

Hearing 92-202100642

**Decision**

Health Services Authority

Sharon Roulstone

Ombudsman

June 8, 2022

**Summary**

An applicant made a request to the Health Services Authority (HSA) under the Freedom of Information Act (2021 Revision) (FOI Act), for medical records dating from 2011, relating to his deceased mother.

After conducting an extensive search, the HSA explained that medical records are retained indefinitely, but it did not find the requested records. When conducting the internal review, the CEO slightly expanded the scope of the search but confirmed that no responsive records were held.

The applicant was not satisfied and questioned the reasonableness of the search that was undertaken.

The Ombudsman investigated the matter and found that the HSA had conducted a reasonable search and had documented its search efforts, as required by regulation 6. The HSA also conducted interviews, as required by regulation 21(b).

No further action is required on the part of the public authority.

**Statutes<sup>1</sup> considered**

Freedom of Information Act (2021 Revision) (FOI Act)

Freedom of Information (General) Regulations (2021 Revision) (FOI Regulations)

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<sup>1</sup> In this decision, all references to sections are to sections of the Freedom of Information Act (2021 Revision), and all references to regulations are to the Freedom of Information (General) Regulations (2021 Revision), unless otherwise specified.

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### A. INTRODUCTION

- [1] On 14 October 2021, the applicant made a request to the HSA under the FOI Act for information relating to a variety of medical records of his deceased mother, dating from 1 January 2011 to 1 January 2012, including:
- Lab results
  - Radiology/X-Ray reports and images
  - CT Scans
  - Doctors' Notes
  - Progress Notes
  - Physician Notes
  - Adverse Events and findings
  - Complications
  - Post-operative screening and assessment
  - Diagnosis
  - Correspondence between Cayman Islands Hospital and a named hospital regarding the deceased parent.
- [2] The HSA responded that no records were found and that medical records are routinely retained indefinitely.
- [3] On 8 November 2021, the applicant requested an internal review and highlighted that the missing records appear to run from 1 September 2010 to 23 March 2012.
- [4] On 7 December 2021, the Chief Executive Officer (CEO) upheld the initial decision and outlined the search efforts undertaken to locate the records responsive to the applicant's request. Additionally, the CEO advised that she had investigated the deceased's employment with the HSA further. She reported that the deceased vacated employment with the HSA on 2 August 2006 and rejoined another government department on 26 March 2012, suggesting that the deceased may have sought medical care at another medical facility during that period.
- [5] On 8 December 2021, the applicant appealed to the Office of the Ombudsman. We accepted the appeal on 16 December 2021.

[6] We requested the search efforts of the HSA, and on 6 January 2022, the Information Manager (IM) provided a record of the search undertaken to locate the responsive records.

[7] On 21 January 2022, we sought clarification concerning the retention of medical records and whether they are subject to a retention policy. The HSA confirmed that these records are retained indefinitely.

## **B. CONSIDERATION OF ISSUES**

### **a) Did the HSA make reasonable efforts to locate records subject to an application for access, and did it make a record of search efforts?**

[8] Regulation 6 requires that a reasonable search be conducted as follows:

#### ***Reasonable search***

*6. (1) An information manager shall make reasonable efforts to locate a record that is the subject of an application for access.*

*(2) Where an information manager has been unable to locate the record referred to in paragraph (1), the information manager shall make a record of the efforts that information manager made.*

[9] The HSA provided a chronology of the search efforts made since receiving the request. The IM requested responsive records from the Health Information Management/Medical Records Department at the HSA (HIM) and provided an affidavit from the HIM, stating (their emphasis):

*Information requested from the Health Information Management/ Medical Records department (HIM) at the HSA, who:*

*i. Searched thoroughly through physical (paper) medical records.*

*ii. Searched thoroughly through electronic records, which lives on one site.*

***It should be noted that patients' medical records, whether on paper or electronically kept, are preserved indefinitely.***

[10] In his request for an internal review, the applicant wrote:

*... Upon inspecting the medical records I notice that 18 months of medical records are missing. Due to the nature of her illness and constant excruciating pain, I believe without the shadow of a doubt that she attended the George Town Hospital for treatment or checkup at least once in 2011.*

*There is no way [my mother] would have been absent from the hospital for 18 consecutive months with an illness that forced [her] to attend for treatment or even*

*a checkup. This 18 consecutive months' worth of missing records runs from 1st September, 2010 – 23 March 2012. With [her] type of illness, [she] had to be monitored constantly by a major health care facility.*

[11] In the internal review, the CEO conducted a further search, explaining that the following steps had been taken:

