

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 19 February 2007

Public Authority: Liverpool Women's NHS Foundation Trust
Address: Crown Street
Liverpool
L8 7SS

Summary

The complainant requested a copy of a medical report written by a Consultant regarding the care of his late mother. This report was written by the Consultant following a visit to her home in 1991. The public authority offered to provide the complainant with a copy of the report under the Access to Health Records Act 1990 ("AHRA"), on receipt of proof that he was the deceased person's personal representative. The public authority went on to state that they would accept a copy of his birth certificate as proof. The public authority refused to disclose the information under the Freedom of Information Act 2000 (the "Act"), and cited the exemption at section 21 of the Act. Having considered both parties submissions the Commissioner found that the public authority had been correct in claiming the section 21 exemption. However, the Commissioner also concluded that the public authority had not complied with section 17(1), as it had failed to issue a refusal notice within 20 working days.

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. The complainant has advised that on 1 January 2005 the following information was requested from the public authority in accordance with section 1 of the Act:

"Since September 1997 I have made requests for [.....]'s report for my mother. He assured me I would be supplied. I have since made repeated requests. In your letter of March 2003 I was told a reply would be sent in due course. Despite further letters I have not had an answer.

I am now writing again to repeat my request."

3. The complainant first contacted the Commissioner on 20 May 2005, at which time he had not received a response from the public authority in relation to his request of 1 January 2005. The Commissioner wrote to the public authority on 11 August 2005 and asked it to confirm whether it had received the complainant's request. In this letter the Commissioner also asked the public authority to provide copies of any correspondence between the public authority and the complainant which had been generated as a result of the request; to explain why it had chosen to withhold the information, if in fact it had chosen to do so; and, if it had not yet responded to the complainant, to confirm the date by which a response would be sent.
4. In a letter dated 23 August 2005 the public authority responded to the Commissioner. The public authority informed the Commissioner that it had received the complainant's request, but that no action had been taken in responding to the request. The public authority explained that the complainant had been attempting to obtain the report since 1997, and that it had previously offered to provide him with a copy of the report through the AHRA, if he provided it with proof that he was the deceased's personal representative. The public authority stated that he had not provided this proof, and after several attempts to resolve the issue with the complainant it had been decided in 2003 that it would not be productive to enter into further correspondence with him. The complainant had been informed of this in a letter.
5. Following receipt of this letter the Commissioner again wrote to the public authority and asked it to respond to the complainant's request under the requirements of Part 1 of the Act.
6. In a letter to the complainant, dated 13 September 2005, the public authority responded to his request. In this letter the public authority offered to supply the complainant with a copy of the report under the AHRA, upon receipt of proof that he was the deceased person's personal representative. The public authority outlined what it would accept as proof, and this included a copy of the complainant's birth certificate. The public authority stated that it believed that the report was exempt under section 21 of the Act as the information was reasonably accessible to the complainant by other means.
7. The complainant contacted the Commissioner on 17 September 2005 expressing his dissatisfaction at the refusal by the public authority to provide the information in question under the Act. The Commissioner responded in a letter dated 21 September 2005 advising that he should seek an internal review of the decision.
8. In a letter dated 25 May 2006 the complainant asked the public authority to review their decision not to release the information under the Act.
9. The public authority responded to the complainant on 17 July 2006. This letter explained the result of the internal review. The public authority upheld the decision to withhold the report under section 21 of the Act, and again offered to

provide the information under the AHRA upon receipt of the proof that it had previously requested.

The Investigation

Scope of the case

10. The complainant contacted the Commissioner again on 24 July 2006 after he had received the result of the internal review. The complainant asked the Commissioner to consider whether the refusal was appropriate.

Chronology

11. The Commissioner wrote to the complainant on 4 January 2007. He noted that the public authority had offered to provide the complainant with a copy of the report under the AHRA, upon receipt of a copy of his birth certificate. He asked him to explain why he could not supply a copy of his birth certificate in order to prove to the public authority that he was the deceased person's personal representative.
12. The complainant responded to this letter on 6 January 2007. However, this letter did not contain an explanation as to why he could not provide a copy of his birth certificate to the public authority.
13. The Commissioner wrote again to the complainant on 17 January 2007. The Commissioner again asked the complainant to explain why he could not provide the public authority with a copy of his birth certificate in order to obtain the report in this way.
14. The complainant did not provide the Commissioner with an explanation.

