

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 7 September 2011

Public Authority: Parliamentary and Health Service Ombudsman
Address: Millbank Tower
Millbank
London
SW1P 4QP

Summary

The complainant submitted a request to the Parliamentary and Health Service Ombudsman (the "PHSO") for a copy of his late mother's medical records. These had been provided to the public authority for the purposes of investigating a complaint made against a NHS Trust. The PHSO considered that the exemption provided by section 44 (statutory prohibitions) of the Freedom of Information Act 2000 applied to the majority of the records, although it also found that a small part of the records constituted the complainant's personal data and should be dealt with under the Data Protection Act 1998. The complainant has only asked the Commissioner to consider the PHSO's reliance on section 44 as grounds for withholding information. The Commissioner has determined that section 44 was applied correctly and does not therefore require any steps to be taken in response to this Notice.

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 14 September 2009 the complainant made a request to the Parliamentary and Health Service Ombudsman (the "PHSO") for the medical records of his late mother. These had originally been supplied to the PHSO to allow it to investigate a complaint made about the treatment afforded by an NHS Trust.
3. The PHSO responded to the request on 13 October 2009 by explaining that it considered the information to be exempt from disclosure and was therefore being withheld. This was principally on the basis that information was caught by section 15 of the Health Service Commissioners Act 1993 (HSCA 1993) and was therefore subject to the exemption provided by section 44 (statutory prohibitions) of the Act.
4. The PHSO, however, also identified that a small part of the records was the complainant's personal data. It therefore considered this information under the Data Protection Act 1998 rather than the Act.
5. On 7 and 30 December 2009 the complainant contacted the PHSO to ask that it carry out an internal review of its handling of his request.
6. The PHSO presented the findings of its internal review on 26 March 2010, which upheld its original response to the request.

The Investigation

Scope of the case

7. On 30 March 2010 the complainant contacted the Commissioner to complain about the refusal of the PHSO to provide requested information.
8. With respect to the withheld medical records, the PHSO has clarified that a "little" of the information constitutes the complainant's personal data. The complainant has, however, confirmed that he is not interested in being provided with his personal data. As such, the Commissioner's decision solely relates to the remaining information contained in the medical records, which was considered exempt under section 44.

Chronology

9. In this case the Commissioner has not considered it necessary to inspect the withheld information. Instead, he has found that he is able to reach a determination based on the consideration of the request itself and the responses provided by the public authority to the complainant.

Analysis

10. The full text of the relevant statutory provisions referred to in this section is contained in the legal annex appended to the Decision Notice.

Exemptions

Section 44 - Prohibitions

11. Section 44 provides that information is exempt if its disclosure is prohibited under any other law or enactment. In this case the relevant statutory prohibition is contained within the HSCA 1993.

The HSCA 1993

12. Section 11(2) of the HSCA 1993 explains that the PHSO has a duty to conduct an investigation in private.
13. Section 15(1) of the HSCA 1993 further specifies that information obtained by the PHSO in the course of an investigation should not normally be disclosed. Section 15 of HSCA 1993 does though set out a number of exceptions to this provision.
14. For it to be possible for the PHSO to disclose information under the Act it is necessary for the information to:
 - have been "obtained" other than "...by the Commissioner or his officers in the course of or for the purposes of an investigation" under the HSCA 1993. If the information falls outside of this condition then the statutory bar would not be appropriately applied; or
 - fall within one of the exceptions found in section 15(1)(a) to (e) of the HSCA 1993.

15. The Commissioner addresses these points in turn.

Was the withheld information “obtained” by the public authority for the purposes of an investigation?

16. Following the approach he adopted in his decision on FS50324048 (PHSO), the Commissioner considers that the term “obtained” should be given its natural meaning. “Obtained” refers both to information that the public authority proactively obtains as part of an investigation and information supplied by those wishing the public authority to carry out an investigation.
17. In this case the PHSO received a copy of the requested medical records in order to facilitate an investigation into a complaint made against a specific NHS Trust.
18. In previous cases involving the application of section 44, the Commissioner has drawn a distinction between information received by a public authority and information created by a public authority (where this does not reveal the content of information obtained by a public authority). The former category of information will be caught by the statutory bar, while the latter is unlikely to be.
19. The Commissioner accepts that the requested medical records fit squarely in the former category of information. He has therefore concluded that the medical records are caught by the statutory bar. Accordingly, the Commissioner has gone on to consider whether any of the exceptions to the statutory bar found in section 15(1)(a) to (e) of the HSCA 1993 apply.

Do any of the exceptions found in the HSCA 1993 apply?

