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Access to Deceased Persons' Records under the Freedom of Information Act 2000

"The dead can't sue" or so the saying goes. But do they have a right to privacy when it comes to the disclosure of information about them? This question has been exercising the minds of public sector lawyers and information professionals alike ever since the Freedom of Information Act 2000 (FOI) came into force on 1st January 2005.

Scottish legislation (the Freedom of Information (Scotland) Act 2002) has a specific exemption to cover a deceased person's health record (section 38). No such exemption exists under the 2000 Act for medical or any other records of the deceased. Therefore, when considering such requests, the application of the general exemptions under sections 21, 40 and 41 has to be considered.

Occasionally, in seeking to comply with a request for the records of the deceased, a public authority may be in danger of disclosing information about the living. For example, social work records are likely to contain information not only about a service user but also about other members of the service user's family. In such situations, the section 40 exemption, which protects personal data, may be claimed.

The Access to Health Records Act 1990 (AHRA) gives, amongst others, the personal representatives of the deceased, a right to access health records of the deceased. This right does not apply in cases where:

- the patient has requested a note be made that they did not wish access to be given; or
- in the opinion of the holder of the record, this would disclose:
 - (i) information likely to cause serious harm to the physical or mental health of any individual; or
 - (ii) information relating to or provided by an individual other than the patient, who could be identified from the information; or
 - (iii) information that was provided by the patient in the expectation that it would not be disclosed to the applicant; or
 - (iv) information obtained as a result of an examination or investigation the patient consented to in the expectation that the information would not be disclosed.

Where the applicant for medical records is the personal representative of the deceased, the information they are entitled to under the AHRA will be exempt from disclosure to them under FOI section 21. This applies when the information requested is reasonably accessible by other means. In an Information Commissioner (ICO) decision involving Liverpool Womens NHS Foundation Trust (FS50127442 19/02/2007), the complainant requested a copy of a medical report written by a consultant regarding the care of his late mother. The public authority offered to provide the information under the AHRA, on receipt of proof that he was the deceased person's personal representative. The public authority

refused to disclose the information under FOI, and cited the exemption under section 21. ICO agreed with this approach. A similar decision was made in relation to The Royal Surrey County Hospital (FS50128269 05/02/2007).

If the requestor is not a personal representative of the deceased then they cannot access the information under AHRA. Therefore their request has to be treated under FOI. This does not mean that the information will have to be automatically disclosed.

Medical information is normally confidential and often quite sensitive. Section 41 of the Act may assist the public authority to withhold such information if it can show that disclosure would be an actionable breach of confidence. Section 41 states:

“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 of breach of confidence actionable by that or any other person.”

For the information to be covered by confidence it has got to be highly confidential not trivial or be in the public domain. Certainly medical information as well as social work records will be confidential information. But other information may need to be considered more carefully. More guidance on this point has been given in the ICO decision involving The National Archives (FS50101391 11/12/06).

The complainant requested information from The National Archives relating to the 1911 census schedule. The National Archives withheld the requested information, relying on the exemption under section 41 (Breach of Confidence). The Commissioner decided that The National Archives wrongly claimed section 41 since the information requested did not have the “necessary quality of confidence” about it. It comprised the names of the individuals, their relationship to the head of the family, age, occupation, marital status, birthplace and nationality. This was not the type of sensitive information which was also captured in the 1911 census such as health or infirmity. Had it been the latter then it would have warranted protection even though the subjects may well be dead by now.

Once it has been ascertained that the requested information is confidential, the next step is to consider whether the breach of confidence would be actionable. In the case of the deceased the question arises as to whether anyone can sue on their behalf.

The leading Information Tribunal decision on this issue involves Epsom and St. Helier University Hospitals NHS Trust which concerned the disclosure of records about Karen Davies died at Epsom General Hospital in 1998. The Trust admitted liability in her death and paid a substantial compensation settlement to her widower Richard Davies on behalf of himself and the couple's two children. Karen Davies's mother sought access to her daughter's medical records to establish what happened. The Trust refused to release the records without the permission of her next of kin, Richard Davies, who refused.

The Trust's decision to deny access was based on section 41 of the Act, on the grounds

that a duty of confidence was owed to the deceased. ICO agreed with this approach. It stated that the duty of confidentiality extends beyond death. If the information was disclosed there was, in theory at least, an actionable breach of confidence which would allow the personal representatives of the deceased to sue the Trust.

This decision was upheld by the Information Tribunal on 17th September 2007. The Tribunal considered the words of Megarry J in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415:

"In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene in the *Saltman* case on p.215 must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it..."

It ruled that the first two elements of the breach of confidence test had been satisfied. It also ruled that there was no need to show detriment merely to show that there was a breach of the deceased's reasonable expectation of confidence.

The next question for the Tribunal was whether the duty of confidence survived the death of the deceased. The Tribunal admitted there was no caselaw on this point and the answer lies in conscience. Considering all the evidence before it, it decided that the answer was in the affirmative. So who could bring a claim on behalf of the deceased? To answer this question, the Tribunal drew upon European caselaw particularly those involving Article 8 (the right to privacy).

In *Plon v France* [2004] ECHR 200 the widow and children of the late President Mitterrand had brought an action in the French Court to prevent the distribution of a book written by the deceased's doctor and describing his health over a number of years while he was in office. Although the Court acknowledged that the lapse of time since the death of a major public figure might lead to the public interest ultimately overriding the late president's right to medical confidence, it nevertheless acknowledged the survival of that right and that it was appropriate for action to protect it to be brought on behalf of the deceased after his death.

Article 8 has also been relied upon by the domestic courts to refuse disclosure of social service records. In *R (on the application of Addinell) v Sheffield City Council* (QBD unreported 27 Oct. 2000) Sullivan J. upheld the decision of Sheffield City Council to refuse the father of a dead teenager access to his son's social services records on the grounds that the boy had a right to privacy. If Article 8(1) allows the disclosure of information about a deceased minor to be refused to a close relative then, arguably, close relatives should have standing to enforce an obligation of confidentiality owed to the deceased during his lifetime (assuming that Article 8(2) does not justify disclosure), particularly if the disclosure is threatened by a public authority.

Care must also be taken especially to ascertain what the wishes of the deceased were before they died. In an ICO decision involving County Durham NHS Primary Care Trust (FS50111780 26/02/2007), the complainant requested a summary of the medical care provided to her late daughter. In order to provide this information it would have

necessitated providing information from the deceased person's medical records. The public authority refused to provide this information and cited the exemption under FOI section 41, stating that the applicant was not the deceased person's next of kin. Further to this the public authority noted that the deceased person had expressed a wish to her GP for details of her healthcare not to be disclosed to her parents. After examining the submissions by both parties ICO concluded that the use of section 41 was valid.

This decision is consistent with section 4(3) AHRA which states: "(3) Where an application is made under subsection (1)(f) of section 3 above, access shall not be given under subsection (2) of that section if the record includes a note, made at the patient's request, that he did not wish access to be given on such an application."

Access to deceased persons' information is a legal minefield which requires consideration of a number of different areas of law including human rights, the law of confidence and the Access to Health Records Act 1990. Recent cases, as well as the Information Commissioner's recently published a guidance note, have clarified the issues to a certain extent.

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