

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 26 February 2007

**Public Authority:** County Durham NHS Primary Care Trust  
**Address:** John Snow House  
Durham University Science Park  
Durham  
County Durham  
DH1 3YG

### Summary

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The complainant requested a summary of the medical care provided to her late daughter. This request was sent to Easington NHS Primary Care Trust, the responsibilities of which have now passed to County Durham NHS Primary Care Trust. In order to provide this information it would have necessitated providing information from the deceased person's medical records. The public authority refused to provide this information and cited the exemption at section 41 of the Freedom of Information Act 2000 (the "Act"), stating that the applicant was not the deceased person's next of kin. Further to this the public authority noted that the deceased person had expressed a wish to her GP for details of her healthcare not to be disclosed to her parents. After examining the submissions by both parties the Commissioner concluded that the use of section 41 was valid. However, the Commissioner also concluded that the public authority initially issued an inadequate refusal notice, and therefore did not comply with section 17 when refusing the original request.

### The Commissioner's Role

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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

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2. The complainant has advised that on 6 January 2006 the following information was requested from the public authority in accordance with section 1 of the Act:

"...a summary of the treatment [the deceased] received before her death..."

The complainant then asked a series of detailed questions relating to the treatment of the deceased person. As these questions themselves contain details of the deceased person's medical history no further detail of the original request is included in this Notice.

3. The public authority refused the request on 23 January 2006, stating that there were a number of exemptions within the Act which allowed it to withhold the information requested. However, the public authority did not specify which exemptions it was relying on.
4. On 28 January 2006 the complainant contacted the Commissioner to seek advice. She was advised to contact the public authority again and ask for an internal review.
5. In a letter dated 10 February 2006 the complainant contacted the public authority again, and asked for a review of the refusal. She also asked the public authority to specify which exemptions it was relying on.
6. The public authority conducted a review and informed the complainant, in a letter dated 6 March 2006, that the decision to withhold the information was upheld. It stated that it believed that the information requested was exempt from disclosure under section 41, as the information was confidential. It went on to note that the complainant was not the deceased person's next of kin.

## The Investigation

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### Scope of the case

7. On 20 March 2006 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider whether the refusal was appropriate.
8. Although the complainant did not raise the point, the Commissioner has also considered whether the public authority breached section 17 of the Act when issuing the refusal notice by not providing details of the exemptions it was relying upon, nor details of its internal review procedures.

### Chronology

9. The Commissioner contacted the public authority on 29 March 2006 to notify it that he had received a complaint. The public authority responded in a letter dated 11 April 2006, which provided the Commissioner with some background information to the complaint. The public authority informed the Commissioner that the complainant had been seeking access to her late daughter's medical records since 2004. The public authority had previously informed the complainant that her daughter, prior to her death, had told her GP that she did not wish for any details

- of her medical condition to be disclosed to her parents, and that this had been witnessed by her husband, who was also her next of kin. The public authority also informed the Commissioner that the complainant had contacted the Parliamentary and Health Service Ombudsman regarding this matter, and that after investigating the complaint the Ombudsman issued a report which had not recommended the public authority to take any action. The public authority went on to state that whilst it appreciated the complainant's frustrations it had to respect the wishes of the deceased. Furthermore, it did not have the consent of the next of kin to disclose the information in question.
10. On 3 January 2007 the Commissioner wrote to the complainant and asked her whether she had any further submissions that she wished to be taken into consideration.
  11. The complainant responded on 12 January 2007 and stated that there was no evidence that her late daughter has stated that she did not wish for any details of her medical condition to be disclosed to her parents. She stated that she wished to know what had happened between the last time she saw her daughter and her daughter's death. She also queried an anomaly between the GP's records and the hospital records regarding the date her daughter was admitted into hospital.
  12. The Commissioner contacted the public authority (now the County Durham NHS Primary Care Trust) by letter on 19 January 2007, following a telephone conversation of the same date. In this letter he asked the public authority to provide him with a copy of the Ombudsman's report.
  13. The Commissioner received a copy of the Ombudsman's report on 5 February 2007.

## Analysis

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### Procedural matters

14. The Commissioner considered whether the refusal notice issued by the public authority on 23 January 2006 complied with section 17 of the Act.
15. Section 17(1) states that a public authority who is relying on an exemption(s) in order to withhold information must 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.
16. Section 17(7) states:

"A notice under subsection (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.”
17. The refusal notice issued by the public authority did not specify which exemptions the public authority was relying upon to withhold the information, nor any reasoning as to why these exemptions applied. The notice also did not contain details of the public authority’s internal review procedures or the contact details of the Commissioner.
18. The full text of section 17 can be found in the Legal Annex at the end of this Notice.

