access to a deceased's records. The Commissioner finds that the first document ([Access to Information](#)) is essentially an internal operational tool available to council staff via its intranet to provide guidance for handling all access to information requests. The Commissioner finds that the second document ([General protocol for protecting and using personal information within Cambridgeshire & Peterborough](#)) is an NHS Trust information sharing protocol which the council is a partner agency. It is not the council's adopted policy for accessing information.

Reasons for believing that further information is not held

32. The council has stated that it does not hold an adopted policy on accessing the records of deceased service user. However, it has confirmed that it abides by the rules set down in the Data Protection, Freedom of Information and Access to Health Records Acts. It has disclosed its [Data Protection policy](#) and discounted its [Access to Information](#) and [General protocol for protecting and using personal information within Cambridgeshire & Peterborough](#) documents as being outside the scope of the request. It has described the attempts it made to trace relevant information including the searches and enquiries it carried out. Although the council provided the Commissioner with a copy of its document retention and destruction schedule/policy it expressed the view that it was not relevant in the current case as its belief was that the specific information requested was never created.

Balance of probabilities

33. The Commissioner has taken into account all the arguments and evidence provided by both parties to come to his decision. Although he accepts that some public authorities (in particular, NHS Trusts and the Department of Health) hold information of the type requested by the complainant, he does not find on a balance of probabilities that this is the case here. The complainant's suspicions that more up to date information should be held have been noted but after due consideration the Commissioner has decided that the grounds for this suspicion do not offer any concrete leads on which to base further investigation.

34. The Commissioner is satisfied that the searches carried out by the council for the requested information were reasonable in the circumstances.
35. On the balance of probabilities, the Commissioner finds that the requested information, except that which was provided, is not held by the council.

The Decision

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

Steps Required

37. The Commissioner requires no steps to be taken.

Right of Appeal

38. 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@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

39. 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.
40. 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 31st day of May 2011

Signed

**Andrew White
Group Manager
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"."