20. The Commissioner considers that the only relevant exceptions in the HSCA 1993 are those set out at sections 15(1)(a) and 15(1)(e). This is because sections 15(1)(b) to (d) will only apply where a body is charged with investigating an offence and a limited disclosure of information would be required for this purpose.
21. Such a scenario is not applicable in this situation and, in any event, a limited disclosure would not be commensurate with the provisions of the Act which makes information available to the world at large.
22. Section 15(1)(a) of the HSCA 1993 permits the PHSO to disclose information where it is for the purposes of its investigation and any report made in respect of it.

23. The Commissioner is aware that the PHSO has previously provided the complainant with a draft report relating to its investigation. This set out the information it had relied upon in the medical records when forming a view on the complaint against the NHS Trust. The PHSO has though not deemed it appropriate to provide further information relating to its investigation.
24. In *Ofcom v Morrissey and the Information Commissioner* [2011] UKUT 116 (AAC)¹ the Upper Tribunal confirmed that the Commissioner does not have the power to question how a public authority exercises its discretion in relation to any 'gateway' to disclosure contained in a relevant statutory enactment. Therefore, the discretion remains with the PHSO with regards to the level of information it considers should be released under section 15(1)(a) for the purposes of its investigation.
25. Following this line of reasoning, the Commissioner finds that in all the circumstances the exemption provided by section 15(1)(a) does not apply to the withheld information. The Commissioner has therefore considered the possibility that section 15(1)(e) would apply in the alternative.
26. The Commissioner observes that section 15(1)(e) has been restricted by section 15(1)(1B), which explains that disclosure can only be made to *"any persons to whom he thinks it should be disclosed in the interests of the health and safety of patients..."*
27. Allegations of negligence have been made against an NHS Trust which, if proven, may allow the PHSO to contact relevant individuals under section 15(1)(e) to protect the health and safety of patients. However, the discretion to disclose information once again lies with the PHSO and cannot be challenged by the Commissioner.
28. The Commissioner has therefore decided that no exceptions apply to the statutory bar provided by section 15(1) of the HSCA 1993.
29. Where a statutory bar is found to be engaged, the Commissioner must necessarily conclude that the information is exempt by virtue of section 44 of the Act. This is because section 44 is an absolute exemption and, as such, there is no requirement for the Commissioner to consider whether there is a public interest attached to the release of the information.

¹ http://www.informationtribunal.gov.uk/DBFiles/Appeal/i365/GIA_605_2010.pdf

Other exemptions

30. Although the PHSO has based on its refusal on section 44 of the Act, decisions of the Commissioner and the Information Tribunal (see Bluck²) have previously upheld the application of section 41 to the medical records of the deceased. In broad terms, section 41 provides an exemption to disclosure where it would constitute a breach of confidence.
31. The Commissioner considers it likely that section 41 would similarly apply in this case. However, as he has upheld the application of section 44, the Commissioner has not deemed it necessary to consider this exemption further.

The Decision

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

Steps Required

33. The Commissioner requires no steps to be taken.

Other matters

34. Although they do not form part of this Decision Notice the Commissioner is concerned by the time taken for the PHSO to complete an internal review. The request for review was put to the PHSO on 7 and 30 December 2009. However, the outcome of the internal review was only provided to the complainant on 26 March 2010.
35. The Act itself does not stipulate a time limit for the completion of an internal review, although the section 45 Code of Practice associated with the Act states that they should be dealt with in a reasonable timeframe. The Commissioner's view is that a reasonable time for completing an internal review is within 20 working days or, in

²<http://www.informationtribunal.gov.uk/DBFiles/Decision/i25/mrspbluckvinformationcommissioner17sept07.pdf>

exceptional cases, 40 working days. It is evident in this case that the PHSO failed to subscribe to the recommended timeframe.

Right of Appeal

36. 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

37. 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.
38. 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 7th day of September 2011

Signed

**Pamela Clements
Group Manager, Complaints Resolution**

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

Legal Annex

Freedom of Information Act 2000

Section 1 - General Right of Access

Section 1(1) of the Act 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 2(3) – Effect of exemptions in part II

Section 2(3) provides that –

“For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (iii) section 41, and
 - (iv) section 44”

Section 10(1) – Time for compliance with the request

Section 10(1) of the Act 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 17(1) – refusal of request

Section 17 (1) of the Act states 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 40(1) – personal data

Section 40(1) of the Act states that:

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 44 – Prohibitions on disclosure

Section 44 of the Act provides that:

“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.”

Health Service Commissioners Act 1993

Section 3 provides that:

Matters subject to investigation

3. General remit of Commissioners

(1) On a complaint duly made to a Commissioner by or on behalf of a person that he has sustained injustice or hardship in consequence of—

- (a) a failure in a service provided by a health service body,
- (b) a failure of such a body to provide a service which it was a function of the body to provide, or
- (c) maladministration connected with any other action taken by or on behalf of such a body,

the Commissioner may, subject to the provisions of this Act, investigate the alleged failure or other action.

