

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 28 September 2011

Public Authority: Health and Social Care Board
Address: Gransha Park House
15 Gransha Park
Clooney Road
Derry
BT47 6FN

Summary

The complainant requested information regarding the number of people from Northern Ireland who received treatment at a specified London clinic in 2010. The Health and Social Care Board ("HSCB") refused to disclose the requested information as it stated that it was exempt under section 41(1) of the Act (information provided in confidence). The Commissioner finds that the exemption at section 41(1) is engaged in relation to the requested information. The Commissioner also finds that the HSCB breached section 17(1) of the Act in its handling of the request. The Commissioner requires no 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.

Background

2. In Northern Ireland there is a process by which individual cases are referred outside of the Northern Ireland Health and Social Care system in particular circumstances. This is referred to as the Extra Contractual Referral ("ECR") process. The cases typically involve patients who are quite ill and vulnerable and who have specialist, rare or complex medical conditions or social care needs which can only be met by very

specialist providers. If a consultant makes a clinical decision that a patient under his or her care requires specific treatment or intervention that is not available within the Northern Ireland Health and Social Care system, he or she can ask the HSCB to consider facilitating access to a provider outside of that system who could meet the patient's needs.

The Request

3. On 11 November 2010 the complainant made the following request: -
"How many people from Northern Ireland availed of treatment at London clinics during the year 2010? What was the total cost to the public purse for each individual case?"
4. The HSCB acknowledged the complainant's request on 16 November 2010. On 6 December 2011, it requested clarification of the request, asking the complainant to identify a specific provider, i.e. to name a specific "London clinic". The HSCB explained that it would be simpler and more efficient to locate the requested information if it was able to search its systems by clinic name. The complainant provided clarification on 20 December 2010 by naming a specific "long-stay" mental health clinic in London.
5. The HSCB responded to the complainant's request on 8 February 2011, refusing to disclose the requested information to the complainant, citing the exemption under section 41(1) of the Act as a basis for non-disclosure.
6. On 15 February 2011 the complainant requested a review of the HSCB's decision. The result of that review was provided on 9 March 2011. The reviewer upheld the original decision.

The Investigation

Scope of the case

7. On 27 December 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider the HSCB's application of section 41(1) to the requested information.
8. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

9. On 27 April 2011 the Commissioner wrote to the complainant to inform him that his complaint had been allocated to a case officer. On the same date the Commissioner wrote to the HSCB requesting its detailed submissions as to why the requested information was being withheld under section 41(1) of the Act.
10. On 27 May 2011 the HSCB responded to the Commissioner providing its detailed submissions regarding its application of section 41(1) to the requested information being withheld ("the withheld information").

Analysis

Exemptions

11. The HSCB has argued that the withheld information is exempt from disclosure on the basis of section 41 because it was provided to it in confidence by third parties. The Commissioner has considered the application of this exemption to the withheld information.

Section 41 – Information provided in confidence

12. This section states that:

*'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.'*

13. Therefore for this exemption to be engaged two criteria have to be met;
 - the public authority has to have obtained the information from a third party; **and**
 - the disclosure of that information has to constitute an actionable breach of confidence.
14. The HSCB has confirmed that the withheld information was provided to it by the Health and Social Care Trusts in Northern Ireland through the ECR process and therefore meets the requirements of section 41(1)(a). The Commissioner is satisfied that this is the case.

15. With regard to section 41(1)(b) the approach adopted by the Commissioner in assessing whether disclosure would constitute an actionable breach of confidence in this case is to follow the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415 ("*Coco*").

This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:

- Whether the information had the necessary quality of confidence;
 - Whether the information was imparted in circumstances importing an obligation of confidence; and
 - Whether an unauthorised use of the information would result in detriment to the confider.
16. The HSCB has provided the Commissioner with detailed submissions to support its position that the three criteria above are met. The Commissioner has considered these submissions and also set out his conclusions in relation to their merit.

Does the information have the necessary 'quality of confidence'?

17. The HSCB has argued that it is clear from the subject matter of the withheld information that it has the necessary quality of confidence.
18. The Commissioner believes that the information will have the necessary quality of confidence if it is not otherwise accessible to the requestor, is more than trivial and is of importance to the confider. Information will not have the necessary quality of confidence if it is already in the public domain.
19. Having considered the withheld information the Commissioner is satisfied that it has the necessary quality of confidence: it is clear that the information is more than trivial and is of significant medical importance. He is also satisfied that the information is not otherwise accessible to the public.

Was the information imparted in circumstances importing an obligation of confidence?

20. An obligation of confidence may be expressed explicitly or implicitly. Whether or not there is an implied obligation of confidence may depend on the nature of the information itself, and/or the relationship between the parties.

21. In this case the information is medical and therefore sensitive in nature. The withheld information contains details of patients referred to a specific health provider under the ECR process, which clearly indicates that those patients have specialist, rare or complex medical conditions.
22. When patients submit to treatment from doctors and other medical professionals, they do so with the expectation that information would not be disclosed to third parties without their consent. The Commissioner 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. When it becomes necessary for that information to be passed to a third party such as the HSCB, that obligation of confidence continues.
23. The ECR process in itself is a process which is clearly confidential in nature and necessitates discretion and sensitivity given that it is specifically designed to meet the unique needs of very ill and vulnerable patients. Any party holding information generated by the ECR process would have an obligation of confidence regarding that information. The Commissioner is therefore satisfied that in this instance the HSCB has an obligation of confidence as the withheld information was imparted to it in circumstances which clearly give rise to an obligation of confidence.

Would disclosure be detrimental to any party?

