

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 18 January 2012

**Public Authority:** Central and North West London NHS Foundation Trust

**Address:** Greater London House  
Hampstead Road  
London  
NW1 7QY

### Decision (including any steps ordered)

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1. The complainant has requested the evidence submitted by the Central and North West London NHS Foundation Trust (CNWL) to the Coroner in relation to a particular inquest. The Trust confirmed that the evidence submitted to the coroner was witness statements of staff who had been involved with the deceased patient who the inquest related to. CNWL refused to provide this information to the complainant under section 31(1)(g), section 32, section 36(2)(b), section 41, section 40(2) and section 42 of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that CNWL correctly withheld the requested information under section 41 FOIA.
3. The Commissioner requires no steps to be taken.

### Request and response

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4. On 1 April 2011, the complainant wrote to CNWL and requested the following information, "Evidence submitted by the Trust to the Coroner" [in relation to a particular inquest].
5. CNWL responded on 12 May 2011. It stated that witness statements should remain confidential as staff may be less willing to co-operate with investigations in the future. As the complainant was dissatisfied with this response an internal review was requested.

6. Following an internal review CNWL wrote to the complainant on 16 September 2011. It stated that,

"It is the Trust's assumption that this request refers to witness statements submitted to the Coroner at the time of the inquest into [named patient's] death. At this time the Coroner refused to disclose the statements to [the complainant's] solicitors. The Coroner was persuaded that the statements should remain confidential, in particular to ensure honest and open engagement by staff in future incident investigations.

After review the Trust would continue to maintain that the witness statements submitted to the Coroner should be exempt from disclosure. This is with reference to s31(1)(g) (law enforcement), s36(2)(b) and (c) (prejudice to effective conduct of public affairs), s40(2) (personal information) and s41(1) (information provided in confidence). These exemptions have been discussed in detail, relevant cases have been reviewed and the opinion of the Trust's 'qualified person' (which for an NHS Foundation Trust like CNWL is our Chief Executive, Claire Murdoch) in relation to the application of s36 has been applied."

### Scope of the case

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7. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The Commissioner will consider whether or not evidence provided by CNWL to the Coroner, which comprises of witness statements, should have been withheld in this case.
9. During the course of the Commissioner's investigation CNWL confirmed that 2 of the 10 witness statements provided to the Coroner were read out in open court and had already been provided to the complainant. CNWL therefore focused upon the remaining 8 witness statements which had not been read out in open court and which had not previously been provided to the complainant. In relation to 2 of those witness statements which had been prepared solely for the Coroner it applied section 32, section 40(2), section 41 and section 42. In relation to the other 6 witness statements, although they were sent to the Coroner, they had actually been prepared for CNWL's internal Serious Untoward Incident (SUI) investigation. CNWL therefore applied section 31(1)(g), section 36(2)(b) and (c), section 40(2) and section 41 to these witness statements.

## Reasons for decision

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10. Section 41(1) of FOIA states that,

“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.”
11. The Commissioner will first therefore consider whether the information was obtained by CNWL from any other person.
12. CNWL has explained that, “Page 5 of the MoJ guidance on section 41 confirms that from ‘any other person’ *usually* requires the information to have been obtained from outside the department and not from an employee’. It went on to explain that, “it is noticeable that the word ‘usually’ is used, implying that there will be some circumstances when information provided by an employee will give rise to a duty of confidence. Whilst the day-to-day processing of staff information would not ordinarily be confidential, given the contentious and sensitive information contained in an SUI statement, these circumstances are an example of where a duty of confidence will arise. The Trust notes that in the case of FS50076785, the Commissioner accepted that witness statements apparently obtained by the Police Service of Northern Ireland from its own officers constituted information obtained from “another person, the other persons being the authors of the witness statements and report.” It continued that, “with regard to the statements produced [solely] for the SUI investigation, it is often the case that staff who are asked to contribute to such investigations are employed by other organisations despite working for the Trust, such as Local Authorities and Social Services. These members of staff would seemingly satisfy the test for information being provided by ‘another person’. Where highly sensitive information has been provided by a ‘team’ comprising both CNWL and non-CNWL employees, it would seem nonsensical to hold that some of the information was confidential whilst some of it was not, despite the information being given for the same purpose.”
13. Based upon CNWL’s submissions set out at paragraph 12 above, the Commissioner accepts that section 41(1)(a) has been met in this case.