(1YA) In the case of the Assembly the Health Service Commissioner for Wales may only conduct an investigation in respect of—

- (a) a failure in a service provided by the Assembly in the exercise of a function of the Assembly relating to the National Health Service (an “Assembly health service function”),
- (b) a failure of the Assembly to provide a service the provision of which is an Assembly health service function, or
- (c) maladministration connected with any other action taken by or on behalf of the Assembly in the exercise of an Assembly health service function.

(1ZA) Any failure or maladministration mentioned in subsection (1) may arise from action of—

- (a) the health service body,
- (b) a person employed by that body,
- (c) a person acting on behalf of that body, or
- (d) a person to whom that body has delegated any functions.

(1A) Where a family health service provider has undertaken to provide any family health services and a complaint is duly made to a Commissioner by or on behalf of a person that he has sustained injustice or hardship in consequence of—

(a) action taken by the family health service provider in connection with the services,

(b) action taken in connection with the services by a person employed by the family health service provider in respect of the services,

(c) action taken in connection with the services by a person acting on behalf of the family health service provider in respect of the services, or

(d) action taken in connection with the services by a person to whom the family health service provider has delegated any functions in respect of the services,

the Commissioner may, subject to the provisions of this Act, investigate the alleged action.

(1C) Where an independent provider has made an arrangement with a health service body or a family health service provider to provide a service (of whatever kind) and a complaint is duly made to a Commissioner by or on behalf of a person that he has sustained injustice or hardship in consequence of—

(a) a failure in the service provided by the independent provider,

(b) a failure of the independent provider to provide the service, or

(c) maladministration connected with any other action taken in relation to the service,

the Commissioner may, subject to the provisions of this Act, investigate the alleged failure or other action.

(1D) Any failure or maladministration mentioned in subsection (1C) may arise from action of—

(a) the independent provider,

(b) a person employed by the provider,

(c) a person acting on behalf of the provider, or

(d) a person to whom the provider has delegated any functions.

(2) In determining whether to initiate, continue or discontinue an investigation under this Act, a Commissioner shall act in accordance with his own discretion.

(3) Any question whether a complaint is duly made to a Commissioner shall be determined by him.

(4) Nothing in this Act authorises or requires a Commissioner to question the merits of a decision taken without maladministration by a health service body in the exercise of a discretion vested in that body.

(5) Nothing in this Act authorises or requires a Commissioner to question the merits of a decision taken without maladministration by—

(a) a family health service provider,

(b) a person employed by a family health service provider,

(c) a person acting on behalf of a family health service provider, or

(d) a person to whom a family health service provider has delegated any functions.

(6) Nothing in this Act authorises or requires a Commissioner to question the merits of a decision taken without maladministration by—

(a) an independent provider,

(b) a person employed by an independent provider,

(c) a person acting on behalf of an independent provider, or

(d) a person to whom an independent provider has delegated any functions.

(7) Subsections (4) to (6) do not apply to the merits of a decision to the extent that it was taken in consequence of the exercise of clinical judgment.

Section 11(2) provides that:

' (2) An investigation shall be conducted in private.'

Section 15 provides that:

'(1) Information obtained by a Commissioner or his officers in the course of or for the purposes of an investigation shall not be disclosed except—

(a) for the purposes of the investigation and any report to be made in respect of it,

(b) for the purposes of any proceedings for—

(i) an offence under the Official Secrets Acts 1911 to 1989 alleged to have been committed in respect of information obtained by virtue of this Act by a Commissioner or any of his officers, or

(ii) an offence of perjury alleged to have been committed in the course of the investigation,

(c) for the purposes of an inquiry with a view to the taking of such proceedings as are mentioned in paragraph (b),

(d) for the purposes of any proceedings under section 13 (offences of obstruction and contempt) or

(e) where the information is to the effect that any person is likely to constitute a threat to the health or safety of patients as permitted by subsection (1B).

(1A) Subsection (1B) applies where, in the course of an investigation, a Commissioner or any of his officers obtains information which—

(a) does not fall to be disclosed for the purposes of the investigation or any report to be made in respect of it, and

(b) is to the effect that a person is likely to constitute a threat to the health or safety of patients.

(1B) In a case within subsection (1)(e) the Commissioner may disclose the information to any persons to whom he thinks it should be disclosed in the interests of the health and safety of patients; and a person to whom disclosure may be made may, for instance, be a body which regulates the profession to which the person mentioned in subsection (1A)(b) belongs or his employer or any person with whom he has made arrangements to provide services.'