

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 30 March 2023

**Public Authority:** Ministry of Defence  
**Address:** Whitehall  
London  
SW1A 2HB

#### **Decision (including any steps ordered)**

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1. The complainant submitted a request to the Ministry of Defence (MOD) seeking a copy of her father's medical record for a particular period in the 1950s. The MOD confirmed that it held information falling within the scope of the request but refused to disclose this on the basis of section 41(1) (information provided in confidence) of FOIA.
2. The Commissioner's decision is that the MOD is entitled to refuse to disclose the information on the basis of section 41(1) of FOIA.
3. No steps are required.

#### **Request and response**

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4. The complainant wrote to the MOD on 5 May 2022 and sought the following information:  
  
“...Grapple nuclear tests on Christmas Island in 1957 and 1958.  
  
...I would like to know under the Freedom of Information Act what information you hold about my father's health – specifically blood test results – during this time.”
5. The MOD contacted the complainant on 8 June 2022. It explained that it required her to clarify the nature of her request before it could be

considered, more specifically 'whether you are requesting your father's full medical record for the period of 1957 to 1958'.

6. The complainant responded on 9 June 2022 and explained that 'In answer to your question, I would like to see any blood counts or urine analyses, and if you are able to provide the health file for the full year I would appreciate it.'
7. The MOD responded on 1 July 2022. It confirmed that it held information falling within the scope of the request. However, it explained that the information was considered to be exempt from disclosure under FOIA on the basis of section 41(1) (information provided in confidence).
8. The complainant contacted the MOD on 13 September 2022 and asked it to conduct an internal review of this refusal.
9. The MOD informed her of the outcome of the internal review on 12 December 2022. It upheld the decision to refuse to provide the requested information on the basis of section 41(1) of FOIA.

### **Scope of the case**

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10. The complainant contacted the Commissioner on 14 December 2022 in order to complain about the MOD's decision to withhold the requested information on the basis of section 41(1) of FOIA. She was also unhappy with the time it took the MOD to process her request.

### **Reasons for decision**

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#### **Section 41 – information provided in confidence**

11. 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.'

12. 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.

13. 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.
14. 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.
15. The Commissioner has assessed each of these criteria in turn, taking into account the submissions provided to him by both the MOD and the complainant.

Was the information obtained from another person?

16. 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.<sup>1</sup>

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<sup>1</sup> Paragraph 13 of the Commissioner's guidance on section 41 notes that information including a doctor's observations of a patient's symptoms recorded during a consultation and an x-ray image of a patient taken by hospital are examples of information which will meet the criterion on section 41(1)(a). <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

Does the information have the necessary quality of confidence?

17. 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.
18. 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?

19. The MOD argued that it attaches great importance to the confidential nature of the relationship between patients and Service medical practitioners and, as medical records relating to a deceased service person contain information which the patient would have expected to remain confidential, it would not wish to undermine that relationship. Furthermore, the MOD argued that it was reasonable to suppose that patients with medical records created before the introduction of the Access to Health Records Act (AHRA) 1990<sup>2</sup> had an understanding and expectation that their sensitive medical information would be kept confidential even after their death. The MOD argued that it therefore had an enduring obligation of confidence towards former members of the Armed Forces.
20. The complainant noted that the MOD was relying on section 41(1) of FOIA as the requested information concerned medical treatment given to her father in the expectation it would not be disclosed. She disputed this position on the basis that a blood test is not treatment - it is a tool for diagnosis. Furthermore, in her view, her father did not expect such information to remain secret.
21. The Commissioner acknowledges the complainant's point regarding the distinction between blood tests and other medical treatment. However, in the Commissioner's view an objective and plain reading of the term medical records would encompass the result of medical tests that were carried out on a patient and recorded.
22. The Commissioner also appreciates the complainant's position that her father would not have expected such information to remain secret. Clearly, the Commissioner appreciates that the complainant is obviously

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<sup>2</sup> This legislation establishes 'a right of access to health records by the individuals to whom they relate and other persons'. <https://www.legislation.gov.uk/ukpga/1990/23/introduction>

far better placed to judge her father's expectations. However, the Commissioner is conscious that in her submissions to the Commissioner the complainant emphasised that as her father's executor she had a right of access to his medical records. For the purpose of this decision notice it is vital to distinguish between disclosure of medical records of the deceased to family members (for example under the AHRA) and disclosure of information under FOIA. Under FOIA disclosure of information is said to be disclosure to the world at large. Consequently, any rights of access that a specific individual may have to a deceased family member's medical records, under AHRA or other potentially relevant legislation, are not relevant to the application of section 41 of FOIA. 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.

23. The Commissioner is therefore satisfied that this criterion is met.

Would disclosure be of detriment to the confider?

24. 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.
25. 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?

26. 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 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.
27. However, disclosure of confidential information where there is an overriding public interest is a defence to an action for breach of confidentiality. The Commissioner is therefore required to consider

whether the MOD could successfully rely on such a public interest defence to an action for breach of confidence in this case.

28. The complainant explained that in her view the requested blood tests would show signs of gross irregularity and it was in the patient's interests, and those of his next of kin, for these to be disclosed. The complainant also highlighted the further overriding public interest in that her father was unaware of these blood tests during his lifetime, despite many years of seeking an explanation for his later ill health which he linked to nuclear testing. More broadly, the complainant argued that there was a significant public interest in the disclosure of such information to shed light on the MOD's medical testing of servicemen during the nuclear testing programme. She noted that evidence of radiation damage in such records could be used to open long-withheld records, and that this issue had already been the subject of calls for a public inquiry, which could affect all 22,000 or so servicemen who served at the nuclear tests.
29. The Commissioner recognises and appreciates the complainant's reasons for wanting to access the requested information. 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. Whilst the Commissioner acknowledges the wider issue of how nuclear testing affected service personnel, 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. 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.

## **Other matters**

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30. FOIA does not impose a statutory time within which internal reviews must be completed albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe.<sup>3</sup> In the Commissioner's view it is reasonable to expect most reviews to

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<sup>3</sup> <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

be completed within 20 working days and reviews in exceptional cases to be completed within 40 working days.<sup>4</sup>

31. In this case, the MOD took 63 working days and therefore failed to meet the timescales set out in the Commissioner's guidance.

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<sup>4</sup> <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/#20>

## Right of appeal

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32. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

33. 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.
34. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**