

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

### **Decision notice**

**Date:** 28 January 2013

**Public Authority:** NHS London  
**Address:** Southside  
105 Victoria Street  
London  
SW1E 6QT

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

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1. The complainant has requested a copy of the Serious Untoward Incident (SUI) report produced in connection with the death of Peter Connelly, also referred to as Baby P. NHS London agreed to the release of some of the requested information but withheld other parts of the report under sections 40(2) (third party personal data) and 41 (information provided in confidence).
2. The Commissioner's decision is that NHS London correctly refused the disclosure of some, but not all, of the withheld information. He therefore requires NHS London to release the information described in the confidential annex attached to this notice.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

#### **Request and response**

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4. On 17 January 2012 the complainant wrote to NHS London with nine separate, but related, information requests. For the purposes of this notice, only one request concerns us here. This asked for information of the following description –

*"A copy of the Serious Untoward Incident report of Peter Connelly's death in August 2007 sent from GOSH [Great Ormond Street Hospital]/Haringey tPCT."*

5. NHS London responded on 14 February 2012. It provided a copy of the final version of the SUI report and the earlier versions of the report held in hard-copy. However, NHS London redacted parts of this information, citing the exemptions provided by sections 41 and 44 of FOIA. NHS London subsequently clarified its position on 21 February 2012, confirming that it was relying on section 40 of FOIA in addition to the exemptions previously stated.
6. The complainant wrote to NHS London on 24 February 2012 challenging the extent of its redactions. NHS London sent the outcome of its internal review on 19 March 2012. It accepted that parts of the redacted information could be disclosed on the basis that the information was already in the public domain. However, NHS London maintained that sections 40, 41 and 44 had been correctly applied to the remainder of the withheld information.

### **Scope of the case**

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7. The complainant contacted the Commissioner to complain about the way her information request has been handled.
8. During the course of the Commissioner's investigation the complainant has confirmed that the application of section 44 can be dropped from the scope of the issues that need to be considered. The complainant has further advised that the Commissioner can focus his attention on the latest iteration of the SUI report on the acceptance that the earlier versions do not contain anything substantively different from that form. The Commissioner has therefore proceeded on the basis of this clarification.

### **Reasons for decision**

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9. The circumstances surrounding the death of Peter Connelly and the subsequent conviction of his mother, her boyfriend and the boyfriend's brother for allowing or causing Peter's death has received considerable media attention.

10. Rather than go over the relevant background here, the Commissioner would refer to his previous decision involving the London Borough of Haringey, reference FS50234513<sup>1</sup>. In that case the Commissioner considered a request for a copy of the first Serious Case Review into the death. As a prelude to the decision, the Commissioner set out at some length a summary of events leading up to mid-2010.
11. As demonstrated by this summary, it is clear that the case of Peter Connelly has attracted a far greater degree of interest than might otherwise be anticipated. The Commissioner has therefore taken a proportionate approach to balancing the fact that a considerable amount of information relating to the death of Peter Connelly has already been placed in the public domain with the need to preserve confidentiality where this is appropriate.
12. For the purposes of analysis, and to ensure that the confidence of information is not undermined inadvertently, the Commissioner has attached a Confidential Annex to the end of this notice.

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

13. Section 41 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.
14. In responding to the request NHS London has accepted that some of the contents of the SUI report are already widely known and has therefore released this information. It has, however, argued that the remainder of the report is covered by section 41 in addition to, in parts, section 40 of FOIA.
15. As referred to by NHS London, a helpful starting point for considering whether all, or any part, of an SUI report should be disclosed is the previous decision issued by the Commissioner on FS50299667<sup>2</sup>, which

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<sup>1</sup> [http://www.ico.gov.uk/~media/documents/decisionnotices/2010/FS\\_50234513.ashx](http://www.ico.gov.uk/~/media/documents/decisionnotices/2010/FS_50234513.ashx)

<sup>2</sup> [http://www.ico.gov.uk/~media/documents/decisionnotices/2010/fs\\_50299667.ashx](http://www.ico.gov.uk/~media/documents/decisionnotices/2010/fs_50299667.ashx)

similarly involved NHS London. For the purposes of analysis, the Commissioner broke down the contents of the SUI report into four categories of information –

