

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 20 December 2006

**Public Authority:** The Royal Surrey County Hospital  
**Address:** Egerton Road,  
Guildford,  
Surrey  
GU2 7XX

#### Summary

Initially the complainant made a request to the Royal Surrey County Hospital (RSCH) under the Access to Health Records Act 1990 (AHRA) for information relating to her late husband's treatment whilst he was a patient in the hospital. She then made a separate request under the Freedom of Information Act 2000 ('the Act') for four particular pieces of information that she maintained the public authority had withheld when it had responded to her request under the AHRA. The public authority informed the complainant that it would not be providing the four pieces of information she had requested under Section 1 of the Act as the information did not exist.

Having investigated the matter and examined the information in question the Commissioner has decided that in relation to three of the four pieces of information the public authority has dealt with the complainant's request in accordance with the requirements of Part I of the Act.

The public authority eventually located the fourth piece of information and provided a copy of this to the complainant. The Commissioner has decided that this information was exempt under section 21 of the Act because it was accessible to the complainant under the AHRA.

#### 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 Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

#### The Request

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2. On 15 February 2005 the complainant made a complaint to the Information Commissioner stating that on 10 January 2005 she had made a request to the

RSCH under the Freedom of Information Act 2000 ('the Act') for items missing from the four pieces of information relating to her late husband that the RSCH had provided in response to a previous request that she made in September 2004 under the AHRA. The four pieces of information she requested were; Microbiology Reports, Vancomycin Assays, Doctor's notes and Notes made by the Dietician.

3. On 21 January 2005 the RSCH informed her that it was unable to supply the information she had requested as "these matters should be dealt with under the Access to Health Records Act/Data Protection Act".
4. On 27 January 2005 the complainant wrote to the RSCH stating that as she had made her request under the Freedom of Information Act 2000 ('the Act') she was now appealing against the decision to withhold the information under the terms of that Act. On 2 February 2005 the RSCH wrote to the complainant informing her that in it's view the Act "does not grant any further rights of access".
5. On 15 February 2005 the complainant contacted the Commissioner to complain about the way her request for information had been handled and asked the Commissioner to consider whether the RSCH were entitled to withhold the information she had requested.
6. On 31 March 2005 the Commissioner asked the RSCH to reconsider the complainant's request in the light of the appropriate provisions of the Freedom of Information Act 2000 ('the Act') and provide her with a response making it clear which part or parts of the Act it had applied to the request.
7. On 17 May 2005, the RSCH provided the complainant with a revised response to her request for information of 10 January 2005 informing her that it would not be providing the information she had requested under Section 1 of the Freedom of Information Act 2000 as "the information does not exist".

## **The Investigation**

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### **Scope of the case**

8. The complainant contacted the Commissioner to complain about the way her request for information had been handled by the RSCH. The complainant maintained that her inspection of the information provided by the RSCH "indicated that a number of items were missing" and she asked the Commissioner to consider whether the RSCH were entitled to withhold the information she had requested.

### **Chronology**

9. Between 18 May 2005 and 31 May 2006 the Commissioner carried out an extensive investigation of the matter in order to establish whether the complainant had been provided with all the information she had requested.

10. During this time the RSCH maintained that the complainant had been provided with all the information she had requested, that no information had been withheld from her and that no further information existed. The complainant maintained that she had not been provided with all the information she had requested and that the RSCH was withholding information from her. The complainant produced extensive additional documentation in support of her argument.
11. In view of the complexity of the information that had been provided by the RSCH and the additional information that the complainant had produced in support of her complaint the Commissioner's Complaints Resolution Officer decided that a meeting with the complainant would be the best way of making progress..
12. The purpose of the meeting was to give the complainant an opportunity to produce any credible information she could to show clearly that the RSCH had withheld information from her and to review all the information that had been provided by the RSCH. The meeting was held on 31 May 2006 at the Information Commissioner's office. At this meeting the complainant explained why she was of the opinion that Dieticians must keep their own records. She therefore could not accept the Trust's response that it did not hold this particular information because no such notes had been kept as the dieticians wrote into the clinical notes.
13. As a result of the meeting the Commissioner wrote to the RSCH on 19 June 2006 asking for responses to a number of points about three of the pieces of information; the Microbiology Reports, the Vancomycin Assays, and Notes made by the Dietician. The Commissioner did not ask for the RSCH for a response in relation to the Doctor's notes as he was satisfied by this time that the RSCH had provided the complainant with all the information from the Doctor's notes and that there was no information missing from the notes.
14. In relation to the dietician's notes the Commissioner pointed out that he had subsequently made his own enquiries to try and establish if dieticians must keep their own notes. As a result he had located a publication entitled "Guidance on Standards for Records and Record Keeping" which is produced jointly by the British Dietetics Association and the Dieticians Board This guidance refers, amongst other things, to rights of access to such records and makes it clear that, "Record keeping is fundamental to the work of a dietician". The Commissioner therefore pointed out to the Trust that he considered it unlikely that dieticians do not keep their own records in addition to the entries contained in hospital records.
15. On 10 August 2006 the RSCH informed the Commissioner that it had instructed Hempsons Solicitors to act on its behalf and deal with the correspondence concerning the complainant's complaint.
16. On 12 August the complainant wrote to the Commissioner informing him that the RSCH had now provided her with a copy of the notes made by the Dietician.
17. On 15 August 2006 Hempsons Solicitors wrote to the Commissioner on behalf of the RSCH providing him with responses to the points he had raised in his letter of 19 June 2006 and informing him that the Trust had now located the notes made

