

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 February 2012

Public Authority: Nottinghamshire Healthcare NHS Trust
Address: Rampton Hospital
Retford
Nottinghamshire
DN22 0PD

Decision (including any steps ordered)

1. The complainant requested the disclosure of any information from Rampton Hospital – part of Nottinghamshire Healthcare NHS Trust (the “Trust”) – that related to his client’s deceased son.
2. The Commissioner has found that the information cannot be disclosed as it would constitute an actionable breach in the duty of confidence owed to the deceased (section 41).
3. The Commissioner has also found that the Trust had not complied with section 17 of the FOIA when refusing the original request.
4. The Commissioner requires no steps to be taken.

Request and response

5. On 25 February 2011, the complainant wrote to the Trust and requested information in the following terms:
“Please provide any information you hold relating to [the deceased’s] time at Rampton Hospital [...]”
6. On 14 March 2011 the Trust responded to the request. It confirmed it held information although it did not acknowledge the request as one made under the FOIA. The Trust processed the request under the Access to Health Records Act 1990 and sought from the complainant proof of

kinship or legal executor status, consent from the next of kin or prior consent from the now deceased to obtain the information.

7. On 19 April 2011 the complainant wrote to the Trust stressing that the request was made under the FOIA.
8. On 28 April 2011 the Trust replied stating that the information requested was confidential and could only be disclosed with the consent of the deceased's 'legal' next of kin - who was not the complainant.
9. On 10 August 2011 the complainant asked the Trust to provide a response compliant with section 17 of the FOIA together with further legal clarification of the Trust's position.
10. On 16 August 2011 the Trust issued a refusal notice stating that the FOIA "*excludes personal details such as confidential medical records*". The Trust provided no further clarification.
11. On 30 August 2011 the complainant wrote to the Trust stating that he could only assume the information was being withheld on the grounds of sections 40 and 41. He requested an internal review and again asked the Trust to comply with section 17.
12. On 06 September 2011 the Trust refused to undertake an internal review and directed the complainant to the Commissioner.

Scope of the case

13. On 12 September 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
14. The scope of the case will be to consider the Trust's handling of the request.

Reasons for decision

15. The Trust has only provided the complainant with very limited arguments as to why it considers the requested information to be exempt from disclosure. However, having taken into consideration what responses it has made, and given the nature of the information in question, the Commissioner has first considered the application of section 41 of the FOIA.
16. Section 41 applies to information obtained from a third party whose disclosure would constitute an actionable breach of confidence. This

exemption is absolute and therefore it is not subject to a public interest test.

17. Section 41(1) 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 a breach of confidence actionable by that or any other person."

18. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:

- Whether the information has the necessary quality of confidence;
- Whether the information was imparted in circumstances importing an obligation of confidence; and
- Whether disclosure would be an unauthorised use of the information and to the detriment of the confider.

19. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.

20. It is common ground between the parties that medical records contain information obtained from a third person, namely the deceased. Therefore the requirement of section 41(1)(a) is satisfied.

21. The Commissioner notes that the original request contained some personal data relating to the deceased, namely, his treatment at Rampton Hospital and an awareness, but no details, of his death. The Commissioner notes that the complainant has not provided him with any evidence to show that information about these events, other than very limited information held by the Hospital's Coroner's Office as a matter of public record, has been put into the public domain (for instance, by way of a press release, court case or the findings of a GMC investigation). During the investigation of the case the Commissioner conducted his own searches (by use of an internet search engine), but was unable to find any evidence that details of these events had been put into the public domain. The Commissioner is satisfied that the information is not otherwise accessible.

22. In this instance access to the withheld information is restricted to medical staff and others who, within their professional capacity and remit, can examine the deceased's records. The Commissioner would not expect the requested information 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 is not generally accessible.
23. The information constitutes a health record of the deceased patient which includes details of interviews held between the doctor and patient relevant to his treatment and prior to his death. Given the nature of the information and the events in question, the Commissioner is satisfied that the information is not trivial.
24. Therefore the Commissioner is satisfied that the information contained in the Report has the necessary quality of confidence.
25. The Commissioner has gone on to consider whether the information was imparted in circumstances importing an obligation of confidence.
26. The information relates to the medical care of the deceased patient and includes information provided in confidence by the patient to the health professionals involved in his care. 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. The Commissioner is satisfied that an obligation of confidence is created by the very nature of the doctor/patient relationship and the duty is therefore implicit.
27. The Commissioner has gone on to consider whether disclosure of the information would be to the detriment of the confider.
28. The loss of privacy can be a detriment in its own right¹ and so 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.
29. It follows then that where on this occasion the disclosure would be contrary to the deceased's reasonable expectation of maintaining confidentiality in respect of his private information, the absence of detriment would not defeat a cause of action.