14. The Commissioner has therefore gone on to consider whether disclosure would constitute an actionable breach of confidence. The Commissioner considers that a breach will be actionable if:
  - i. The information has the necessary quality of confidence. (Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial; information which is of importance to the confider should not be considered trivial.)
  - ii. The information was communicated in circumstances importing an obligation of confidence. (An obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend upon the nature of the information itself, and/or the relationship between the parties.)
  - iii. Unauthorised disclosure would cause a specific detriment to either the party which provided it or any other party. (In the Commissioner's view, information on personal matters can still be protected under the law of confidence, even if disclosure may not be detrimental in terms of any tangible loss.)
15. If these parts of the test are satisfied, the Commissioner considers that he should then decide whether there would be a defence to a claim for breach of confidence based on the public interest in disclosure of the information.
16. As the withheld witness statements were produced after the [named patient's] death, they would not be considered to constitute the complainant's medical records, however upon viewing the withheld information the Commissioner considers that the contents of the statements focus upon the medical care of the patient. The Commissioner does not therefore consider that the contents of the statements to be trivial. Furthermore given the nature of the events leading up to the death of the patient, the Commissioner would not expect details of those events to generally be put into the public domain. Bearing this in mind, and given the lack of evidence that any details are in the public domain, the Commissioner is satisfied that the information contained in the witness statements is not generally accessible. The Commissioner is satisfied in this case that the information contained in the witness statements has the necessary quality of confidence.
17. The Commissioner has gone on to consider whether the information was communicated in circumstances importing an obligation of confidence.

18. CNWL said that, "The Trust is aware that as an employer it can require that statements are given by members of staff. In particular the Trust refers to the accepted duty of an employee to comply with reasonable management requests by its employer. In light of the Trust's inherent power to require the provision of such statements, they refer the Commissioner to the MoJ's guidance concerning section 41 at page 9 which states that:".....if a public authority has statutory powers of compulsion, that is to say if it can legally oblige people to provide information for certain purposes, a duty of confidentiality will often arise in relation to that information and the public authority may be prohibited from disclosing the information in other contexts."
19. The Commissioner considers that the information in the witness statements relates to the medical care of the deceased patient. The Commissioner is satisfied that the information was imparted in circumstances importing an obligation of confidence, as it was provided in confidence by the patient to the health professionals involved in his/her care who subsequently provided the witness statements to CNWL and the Coroner. When patients submit to treatment from doctors and other medical professionals, they do so with the expectation that information would not be disclosed to third parties without their consent. He is satisfied that an obligation of confidence is created by the very nature of the doctor / patient relationship and the duty is therefore implicit. This is further supported by the oath which doctors take guaranteeing to protect doctor / patient confidentiality.
20. As the information in the witness statements is drawn from interviews with the relevant health professionals involved in the deceased patient's care, 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 any tangible loss, in order for it to be protected by the law of confidence.
21. As section 41(1) is an absolute exemption there is no public interest test under section of the FOIA. However, case law suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. The duty of confidence public interest test assumes that the information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence. The Commissioner has therefore gone on to consider whether there would be a defence to a claim for breach of confidence based on the public interest in disclosure of the information. The Commissioner takes the view that a duty of confidence should not be overridden lightly, particularly in the context of a duty owed to an individual.

22. The Commissioner does not consider that the public interest in understanding how this incident occurred and whether it has been investigated appropriately by disclosure of the requested witness statements is sufficient to outweigh the considerable public interest in maintaining the confidentiality of this information in this case.
23. In light of the above, although the Commissioner can appreciate why the information is of particular interest to the complainant, there is no evidence available to the Commissioner indicating that there is sufficient wider public interest. The complainant's wish to access this information is a matter that the Commissioner can sympathise with but it is nonetheless a personal need. The Commissioner therefore takes the view that the public interest in preserving the principle of confidentiality is much stronger in the circumstances of this case and that there would be no public interest defence available if the Trust had disclosed the information.

## Right of appeal

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24. 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: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

25. 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.
26. 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** .....

**Pamela Clements**  
**Group Manager, Complaints Resolution**  
**Information Commissioner's Office**  
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**Water Lane**  
**Wilmslow**  
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