- i. Interviewed HIM Manager*
- ii. Interviewed Records Officer*
- iii. Interviewed supervisor of deceased to clarify tenure with the HSA*
- iv. Interviewed Head of Department of deceased to clarify tenure with the HSA*
- v. Search of Human Resources records to confirm tenure with the HSA*
- vi. Search of IT Systems*
- vii. Examination of physical (paper) medical records*
- viii. Examination of electronic records, which live on one site.*

[12] The question of whether a search effort was reasonable under the UK's Freedom of Information Act, 2000 was addressed in the appeal to the Information Tribunal in *Bromley v Information Commissioner* in which the Tribunal concluded:

*... the standard of proof to be applied... is the normal civil standard, namely, the balance of probabilities.... [since] there can seldom be absolute certainty that the information relevant to a request does not remain undiscovered somewhere within the public authority's records...*

[13] The Information Tribunal confirmed that a number of factors are relevant to this test, namely:

- the quality of the public authority's initial analysis of the request;*
- the scope of the search that it decided to make on the basis of that analysis; and*
- the rigour and efficiency with which the search was then conducted...<sup>2</sup>*

[14] Given the extensive similarities between the UK and Cayman Islands FOI Acts, I am applying the same standard and factors.

[15] In its correspondence to the applicant, the HSA described the searches that were undertaken and explained that IT systems and physical records were both searched. Relevant staff members were interviewed, and the applicant was informed that medical records are retained indefinitely. The staff within the HSA's Health Information Management team were best suited to know the record-keeping practices of the HSA and

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<sup>2</sup> *Bromley v Information Commissioner and Environment Agency* (EA/2006/0072) [2011] 1 Info LR 1273 paras 12-13

confirmed by way of an affidavit that no responsive records were found for the period requested by the applicant.

[16] **Therefore, I am satisfied that the quality of the IM's initial analysis and the scope, rigour and efficiency of the initial search were adequate. Given the explanation of the search efforts and the fact that the HSA went beyond the scope of the initial request based on the applicant's comments in his internal review request, I conclude that the HSA made reasonable efforts to locate the records as required by regulation 6(2).**

[17] **For the reasons explained above, I am also satisfied that the HSA made a record of the search efforts made, as required by regulation 6(3).**

[18] I note the applicant's statement that his mother had attended an overseas facility in 2011 and that he asked whether the HSA had contacted the overseas facility to obtain medical records from other (i.e. non-HSA) healthcare providers.

[19] Under the FOI Act, public authorities have a statutory duty to respond to a request for records, and if records are held, disclose them in whole or in part and explain any reasons for withholding them. They can transfer the request to another public authority likely to hold the records, pursuant to section 8.

[20] However, as stated in the HSA's reply submission, public authorities are not obligated to seek records from a third-party, overseas entity, as suggested by the applicant. Therefore, the public authority does not hold such records, and they fall outside the scope of the FOI request in this case.

**b) Did the HSA conduct an interview with the applicant to ensure that the appropriate records were located, as required by regulation 21(b)?**

[21] Good communications between an IM and an applicant are vital for the success of the Act. There are several provisions in the FOI Act that require a public authority to assist an applicant in order to ensure that the focus of the request is clear and that relevant records, if held, can be identified. These requirements are stated in sections 7(2)(b), 7(3) and 7(3A).

[22] In addition, regulation 21 explains the specific steps to be taken by information managers, including regulation 21(b), which states:

***Functions of information managers***

*21. An information manager shall —*

*...*

*(b) conduct interviews with applicants to ensure that the appropriate records are located;*

*...*

- [23] While the requirement to interview an applicant can be essential in some circumstances, I do not consider that to be the case in this appeal. From the start, the request was well-defined, and its focus on the medical file of the applicant's deceased mother within the period specified was unambiguous and clear.
- [24] I was informed that the HSA's HIM interviewed the applicant in person shortly after the request was made and showed him evidence that no patient registration was on file for the individual in question. Further telephone conversations took place, including one with the Acting IM in which the absence of responsive records was explained to the applicant.
- [25] **For these reasons, I find that the HSA conducted interviews with the applicant to ensure that appropriate records could be located if they had been held. Therefore, the HSA met the requirements of regulation 21(b).**

### C. FINDINGS AND DECISION

Under section 43(1) of the Freedom of Information Act, for the reasons outlined above, I make the following findings and decisions:

- The quality of the analysis and the scope, rigour, and efficiency of the search undertaken by the HSA were adequate, and its search efforts were reasonable, as required by regulation 6(2).
- The HSA documented its search efforts, as required by regulation 6(3).
- The HSA conducted interviews with the applicant to ensure that appropriate records could be located if held, thereby meeting the requirements of regulation 21(b).

For these reasons, the HSA has met its obligations under the FOI Act and is not required to take any further action.

Within forty-five calendar days of this order, the applicant and the public authority may apply to the Grand Court for leave to seek a judicial review of this decision.



Sharon Roulstone  
Ombudsman