### **Exemption**

19. In considering whether the exemption is valid, the Commissioner has taken into account the fact that the Act is designed to be applicant blind and that disclosure under the Act should be considered in the widest sense – that is, to the public at large. In view of this, the Commissioner has not taken into account the unique circumstances of the applicant, or her relationship to the deceased person. The Commissioner has had to consider that if the information were to be disclosed, it would in principle be available to any member of the public.
20. Whilst taking into account the particular circumstances of this case, the Commissioner has been mindful of the decision notice (reference FS50071069) which related to Epsom and St Helier University Hospitals NHS Trust. This decision notice dealt with a situation where a request had been received for a deceased person’s medical records from an individual who was not the deceased person’s personal representative. In that decision notice the Commissioner upheld the public authority’s decision to withhold the requested information under section 41 of the Act.
21. The Commissioner has therefore considered whether the Trust was correct to apply the exemption under section 41 of the Act in this case.
22. The full text of section 41 can be found in the Legal Annex at the end of this Notice.
23. The Commissioner is satisfied that the requested information was indeed obtained from a third party.
24. He is also satisfied that medical records have the necessary quality of confidence required to sustain an action for breach of confidence. 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. 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 which doctors take guaranteeing to protect doctor / patient confidentiality.

25. The Commissioner has gone on to consider whether the duty of confidence can survive the death of the individual to whom the duty is owed. The argument is considered on the basis of both principle and authority contained in relevant case law.
26. The argument of principle is that the breach of confidence would affect the conscience of the defendant. Where the disclosure of such information could be said to be unconscionable, it may be restrained by the Court even where it would not damage the confider. The Commissioner finds the argument of principle to be a reasonable one, particularly given the fact that the disclosure under the Act is disclosure to the world at large.
27. Having considered the argument of principle, the Commissioner has examined the argument of authority. While this may be less powerful than the argument of principle, there would appear to be no binding authority against the argument of principle. In view of this, the Commissioner is satisfied that the duty of confidence attached to medical / health records can survive the death of the person to whom the records relate.
28. The Commissioner's decision is therefore that the information has the quality of confidence necessary for a duty to be owed.
29. 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.
30. There are no issues surrounding consent or law in this case. This leaves a consideration of the public interest. 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 if the duty of confidence should be maintained.
31. In considering whether the disclosure was in the greater public interest, the Commissioner was 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 – although he considers such circumstances will be rare.
32. The Commissioner has considered the findings of the Parliamentary and Health Service Ombudsman's report into the complainant's complaint to her. Having considered this report the Commissioner has formed the view that in this case there is no overriding greater public interest, and that therefore a duty of confidentiality does exist.
33. One of the requirements for section 41 to apply is that the disclosure of the information would constitute an actionable breach of a duty of confidence. Given that the Commissioner accepts that in this case a duty of confidence exists, the

questions to be addressed are whether such a disclosure would be actionable, and if so, who could bring the action?

34. In regard to whether this disclosure would be actionable, the Commissioner considers this to be the case, though 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. Instead, any remedy would most likely be in the form of an injunction to prevent publication of the information requested.
35. After reaching this view, it is therefore necessary to establish who would be able to bring the action if the duty of confidence was breached.
36. While again there would appear to be no binding authority on this point, the Commissioner has reached the view that an action could be brought by the personal representatives of the deceased person, namely the executors or administrators of the estate. It would be unlikely that surviving relatives other than the deceased person's personal representatives would be able to bring an action based on a breach of the duty of confidence. The Trust has supplied the name of the deceased person's personal representative to the Commissioner and has explained that he has confirmed that the deceased person told her GP that she did not wish for any details of her medical condition to be disclosed to her parents. The Commissioner has concluded that the breach of confidence which would arise from the disclosure would be actionable by him.
37. In view of the above, the Commissioner considers that disclosure of this information is exempt under section 41 of the Act, and that the public authority was correct to apply this exemption.
38. Section 41 is an absolute exemption, and is therefore not subject to the public interest test as listed in section 2(1)(b) of the Act.

## The Decision

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39. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

The exemption applied by the public authority under section 41 of the Act is valid.

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 issue an adequate refusal notice the public authority breached section 17 of the Act.

## Steps Required

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40. The Commissioner requires no steps to be taken.

## Right of Appeal

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41. 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](mailto: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 26<sup>th</sup> day of February 2007**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### Section 17

- (1)** 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.
- (2)** 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.
- (3)** 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.
- (4)** 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.



- (5)** 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.
- (6)** 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.
- (7)** A notice under subsection (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**

- (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.