

DR FOI POSTBAG MAY

VALIDATING AN FOI REQUEST

Dear Dr FOI

I have recently learnt that FOI requests do not have to have “FOI” written on them; surely this must mean that many organisations are overlooking what are really FOI requests? Would it not make more sense to have “FOI request” at the top of each request?

Dear Colleague

In order for an FOI request to be a valid one, it should be:

- In writing (e.g. letter, e-mail, fax)
- State a name
- State an address
- Describe the information required

If you do not understand the request, then the public authority should return to the applicant and assist them in clarifying and reformulating their request. This is duty placed upon them by the section 45 Code of Practice. For advice on the management of requests, see guidance at:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailled_specialist_guides/gnp_3_lifecycle_of_a_request.pdf

FOI requests do not have to mention FOI; and indeed, requests for environmental information do not need to mention the Environmental Information Regulations.

RECORDS OF THE DECEASED

Dear Dr FOI

We have recently been asked for the records of a patient who is deceased. The relative has made the request under the Access to Health Records Act, but our Caldicott Guardian has decided that although they are a relative, they do not meet the requirements of the Access to Health Records Act. Can they obtain the records under the Freedom of Information Act?

Dear Colleague

Thank you for your query. The Information Commissioner has recently published guidance on this, following a number of Decision notices. The Guidance can be seen in full at:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detail_ed_specialist_guides/access_to_information_about_deceased_220307_v1.1.pdf

Essentially the guidance sets out a variety of different circumstances. In some cases, the information requested may result in disclosure about someone who is still alive, such as a relative as many health and social care records include information about the family or a family member as well. In these circumstances, the information will be exempted under section 40. The Information Commissioner's Guidance states:

“there are cases where information about a deceased person is also information about a living individual. An example which is often cited is genetic information which may identify and relate to both a person who has died and a surviving relative. Similarly, social work records are likely to contain information not only about a client but also about other members of the client's family, some of whom may have died. In both these cases, the information about the deceased person forms part of the information about a living individual and, as a living individual may be identified from the information and the information may be said to relate to that individual, it will be personal data of which that living individual is the subject.

Once a public authority has established that requested information relating to a deceased person is also the personal data of a living individual, it must then consider whether disclosure would constitute a breach of one or more of the data protection principles. If disclosure would, for instance, be unfair to the living person, it will be exempt under section 40 of the FOIA”.

The guidance moves on to cover information that specifically relates to an individual who is deceased. In this instance the public authority needs to consider whether there is duty of confidence, and whether by disclosing the information, there would be an actionable breach of confidence. The Information Commissioner further states:

“There is case law to suggest that, where action for a breach of confidence was initiated by a person before their death, the courts may allow that action to be continued by the legal representatives of the deceased person. There is no definitive case law as regards the rights of any living person to initiate action after the death of the person the information relates to. However, recognising the uncertainty experienced by a number of public authorities, the Commissioner sets out in this guidance his views on who might be able to take action and the approach he recommends public authorities to take. If there is anyone who can take action, the Commissioner considers that this will be the personal representative of the deceased. This approach is consistent with the approach taken by the courts in cases involving alleged breaches of intellectual property rights.”

Importantly, he goes on to state:

“In many cases a public authority will not know whether a personal representative exists. The FOIA allows only 20 working days for a response to a request for information. The Commissioner does not think that it is reasonable within this period that public authorities should be expected to establish positively whether there is such a person. The important thing will be to establish in principle whether disclosure would give rise to the right to take action”.

The guidance further sets out how if the information about the deceased were to be disclosed and it affected a living individual, then this could also be a breach of the Human Rights Act 1998 (which incorporates the European Convention on Human Rights):

“However, there are also situations in which the information in question identifies only a deceased person, but whose disclosure would affect a living person, most commonly a member of the deceased person’s family. In these cases, a public authority must consider the implications of the Convention. If disclosure would involve a breach of Article 8, then the information is exempt under section 44 of the FOIA because it is information subject to a statutory bar on disclosure. The statutory bar in this case is provided by the Human Rights Act 1998.

The Commissioner’s general advice is that public authorities should first assess whether or not disclosure would constitute an unjustified interference with the right contained in Article 8(1). In principle the Commissioner accepts that:

- the disclosure of information about a deceased individual **may** constitute an interference with the right of the living to respect for their private or family life; and
- the more recent the death and the more sensitive the information, the more likely that disclosure would have an adverse effect on the rights of surviving people closely connected to the deceased.

Public authorities should then consider whether, in any particular instance, Article 8(2) would allow disclosure. The Commissioner’s view is that the FOIA can provide a legal basis for the disclosure of information about the deceased. However, the public authority must consider all the other requirements of Article 8(2) including whether or not the disclosure would be proportionate in relation to the harm that may be caused”.

The guidance goes on to discuss the Access to Health Records Act.

Dear Dr FOI

We have received a letter from the service personnel and veterans agency asking for notes on a deceased patient in order to process a war widow’s pension. They mention that we have to comply with Circular HSC 1999/001. What is this and why do we have to comply?

Dear Colleague

Circular HSC 1999/001 "The Provision of Patient Information by NHS Trusts to the Department of Social Security" sets out how "NHS Trusts should handle requests for patient information from the DSS, its executive agencies (Benefits Agency and War Pensions Agency) and contractors who will be providing medical services on behalf of the Benefits Agency and the Independent Tribunal Service. These requests for patient information will be sought in order to assess individual claims for a range of social security benefits and war pensions".

The main thrust of it is to ensure that relevant information is speedily made available to ensure that people are in receipt of benefits and pensions as quickly as possible.

The circular can be read in full at:

http://www.dh.gov.uk/en/Publicationsandstatistics/Lettersandcirculars/Healthservicecirculars/DH_4004381