- Information obtained from the patient's medical records, either directly or indirectly and in such a way as that details of their medical care and condition can be easily identified.
  - Parts of the report which give detailed information of the circumstances surrounding the patient's death.
  - Information relating to employees of the Trust involved in the patient's care.
  - Other, more general, information.
16. With the exception of the last category of information, which may loosely be termed records of an administrative nature, the Commissioner accepted that the SUI report was exempt information under section 41. This was because the contents satisfied the conditions inherent in the exemption, namely: they were obtained by the public authority from another party; the information had the necessary quality of confidence; the information was imparted in circumstances importing an obligation of confidence; disclosure would be an unauthorised use of the information and to the detriment to the confider; and the public interest favoured the withholding of the information.
17. The Commissioner appreciates that the section 41 considerations outlined in case FS50299667 will have a bearing on the assessment of information contained in other SUI reports which relate to the death of an individual. Ultimately, this is because of the particularly sensitive information contained in SUI reports and the Commissioner's acknowledgment that this information should be afforded protection. However, the Commissioner also recognises that the circumstances of this case are not usual, in that the events surrounding the death of Peter Connelly have already to a significant degree been made public, both through media reporting and the publication of various reports into Peter Connelly's death.
18. This has led him to the conclusion that while section 41 will apply to parts of the redacted information, it will not apply to all. In particular, the Commissioner considers there is room for further disclosure because
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of the specific information known about Peter Connelly, his background and his treatment.

19. To demonstrate the reasons for reaching his view, the Commissioner details below his consideration of the tests set out in FS50299667, which derive from the approach to confidentiality taken by the court in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415.

Was the information obtained from a third party?

20. The Commissioner accepts that the SUI report was provided to NHS London as part of its role in monitoring the investigation of SUIs by NHS Trusts that fall within its jurisdiction.
21. Furthermore, reflecting his finding outlined at paragraph 31 of his decision on FS50299667, the Commissioner is satisfied that a significant proportion of the information contained in the report has been drawn directly from the patient's (Peter Connelly's) medical records. He also believes that the report contains information which has been written after consideration of the patient's medical records and from which details of the patient's medical care can be easily identified.
22. Therefore the Commissioner is satisfied that this information has been drawn from the patient's medical records and from interviews with the relevant health professionals involved in his care, and has been combined into a report into the circumstances surrounding his death.
23. For these reasons, he has accepted that the SUI report was obtained by NHS London from third parties.

Does the information have the necessary quality of confidence?

24. The Commissioner believes that information will have the necessary quality of confidence if it is more than trivial and is not otherwise accessible. To put it another way, the Commissioner will generally find that section 41 is not engaged where the information is already in the public domain due to the fact that the information will have lost its quality of confidence.
25. In this case an immediate question arises as to what, if any, information included in the SUI report is already known to the public. To answer this question involves, to the Commissioner's mind, the consideration of two issues –
  - Whether the information is actually in the public domain.
  - Whether disclosure would reveal anything new.

26. In relation to the first point, the Commissioner considers that information will be in the public domain if it is realistically accessible to the general public at the time of the request. This is a matter of degree and will depend on the particular circumstances presented in a case.
27. Turning to the second point, the Commissioner observes that even where information appears to be in the public domain, the exact content of the withheld information should be considered so as to establish whether disclosure would in fact reveal anything new. This could include, for example, giving a previously unknown context for the information.
28. Thus, any element of information which can reasonably be deemed new information can still retain its quality of confidence. This also corresponds with NHS London's broader argument which states that the fact that some information is publicly available does not, by itself, mean that a claim to confidentiality cannot continue to be made.
29. In considering these points, the Commissioner has tested what information can be considered as publicly available both by examining published literature on the Baby P case and by taking steps to establish what information can be retrieved elsewhere through an internet search. Care must obviously be taken to avoid assuming that just because information is publicly available it is accurate and from a creditable source.
30. Having taken what he considers are reasonable steps, the Commissioner has found that a large amount of the disputed information can be classified as being in the public domain. His findings relate to the information quoted in table 1 of the confidential annex.
31. As noted, NHS London has rightly argued that the fact that some information is publicly available does not, by itself, mean that a claim to confidentiality cannot continue to be made. However, with regards to the information set out in table 1, the Commissioner has taken the view that not only is the information already publicly available but also that its disclosure would not add, or reveal, anything not already known. He therefore considers that this information does not attract the confidence described in section 41 of FOIA.
32. In passing, the Commissioner understands, and to a degree is sympathetic to, NHS London's argument which says that owing to the amount of information now in the public domain there is very little residual public interest in the information in question here. However, as the Commissioner has decided that the above information does not have the necessary quality of confidence, there is no requirement to consider whether the public interest favours the withholding of the information.

The Commissioner has, however, gone on to assess whether the remaining withheld information is subject to section 41.

33. Where the information has not already been placed in the public domain, the Commissioner considers that the contents of an SUI report relating to the death of a patient will have the necessary quality of confidence. This is because of the seriousness of the issues discussed in the report and the nature of the events to which the information relates.
34. The next question for the Commissioner to consider is whether the report was imparted in circumstances importing an obligation of confidence.

Imparted in confidence?

35. Echoing his decision on FS50299667, the Commissioner is satisfied that the SUI report had been obtained by NHS London from another NHS organisation with the expectation that it would be treated as confidential. This corresponds with the serious nature of the report itself which relates to the circumstances surrounding the death of a patient in an NHS hospital.

Would disclosure be to the detriment of the confider?

36. The Commissioner has considered this question in relation to each of the categories of information identified at paragraph 15 above.
37. Regarding the information covered by the first, second and third categories, the Commissioner has adopted the same approach taken on his decision on FS50299667. He considers that the findings outlined at paragraphs 45 – 47 of that decision equally apply here. As can be observed, the Commissioner determined that it would not be necessary for disclosure to cause detriment in order for the disclosure of this information to be actionable. He further added that, in the case of the third category information, disclosure would also be likely to cause distress to the employees involved in the care of the deceased patient. The Commissioner has therefore moved to the fourth category of information, which in his view attracts different considerations to those set out in FS50299667.
38. The Commissioner has defined the fourth category of information as "information which does not fall under any of the other categories, and relates (broadly) to the administrative aspects of producing the Report, or to the more general observations or recommendations which did not closely relate to details of the deceased patient's medical care, the events leading up to his/her death, or the Trust staff involved in these events."

39. Under this category, the Commissioner has placed information which refers to NHS staff who were not connected with the original incident or care of the deceased. This information has been further broken down by NHS London into the following sets –
- a) Individuals who cannot be identified or who are not of sufficient grade to have their identities disclosed.
  - b) NHS London staff members who were not of sufficient grade to have their identities disclosed.
  - c) Individuals of director level or above, who have had their job title rather than their names disclosed.
40. As observed previously, the Commissioner is aware of the controversy surrounding the care of Peter Connelly, which has led to information relating to this matter attracting a greater level of attention than might normally be expected.
41. The Commissioner accepts that typically the release of the information summarised above is unlikely to cause the individuals significant detriment. This is because they did not have a direct involvement with the incident and so no culpability could be attached to them. Similarly, he would consider in most other cases that an individual is unlikely to suffer any loss of privacy because of disclosure. This is because the information clearly relates to their role as public employees. However, the Commissioner has also been reminded by NHS London that the circumstances of this case are not typical.
42. The Commissioner agrees with NHS London that the emotive nature of the case has manifested itself in attempts to find where the blame for organisational failings lay. In this situation, NHS London has argued that there is a real possibility that individuals will be unfairly connected with the Peter Connelly case and for their role to be taken out of context. Following this reasoning through to its natural conclusion, the Commissioner has decided that to varying degrees disclosure would be detrimental because of the distress it would cause each of the individuals concerned.
43. In making this finding, the Commissioner acknowledges that NHS London has been unable to identify all of the individuals referred to in the report despite some attempts to do so. This is where the report only includes the initials of an individual, with no additional information given that would enable a definitive identification to be made. However, the Commissioner also observes that the report itself gives clues to where an individual worked at the time the report was produced. On this basis, the Commissioner has concluded that a member of the public with a



reasonable knowledge of the staff working in a specific department of the relevant NHS organisation would be able to identify an individual from the initials.

Would there be a defence to disclosure in the public interest?

44. As an absolute exemption, there is no public interest test to be applied to section 41 under FOIA. However, in deciding whether the exemption is engaged it is necessary to consider whether an actionable breach of confidence would occur.
45. Case law on the common law concept of confidence suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. However, the the public interest test in deciding if a duty of confidence is actionable is the reverse of the test normally applied under FOIA; in effect, the duty of confidence public interest test assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.
46. As his decision on FS50299667 described, the Commissioner accepts that the disclosure of any confidential information will, to some degree, undermine the principle of confidentiality which is really to do with the relationship of trust between confider and confidant. This finding sits alongside the view of the Information Tribunal on *Bluck*<sup>3</sup>.
47. The SUI report is the incident report logged onto the Strategic Executive Information System (StEIS) and is not an investigation report. In its introduction to the July 2009 policy on Serious Untoward Incident Reporting for Safeguarding Children<sup>4</sup>, NHS London stated that –  
  
"NHS London has a duty to receive information on Serious Untoward Incidents (SUIs) from NHS organisations within its boundaries to both identify learning opportunities for improving patient safety and to ensure that NHS organisations have robust arrangements in place to identify and investigate SUIs to prevent recurrence.

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<sup>3</sup><http://www.informationtribunal.gov.uk/DBFiles/Decision/i25/mrspbluckvinformationcommissioner17sept07.pdf>

<sup>4</sup><http://www.london.nhs.uk/webfiles/Corporate/Serious%20Untoward%20Incident%20POLICY%2028%207%2009.pdf>

The principle definition of an SUI is something out of the ordinary or unexpected, with the potential to cause serious harm, and/or likely to attract public and media interest that occurs on NHS premises or in the provision of an NHS or a commissioned service. SUIs are not exclusively clinical issues, for example, an electrical failure may have consequences that make it an SUI.”

48. In FS50299667 the Commissioner found that the combination of the purpose of the SUI reports, the role that Strategic Health Authorities (such as NHS London) play in the effective investigation of SUIs and the nature of the information contained in the reports meant that the public interest in maintaining the confidentiality of the withheld information was particularly strong. The Commissioner shares this sentiment here.
49. Having had sight of the withheld information, the Commissioner also agrees with NHS London to an extent that disclosure would not contribute anything meaningful to the public debate of this matter nor significantly add to the public’s understanding of the events surrounding the death of Peter Connelly. This is particularly the case because of the considerable amount of information already in the public domain about the incident and the fact that parts of the report only indirectly relate to Peter Connelly. The Commissioner has therefore decided that the public interest favours the withholding some of the information contained on the report, which includes information covered by the fourth category of information. There are, though, exceptions to this determination that section 41 applies.
50. Specifically, the Commissioner observes that the SUI report makes reference to the employees of Haringey Teaching PCT who were given the responsibility of preparing and analysing information relating to the incident with the aim of signing off recommendations of an Individual Management Review (IMR). This was prior to a sub-committee meeting of the Local Safeguarding Children Board, the members of which were listed in the first SCR completed in November 2008 but only published in October 2010. NHS London has disclosed the job titles of the employees involved in the preparation of an IMR but refused to release the initials of the individuals.
51. The Commissioner understands that an IMR may form the basis of an SCR. As such, it is meant to give an accurate account of an agency’s response to a child’s wellbeing and to evaluate it fairly. Unlike the other information referred to above, the Commissioner considers that the preparation of the IMR records the reaction to the incident. As such, he finds that there is a compelling public interest argument in making this process transparent, which includes identifying the persons involved in this process.

52. For this information alone (specified at table 2 of the confidential annex) the Commissioner considers that NHS London would have a public interest defence. This reflects his view that the public interest in disclosure is sufficient to override the public interest in maintaining the confidentiality.
53. The Commissioner notes that, in coming to this conclusion, he has not taken lightly the fact that the confidentiality inherent in the exemption has been trumped. However, he has taken account of the exceptional circumstances of the Peter Connelly case, which not only strengthen the public interest in making details relating to the incident available but also the response of the various public authorities to the incident.

### **Section 40(2) – third party personal data**

54. In addition to section 41 of FOIA, NHS has also claimed that parts of the disputed information are covered by section 40(2) of FOIA. Where the Commissioner has found that section 41 is not engaged in respect of this information, he has gone on to consider whether section 40(2) of FOIA may apply in the alternative.
55. Section 40(2) of FOIA provides an exemption to the public right to access recorded information where it is the personal data of any third party. In order for a public authority to rely on section 40(2) correctly it would have to be satisfied that:
  - the disputed information constitutes the personal data of a third party; and
  - disclosure of the disputed information would contravene a data protection principle contained in the Data Protection Act 1998 (DPA). The relevant principle in this case is the first which requires the fair and lawful processing of personal data.
56. The Commissioner is satisfied that the information to which section 40(2) has been applied comprises personal data. This is even the case where NHS London has been unable to identify the individuals recorded in the report. This is because, as previously stated, the Commissioner considers that a member of the public could make the identification by cross-referencing the information contained in the report with other information that was already known to them.
57. The Commissioner has therefore moved on to the question of whether disclosure would be in keeping with the first data protection principle. To test whether disclosure would be fair in the circumstances, the Commissioner has taken into account the following competing interests:

- (i) A data subject's reasonable expectations of what would happen to their personal data.
- (ii) The consequences of disclosure.
- (iii) The balance between the rights and freedoms of the data subject and the legitimate interest of the public in disclosure.

58. For the release of personal data to be allowed, the Commissioner must also have regard to the sixth condition of schedule 2 of the DPA, as well as to the question of whether disclosure would be lawful.
59. In considering the above factors, the Commissioner has addressed separately the information contained in table 1 of the confidential annex and the information contained in table 2 of the confidential annex.

**Table 1**

60. For the reasons explained previously, the information quoted in table 1 is considered to be already in the public domain. This fact in itself does not dictate that disclosure will automatically be fair but, instead, its effect should be considered in the circumstances of the case.
61. The Commissioner is satisfied that the public availability of the information means that a data subject is less likely to expect their personal data to be protected in this situation. Building on this point, the Commissioner is of the view that the release of the information cannot reasonably be expected to cause significant additional harm to the interests of the data subject. Consequently, the Commissioner has found that disclosure would be fair when bearing in mind that there will always be a legitimate public interest in full disclosure for the sake of transparency.
62. However, condition 6 of schedule 2 of the DPA also requires that disclosure must be necessary for a legitimate interest of the public. The Commissioner considers that, to a degree, the arguments of NHS London have traction here in that the existing information already meets the public interest in disclosure. However, he has also decided that the features of the Peter Connelly case and the response to this also gives an extra spur to the cause of transparency which has the effect of making the disclosure necessary. Ultimately, any suspicions of wrongdoing or of a whitewash will only be allayed by the public having access to records produced in response to the incident.
63. Therefore the Commissioner has determined that disclosure of the personal data quoted in table 1 would not breach the first data protection principle and, thus, section 40(2) does not apply. In reaching this view, the Commissioner is not aware of any statutory bar protecting

this information nor does he consider, for the reasons set out previously, that the disclosure would be an actionable breach of confidence.

## **Table 2**

64. The information under consideration comprises the initials of employees from Haringey Teaching PCT.
65. The Commissioner notes that the information in question records the involvement of these employees in the preparation, and analysing, of information relating to the SUI. These employees were not involved in the care of Peter Connelly.
66. It is apparent that the case of Peter Connelly is particularly sensitive because of the circumstances of the death and the criticism of the public authorities involved with his care. This has developed into a fear of being stigmatised as a result of being associated with the incident.
67. The Commissioner acknowledges the apprehension that NHS London has in releasing the personal data of individuals referred to in records connected with Peter Connelly. However, equally, the Commissioner considers that the fact that the disputed information only relates to employees involved in the SUI investigation and not to the incident itself should to a greater extent dispel or offset any distress that disclosure could cause the data subjects.
68. The Commissioner has also reminded himself of the relative seniority of the employees, which would serve to weaken any expectation that their inclusion in the report would be kept confidential. Furthermore, the Commissioner realises there is legitimate interest in the public understanding how the incident had been investigated. Knowing the names of some of the individuals involved in the production of the IMR would go some way to increasing this understanding.
69. In light of the legitimate interest in the information and the negligible harm or distress that would be caused by its release, the Commissioner has found that disclosure would be fair. The Commissioner has also deemed that disclosure is necessary simply on the basis that it would help satisfy the legitimate interest of the public by providing a fuller picture of who was involved in the investigation of the SUI.
70. On this basis, and not finding any legal obstacle to disclosure, the Commissioner has decided that the release of the information would not breach the first data protection principle. Accordingly, section 40(2) is not engaged.

## Right of appeal

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71. 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)

72. 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.
73. 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 .....**

**Steve Wood**  
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