¹ *Bluck v ICO & Epsom and St Helier University Hospital NHS Trust* [EA/2006/0090] para 15.

30. The Commissioner considers that while disclosure would cause no positive harm to the confider, knowledge of the disclosure of the deceased's medical records could distress surviving relatives of the deceased. Knowledge that confidential information has been passed to those whom the confider would not willingly or otherwise failed to convey it may be sufficient detriment.² It follows then that in determining whether disclosure would constitute an actionable breach of confidence, it is not necessary to establish whether, as a matter of fact, the deceased person has a personal representative who would take action as the complainant argues.
31. The Commissioner has gone on to consider whether there is a public interest defence for a breach of confidence.
32. In the Commissioner's view disclosure will not constitute an actionable breach of confidence if there is a public interest in disclosure which outweighs the public interest in keeping the information confidential.
33. The complainant has argued that there is a public interest defence as disclosure of the information could enlighten the "*unanswered questions*" concerning the circumstances that lead to the death of a specific patient. The complainant went further to argue that the medical records could bring to light how individuals as a whole are treated at Rampton Hospital, and in similar institutions, to ultimately help prevent such an occurrence of death happening again.
34. The Commissioner accepts that there is a strong public interest in the public understanding how such an incident occurred within a hospital. The Commissioner also accepts that the disclosure of the information would in turn cast light on whether the incident had provoked an appropriate investigation from the Trust and indeed whether wider issues concerning patient care might be highlighted.
35. In weighing this against the public interest in keeping the information confidential, the Commissioner has been mindful of the wider public interest in preserving the principle of confidentiality.
36. It is in the public interest that confidences should be respected. The encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence.³ The Commissioner is mindful of the need to protect the relationship of trust

² *EY v ICO & Medicines and Healthcare Products Regulatory Authority* [EA/2010/0055] para 13.

³ *Bluck v ICO & Epsom and St Helier University Hospital NHS Trust* [EA/2006/0090], para 8.

between confider and confidant and not to discourage or otherwise hamper a degree of public certainty that such confidences will be respected by a public authority.

37. The Commissioner does not consider that the disclosure of this information to the world at large (under the FOIA) is an appropriate manner in which to scrutinise the care provision at Rampton Hospital and similar institutions.
38. The Commissioner considers that the public interest in disclosing the information does not outweigh the public interest in maintaining trust between the doctor and patient - preserving the free flow of information and dialogue. The Commissioner finds that the public interest in preserving the trust between patient and doctor to be particularly weighty.
39. In light of all the information at hand, the Commissioner considers that the Trust would not have a public interest defence for breaching its duty of confidence. The Commissioner cannot conclude that there is a strong enough public interest argument to disclose the requested information.
40. Therefore the Commissioner finds that the requested information is exempt under section 41 and the Trust was correct to withhold this information.
41. As the Commissioner has found the information to be exempt under section 41 he has not gone on to consider the application of section 40 to this information.

Other matters

42. The Commissioner notes that the Trust failed to comply with section 17(1)(b) of the FOIA. While the Trust implicitly applied sections 40 and 41, the exemptions in question were never specified to the complainant.
43. It follows then that the Trust also failed to comply with section 17(1)(c) when it failed to state why these exemptions applied.
44. The Trust also failed to include details of its internal review procedure or explain why an internal review might not be appropriate in this case, and in failing to include the details of the complainant's rights under section 50 of the Act, the Trust breached section 17(7) of the FOIA.
45. Finally, the Commissioner would like to note that he is disappointed at the time taken - from 25 February 2011 until 28 April 2011 – for the Trust to communicate its position to the complainant. In this particular

case, compliance with the section 17 paragraphs outlined above could have spared parties further and prolonged distress.

Right of appeal

46. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

47. 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.
48. 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
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