by the Dietician and had provided the complainant with a copy of these. The solicitors explained that the reason why the Trust had not previously located the notes was because when the original request for disclosure was made, the dietician's notes were removed by the Trust from the archive in readiness to process the request. No tracer was then put into the archive to mark the records removed, as it should have been. Those searching the archive found no records and no evidence that records had been taken out. In addition the solicitors explained that the in patient medical notes for the complainant's late husband did not show on the front of the file that any other records were kept separately, as is the practice now. The Trust therefore assumed that there were no separate dietician's records made in this case.

## Findings of fact

18. In reaching his decision in this case the Commissioner has considered the information provided by the complainant and the RSCH in relation to the Doctor's notes, the Microbiology Reports and the Vancomycin Assays. The Commissioner has decided that he is satisfied that the RSCH has provided the complainant with all the information she had requested and that there is no information missing from either the Doctor's notes, the Microbiology Reports or the Vancomycin Assays.
19. The Commissioner has also considered the points raised by the complainant and the responses provided by the RSCH in relation to the notes made by the Dietician. However, these notes were eventually located by the RSCH and a copy was provided to the complainant.
20. The Access to Health Records Act 1990 section 3 (f) 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 Trust to disclose documents in certain situations. In this case the Trust provided a bundle of information constituting "health records" to the complainant under the AHRA before her request under the Act. The Information Services Manager confirmed in his letter of 2 February 2005 to the complainant that he had not been requested to withhold any information from her.

## Analysis

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### Procedural matters

21. Section 1 of the FOIA requires, amongst other things, that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request.

22. On 17 May 2005 in response to the complaints request of 10 January 2005 the RSCH informed her that it would not be providing the information she had requested in her letter of 10 January 2005 as “the information does not exist”. This response followed an internal review, the initial response effectively denying that the Act applied to the request.

### **Exemption**

23. No exemptions were applied by the Trust.
24. However the Commissioner has considered whether section 21 should have been applied by the Trust in respect of the information it disclosed about the dietician's notes.
25. Section 21 of the Act states that information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
26. The Commissioner notes that as a result of his investigations with the Trust it did locate further information and provided this to the complainant. The Commissioner is however satisfied that this information would have been provided to the complainant under the AHRA if it had been located prior to her complaint under the Act.
27. In the circumstances the Commissioner considers that disclosure of this information is exempt under section 21 of the Act. This is because it was reasonably accessible to the complainant under the AHRA. Therefore when providing this information to the complainant the Trust should have explained that the information was exempt under section 21 of the Act.
28. 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). However the Commissioner has taken into account that the Act is designed to be applicant blind and that 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 the circumstances of the complainant. 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 Commissioner has also considered the implications of this particular request being made under the Act by anyone other than the complainant. Having done so the Commissioner considers that in any other situation it is likely that depending on the circumstances of the case the information would be exempt by virtue of section 41 or possibly section 44 of the Act. In his decision notice reference FS50071069 which also concerns a request for the health records of a deceased patient by the deceased's mother the Commissioner decided that the information requested was exempt by virtue of section 41.

## The Decision

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29. The Commissioner's decision is that the public authority did not deal with the request in accordance with the Act as its initial response was not in accordance with section 1 of the Act. It did not confirm or deny whether it held the information. However, this was rectified on internal review when it indicated that the information was not held by it. This was an appropriate response in relation to:

That part of the request relating to Microbiology Reports.

That part of the request relating to Vancomycin Assays

That part of the request relating to Doctors Notes

30. In relation to the information located and disclosed following the complaint to the Commissioner, the Commissioner has decided that it was exempt under section 21 of the Act as it was accessible to the complainant by other means, even though it was not made available to her promptly due to the inadequacy of the public authority's search.

## Steps Required

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30. The Commissioner requires no steps to be taken.

## Other matters

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31. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
32. The initial failings of the RSCH in locating and providing the complainant with the notes made by the Dietician described in her request were not rectified until many months into the Commissioner's investigation. The Commissioner notes however that the Trust has now changed its procedures to ensure this situation does not arise again.
33. The Commissioner also wishes to highlight some deficiencies in the standard of recording of some information by the RSCH. The RSCH has accepted that some of these records are "poorly worded" and that some information was "either incorrectly relayed or incorrectly recorded in the notes". The RSCH has also stated that these deficiencies were not "clinically significant".

## Right of Appeal

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34. 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)

35. 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 20th day of December 2006**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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