Analysis

Procedural matters

15. The Commissioner has considered whether the public authority has complied with its obligations under section 17 of the Act.
16. Section 17(1) states that a public authority who is relying on an exemption(s) in order to withhold information must issue a refusal notice "within the time for complying with section 1(1), that is, within twenty working days.
17. The public authority did not respond to the complainant's request of 1 January 2005 until 13 September 2005, following a letter from the Commissioner.

18. The full text of section 17 can be found at the Legal Annex at the end of this Notice.

Exemption

19. Section 21 of the Act contains an exemption for information which is reasonably accessible to the applicant by other means. The full text of section 21 can be found in the Legal Annex at the end of this Notice.
20. Although the Act is designed to be applicant blind, in order for a public authority to consider whether section 21 applies it has to take into account the individual circumstances of the applicant, and whether the information requested is reasonably accessible to that applicant.
21. In determining whether information is reasonably accessible to the applicant, the public authority should take into account any legal access schemes or rights which are available to that applicant. In this instance the public authority has taken into account, and cited, the AHRA.
22. Section 3 (f) of the AHRA provides that an application for access to a health record, or to any part of a health record may be made by a deceased patient's personal representative and any person who may have a claim arising out of the patient's death. The AHRA requires the public authority to disclose documents in certain situations.
23. The Commissioner has considered the accessibility of the information requested by the complainant through the two access regimes of the AHRA and the Act. The AHRA only allows disclosure to certain categories of persons as defined in section 3(1). The Act is designed to be applicant blind and disclosure should be considered in the widest sense – that is to the public at large. In view of this the Commissioner has taken into account both the circumstances of the complainant and the fact that if the information requested by the complainant was disclosed under the Act, it would in principle be available to any member of the public.
24. The public authority has offered to provide the complainant with a copy of the medical report upon receipt of proof that he is the deceased person's personal representative – a fact that the complainant has asserted several times in his correspondence. The Commissioner has sought to obtain information from the complainant as to why this was not a reasonable request from the public authority. Despite two requests, he has not been provided with any relevant information by the complainant. Given the circumstances of the case the Commissioner has considered whether this request for proof by the public authority was reasonable. In the Commissioner's opinion it was.
25. In the circumstances the Commissioner considers that disclosure of this information is exempt under section 21 of the Act. This is because it is reasonably accessible to the complainant under the AHRA.
26. Section 21 is an absolute exemption, and as such there is no public interest test to apply.

27. In considering this case the Commissioner has taken into consideration the fact that if the complainant was not the personal representative of the deceased person, and was not therefore eligible to obtain the information through the AHRA, section 21 of the Act would not apply. In such circumstances the public authority would not be required to take into account the individual circumstances of the complainant, and the disclosure would have to be considered as a disclosure to the public at large. Simply put, the public authority would have to consider the request as a request for extracts of a deceased person's medical records from a member of the general public.
28. Although these circumstances have not arisen in this case, and therefore a decision has not been made based on these grounds, the Commissioner has noted that in his decision notice reference FS50071069, which related to Epsom and St Helier University Hospitals NHS Trust, 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, which provides an exemption for information provided in confidence, the disclosure of which would be an actionable breach of confidence. Therefore, if the request was received by anyone other than the personal representative of the deceased person, the Commissioner considers that, depending on the circumstances of the case, it is likely that the information would be exempt by virtue of section 41, and possibly section 44, of the Act. Section 44 of the Act provides an exemption for information for which there is a statutory bar on disclosure. In cases such as these the Commissioner considers it is likely that Article 8 of the Human Rights Act 1998 (right to privacy and family life) would provide such a statutory bar.

The Decision

29. 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 21 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 respond to the complainant's information request within 20 working days the public authority breached section 17(1) of the Act, as it failed to issue a refusal notice within twenty working days.

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@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 19th 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 21

- (1)** Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
- (2)** For the purposes of subsection (1) –

 - (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
 - (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.
- (3)** For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.