24. Where information is purported to have been imparted in confidence the Commissioner considers that there would have to be a detrimental impact to the confider for this limb of the *Coco* test to be engaged.
25. However, in the *Coco* case it was made clear that the element of detriment may not be necessary in every case. In the Commissioner's view, information on personal matters can still be protected under the law of confidence, even if disclosure may not be detrimental in terms of any tangible loss. Older case law on the common law of confidence must be considered in light of case law relating to the Human Rights Act 1998 ("HRA") and the right to private and family life under article 8. Case law has stressed that an obligation of confidentiality can arise in various circumstances and highlights in particular the distinction between an "old fashioned breach of confidence" i.e. arising out of commercial secrets and the "misuse of private information".
26. The law of confidence as it relates to private and personal information such as medical information, must be read in the context of the HRA.

The HSCB has indicated to the Commissioner that it has considered Article 8 of the HRA in this case.

27. Article 8 identifies the importance to individuals of having the privacy of their affairs respected. Therefore an invasion of privacy, and the resulting damage or distress caused to an individual, can be considered to have a detrimental impact upon that individual.
28. In this case the withheld information contains details of patients with rare and/or complex medical conditions requiring specialist intervention. Disclosure of the withheld information could lead to the identification of a specific patient or patients, which would be extremely likely to cause damage and distress to already vulnerable patients and also to their families. The Commissioner is satisfied that this would constitute an invasion of those individuals' privacy which would cause detriment to the individuals.

Would disclosure of the withheld information be actionable?

29. An actionable breach of confidence is not just one that is arguable but one that would, on the balance of probabilities, succeed.
30. To establish an 'actionable' breach of confidence, the public authority must establish that such an action would, on the balance of probabilities, succeed, that is considering whether or not all three limbs of the test of confidence can be established and whether or not it has a public interest defence.
31. Since the Commissioner is satisfied that the withheld information engages all three limbs of the test of confidence, he has considered whether the HSCB would have a defence to a claim for breach of confidence.

Would the HSCB have a defence to a claim for breach of confidence based on the public interest in disclosure of the information?

32. Although section 41 is an absolute exemption the law of confidence contains its own inbuilt public interest test. One defence to an action for breach of confidence is that the disclosure is in the public interest.
33. When weighing up the public interest arguments in favour of upholding an obligation of confidence, the Commissioner considers the wider public interest in preserving the principle of confidentiality and the impact that disclosure would have on the interests of the confider. The weight of the consideration will depend on the context.
34. The disclosure of any confidential information will, to some degree, undermine the principle of confidentiality, which is really to do with the

relationship of trust between confider and confidant. Individuals would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected. In the case of *Bluck v Epsom & St Helier University NHS Trust (17 September 2007)*¹ the Tribunal quoted from *Attorney General v Guardian*,

"...as a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence..."

35. In this case the withheld information consists of the private medical information of an individual or individuals. The importance of an individual's right to privacy is recognised by Article 8 of the HRA as mentioned in paragraphs 30 and 31 above, which provides that *"Everyone has a right to respect for his private and family life, his home and his correspondence"*. The courts are obliged to interpret domestic law, including the law of confidence, in a way that respects this right to privacy and so Article 8 considerations are taken into account when determining whether information is confidential and are weighed against factors favouring disclosure when considering whether there would be a public interest defence against a breach of confidence. In short the real consequence of disclosing private, personal information is an infringement of the confider's privacy and there is a public interest in protecting the privacy of individuals. The Commissioner has therefore considered whether there are any public interest factors in favour of disclosing the withheld information which would outweigh the strong public interest in the protection of individuals' privacy.
36. The complainant argues that it is in the public interest to know how the health and social care system in Northern Ireland allocates the expenditure of public money. The Commissioner accepts that there is a public interest in public bodies being open and transparent with regard to their expenditure.
37. However, as the HSCB has pointed out, there is a strong public interest in maintaining the confidentiality of the ECR mechanism and the information generated by the ECR process. The process is designed to promote healing and wellness, so if patients were to be exposed to public scrutiny this would be counter-productive and would be very likely to cause severe damage and distress to already vulnerable individuals. This would also damage the integrity of the process and

¹ EA/2006/0090

would not encourage public confidence in the health and social care system. The Commissioner accepts that it would not be in the public interest for the public not to have confidence in its own health services.

38. The Commissioner, having weighed up the public interest arguments on both sides, has concluded that there is no overriding public interest in the disclosure of the information and therefore that this would not be a defence to any action for breach of confidence taken as a result of disclosure.

Procedural Requirements

Section 17(1) of the Act

39. Section 17(1) of the Act provides that a public authority which is refusing information under an exemption must provide a refusal notice within the time for complying with section 1(1) of the Act, i.e. 20 working days. The full text of section 17(1) can be found in the Legal Annex to this Notice.
40. The HSCB, once it had received clarification from the complainant of the name of the specific London clinic, took 32 working days to provide the complainant with a refusal notice. Therefore, the HSCB is in breach of section 17(1) of the Act. The Commissioner notes that the HSCB acknowledged this breach and apologised for it in its response to the complainant's request for an internal review.

The Decision

41. The Commissioner's decision is that the HSCB dealt with the request in accordance with the requirements of the Act in that it correctly applied section 41 to the withheld information.
42. However, the Commissioner has also decided that the HSCB did not deal with the request in accordance with the Act in that it breached section 17(1) of the Act by failing to issue a refusal notice within 20 working days.

Steps Required

43. The Commissioner requires no steps to be taken.

Right of Appeal

44. 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

45. 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.
46. 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 28th day of September 2011

Signed

**Faye Spencer
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 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"

17- Refusal of request

- (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.

41- Information provided in confidence

- (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.

Human Rights Act 1998

ARTICLE 8- RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

- 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.