

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 May 2024

Public Authority: The National Archives
Address: Ruskin Avenue
Kew
Richmond
Surrey
TW9 4DU

Decision (including any steps ordered)

1. The complainant has requested a full copy of their father's army service record. The National Archives ('TNA') provided a redacted copy of the record as part of its internal review response and advised the redacted information was withheld under section 41 of FOIA (provided in confidence).
2. The Commissioner's decision is that TNA is entitled to refuse to disclose the information on the basis of section 41(1) of FOIA.
3. No steps are required as a result of this decision.

Request and response

4. On 26 July 2022, the complainant wrote to TNA and requested information in the following terms:

"I wish to obtain a copy of my father's army record. I applied for this in April 2021, and have just received the response (15 months later) advising me to contact you. Would you kindly assist me with the procedure to obtain the record."

5. TNA responded on 13 February 2023. It stated that it was unable to open the requested record as it was exempt from disclosure under section 41 of FOIA until 2032.
6. Following an internal review TNA wrote to the complainant on 14 December 2023. It stated that it had reviewed the request and decided to release some of the requested information to the complainant. It advised that some of the information in the record had been redacted under section 41 of FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 29 January 2024 to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to determine whether TNA have correctly applied section 41(1) of FOIA to withhold the redacted information.

Reasons for decision

Section 41 – information provided in confidence

9. Section 41(1) of FOIA states that:

'(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.'

10. 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.
11. With regard to whether disclosure would constitute an actionable breach of confidence the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. 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.
12. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure. Although, it is still necessary to show that disclosure of such information would be an unauthorised use of the information.
13. The Commissioner has assessed each of these criteria in turn, taking into account the submissions provided to him.

Was the information obtained from another person?

14. With regard to the requirements of section 41(1)(a), the Commissioner accepts that medical records will constitute information which was received by a third party. Therefore, the Commissioner is satisfied that section 41(1)(a) of FOIA is met.¹

Does the information have the necessary quality of confidence?

15. In the Commissioner's view information will have the necessary quality of confidence if it is not otherwise accessible and it is more than trivial.
16. The Commissioner is satisfied that the requested information has the quality of confidence. The information is clearly not trivial, nor is it in the public domain.

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

17. TNA explained that in this case, the record was transferred to TNA from the Ministry of Defence ('MOD'). TNA has explained that, upon transfer of records from the MOD, it has a duty of confidentiality to service personnel and their families which lasts beyond the death of the data subject. It explained that this regards the personal information which was imparted for the purposes of military service and that, even after

¹ [information-provided-in-confidence-section-41.pdf \(ico.org.uk\)](https://ico.org.uk/information-provided-in-confidence-section-41.pdf)

death, disclosure of this type of information to a third party could constitute an actionable breach of confidence.

18. The complainant has stated that they recognise the need for privacy but they feel they should be able to access their father's service record in full to learn more about that particular period in their father's life.
19. Under FOIA, disclosure of information is said to be disclosure to the 'world at large.' It is the equivalent of TNA publishing the information on its website, notwithstanding the fact that the complainant has stated he only wanted the information for himself as immediate family. Taking this into account, the Commissioner is of the view at the time that the medical records were created the complainant's father would not have expected such information to be disclosed to the world at large.
20. The Commissioner is therefore satisfied that this criterion is met.

Would disclosure be of detriment to the confider?

21. As noted above, case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure. The Commissioner considers that, as medical records constitute information of a personal nature, there is no need for there to be any detriment to the confider in terms of tangible loss, in order for it to be protected by the law of confidence.
22. The Commissioner considers that the knowledge that confidential information has been passed to those whom the confider would not willingly convey it to, may be sufficient detriment.²
23. In this case, the Commissioner considers that disclosure would be contrary to the deceased person's reasonable expectation of maintaining confidentiality in respect of his medical records. He therefore considers the absence of detriment would not defeat a cause of action.

Is there a public interest defence to the disclosure of the information?

24. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public

² EY v ICO & Medicines and Healthcare Products Regulatory Authority [EA/2010/0055] para 13.

interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under FOIA). British courts have historically recognised the importance of maintaining a duty of confidence, so it follows that strong public interest grounds would be required to outweigh such a duty.

25. The Commissioner is therefore required to consider whether TNA could successfully rely on such a public interest defence to an action for breach of confidence in this case.
26. The Commissioner recognises the complainant's strong personal interest for wanting to access the requested information. Some of the information may be considered to be relatively innocuous and was obtained many decades ago. However, as noted above, the Commissioner would again emphasise the distinction between disclosure of such information under FOIA and a private or limited disclosure of information to the next of kin.
27. Whilst the Commissioner acknowledges the complainant's desire to obtain their father's full service record, in terms of a disclosure under FOIA, the Commissioner considers that there is a particularly strong public interest in ensuring that patient confidentiality, and furthermore, that the relationship between patients and Service medical practitioners is not undermined. When patients receive treatment from doctors and other medical professionals, they do so with the expectation that information will not be disclosed to third parties without their consent. It is in the public interest that confidences should be respected.
28. The Commissioner also believes there is a public interest in ensuring that an employee can give their employer all necessary private or domestic information about themselves with the certainty that it will be held by the employer in confidence and only used for specific purposes that are within an employee's reasonable expectations.
29. Overall, the Commissioner is mindful of the need to protect the relationship of trust between confider and confidant; and the need not to discourage or otherwise hamper a degree of public certainty that such confidences will be respected by a public authority. He finds that the public interest in preserving the trust between doctor and patient to be particularly weighty.
30. For these reasons, the Commissioner has concluded that there is not a sufficiently compelling argument in support of a public interest defence against an action for breach of confidence.

Procedural matters

31. The Commissioner finds that TNA breached section 17(1) of FOIA by failing to provide a section 41 refusal notice within 20 working days of the request.

Other matters

32. The Commissioner notes that TNA failed to carry out an internal review within 40 working days. The Section 45 Code of Practice advises all public authorities to carry out internal reviews in a timely manner and within 20 working days. A total of 40 working days is permitted in particularly complex cases only.
33. TNA is reminded of the requirements of the Code and of the importance of carrying out internal reviews in a timely manner and in accordance with the timeframes specified in the Code. The Commissioner has recorded this as part of his routine monitoring of public authorities.

Right of appeal

34. 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,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. 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.
36. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Keeley Christine
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF