

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 7 August 2014

**Public Authority:** Southern Health NHS Foundation Trust

**Address:** Tatchbury Mount, Calmore,  
Southampton, SO40 2RZ

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to any investigation carried out into the death of a named patient.
2. The Commissioner's decision is that Southern Health NHS Foundation Trust (the trust) has complied with its obligations under the FOIA in refusing to confirm or deny whether the information is held under section 41(2) of FOIA.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

#### Request and response

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4. On 1 April 2014, the complainant wrote to the trust and requested information in the following terms:  
*"I request to know if a full, or indeed, any investigation was carried out into the death of [redacted] at [redacted] in Summer 2013 [redacted]."*
5. The trust responded on 25 April 2014. It neither confirmed nor denied that the requested information was held, citing section 40(5)(b)(i) as its basis for doing so.
6. Following an internal review the trust wrote to the complainant on 29 April 2014 and maintained its position.

## Scope of the case

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7. The complainant contacted the Commissioner on 29 April 2014 to complain about the way her request for information had been handled.
8. The Commissioner considers the scope of this case to be to determine if the trust complied with its obligations under the FOIA.

## Reasons for decision

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9. The trust explained that it provided a standard response that is given when an applicant who is not known to have any connection to a named individual, makes an enquiry which, in responding to it, would reveal whether the individual accessed services from the trust.
10. The trust provides mental health and learning disability services among others and anything which would confirm that an individual had accessed these services is deemed by the trust to be a breach of confidentiality. This is because the simple fact of having received services from a mental health and learning disability trust would be deemed to be sensitive personal information of the individual in question.
11. In the initial response and initial internal review response, the trust acknowledged that it had made an oversight in the application of the 'neither confirm nor deny' response as it did not take account of the fact that the individual was allegedly deceased. The trust therefore referenced Section 40(2) personal information under the Data Protection Act.
12. On further review of the request the trust wrote to the applicant again and explained this oversight. It again provided a "neither confirm nor deny" response, this time referencing Section 41(2) of the FOIA.

### Section 41

13. Section 41 of the FOIA states that information is exempt from disclosure 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.*

*(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constituted an actionable breach of confidence."*

14. Therefore for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party **and** the disclosure of that information has to constitute an actionable breach of confidence.
15. With regard to section 41(1)(b), in most cases the approach adopted by the Commissioner in assessing whether disclosure would constitute an actionable breach of confidence is to follow the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgement suggested that the following three limbed test should be considered in order to determine if information was confidential:
  - Whether the information had the necessary quality of confidence;
  - Whether the information was imparted in circumstances importing an obligation of confidence; and
  - Whether an unauthorised use of the information would result in the detriment to the confider.
16. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

*Was the information obtained from a third party?*

17. In its submissions to the Commissioner, the trust stated that, if the information was held, it would have been provided by the individual when seeking access to its services.

*Would disclosure constitute an actionable breach of confidence?*

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

*i. Whether the information has the necessary quality of confidence;*

19. For the information to have the necessary quality of confidence it must not be trivial and otherwise available to the public. Information which is of a trivial nature or already available to the public cannot be regarded as having the necessary quality of confidence.
20. The trust considered that confirming whether a named individual had accessed services from the trust would be an actionable breach of confidence. The trust in question provided learning disability services at that time and the fact that an individual had to access services provided by a learning disability trust is most definitely not trivial. It is also not accessible elsewhere. It therefore considers the information, if held, would have the necessary quality of confidence.

*ii. Whether the information was imparted in circumstances importing an obligation of confidence;*

21. The trust considered that information about who accessed which services is information that, if held, is communicated implicitly in circumstances importing an obligation of confidence. This is due to the relationship between patients and health care providers.

*iii. Whether disclosure would be an unauthorised use of the information to the detriment of the confider.*

22. In individual cases is it not always necessary to demonstrate that a detriment to the individual would occur. The courts have accepted that the loss of privacy which would occur if the confidential information is disclosed is a detriment in itself. It is not therefore always necessary to demonstrate detriment in cases involving personal confidences. In this case, due to the nature of the information the Commissioner is satisfied that a disclosure of the information would breach the general privacy under which a person's medical records are expected to be held. The detriment would be a loss of privacy.
23. The trust considered that detriment could be caused to the third party's relatives who may not know or may not want to know whether or not a deceased family member had to access certain services.

*Does confidence extend beyond a person's death?*

24. In *Bluck v IC and Epsom & St Helier University Hospitals NHS Trust EA/2006/0090* the Tribunal confirmed that even though the person to whom the information relates may have died; action for a breach of confidence could be taken by the personal representative of that person,

and that therefore the exemption continues to apply. The Tribunal stated that:

*"In these circumstances we conclude that a duty of confidence is capable of surviving death of the confider and that in the circumstances of this case it does survive" (para 21)."*

The death of an individual does not therefore dissipate the duty of confidence for cases relating to medical or social care records.

25. The Commissioner's view is that in determining whether disclosure would constitute an actionable breach of confidence, it is not necessary to establish that, as a matter of fact, the deceased person has a personal representative who would be able to take action.
26. This is because it should not be the case that a public authority should lay itself open to legal action because at the time of a request it is unable to determine whether or not a deceased person has a personal representative. Therefore if the information were to be disclosed in breach of confidence it would be actionable on this basis.

There are however a number of defences to a disclosure of confidential information.

#### *Defences to a breach of confidence*

27. There are established reasons why a breach of confidence will not always be actionable. The relevant reason to consider in this case is whether there would be a public interest defence to the disclosure which would prevent action being taken for the confidence being broken by the disclosure.
28. 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.

#### **The public interest in confidence**

29. As Section 41 is an absolute exemption there is no requirement for an application of the conventional public interest test. 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 Commissioner has therefore gone on to consider whether there would be a defence to a claim for breach of confidence.

30. The trust stated it had considered the arguments for and against disclosure. The trust considered that there is greater public interest in maintaining the exemption as any unnecessary and unwarranted breaches of confidentiality would have an adverse impact on the public who are ultimately all potential patients, to the trust and in general.
31. The trust considered that there cannot be any countervailing public interest that warrants disclosure in this case as this exemption is based upon ensuring and maintaining the integrity of patient confidentiality.
32. Disclosure, of the information if held, would undermine the principle of confidentiality and the trust would run the risk of having its patients and service users hesitating from accessing the trust if such confidences were not to be respected after their deaths. For people with mental health problems in particular, this could be extremely dangerous if they were to decline to access help because of a fear that once they had died, the fact that they had accessed that help became public knowledge.
33. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly. As the decisions taken by courts have shown, very serious public interest matters must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality.

### **The Commissioner's decision**

34. It should be made clear that the Commissioner's decision relates to whether the trust was correct to 'neither confirm nor deny' if the information is held by virtue of section 41(2). The Commissioner would not expect an individual's medical records (deceased or not) to be disclosed to the public. In addition, he is mindful of the public interest in maintaining confidentiality. This is particularly strong in terms of a 'doctor/patient' relationship.
35. The complainant has not presented any arguments or evidence of misconduct, illegality or gross immorality that would override the duty of confidence, if the information were held by the trust.
36. The Commissioner has decided that the trust was correct to apply section 41(2) to the withheld information.

## Right of appeal

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37. 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: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

38. 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.
39. 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**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
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