

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 May 2015

Public Authority: NHS North Tyneside Clinical Commissioning Group

Address: John Snow House
Durham University Science Park
Durham
DH1 3YG

Decision (including any steps ordered)

1. The complainant has requested information about a panel hearing regarding Continuing Healthcare retrospective funding arrangements for a deceased individual. NHS North Tyneside Clinical Commissioning Group ('CCG') refuses to provide the requested information. It says the information is the personal data of a third person and exempt from disclosure under section 40(2) of the FOIA.
2. The Commissioner's decision is that the requested information is not personal data and is consequently not exempt under section 40(2).
3. In the particular circumstances of this case, the Commissioner took the decision to proactively consider section 41(1) of the FOIA (information provided in confidence) in relation to this request. He has concluded that the information can be withheld from disclosure on the basis of this exemption because it is information provided in confidence.
4. The Commissioner does not require the public authority to take any further steps.

Background

5. The complainant represents a company that advises people with serious, long-term health conditions on how to gain access to NHS funding. The complainant says the company is a representative of a deceased patient of NHS North Tyneside CCG, and is a potential debtor of the deceased's

estate. The complainant has told the Commissioner that the son of the deceased executed the deceased's will and is a beneficiary of the estate.

6. From the correspondence that the Commissioner has seen, the son of the deceased maintains that he engaged the complainant's company to pursue a Continuing Healthcare fund claim on behalf of this mother in 2009. Having had little communication from the company in the intervening years, he says he terminated his relationship with the company. The son is of the view that the complainant's company has now emerged solely in anticipation of making a claim against the deceased's estate. The complainant says that, under the terms of their agreement, the son cannot unilaterally terminate their relationship.

Request and response

7. On 14 July 2014, the complainant wrote to NHS North Tyneside CCG and requested information in the following terms:

"Cheselden Continuing Care Limited wishes to formally make an FOI request regarding the outcome of the panel hearing on or around the 7th of May 2014 regarding the decision of whether [Named Individual] was in need of primary care and whether funds should be awarded, full details of any amount awarded and confirmation of whether any such amount has been paid or if not yet paid, confirmation of when any such amount is likely to be paid."

8. North of England Commissioning Support Unit responded on behalf of North Tyneside CCG on 8 August. It refused to provide the requested information, citing the exemption under section 40(2) of the FOIA. The CCG, through the North of England Commissioning Support Unit, says that information about any funding awarded to the deceased following the panel hearing is the personal data of a third person, specifically the deceased's son as he is the deceased's legal representative.
9. Following an internal review the CCG wrote to the complainant on 23 September. It maintained its position.

Scope of the case

10. The complainant contacted the Commissioner on 20 January 2015 to complain about the way his request for information had been handled.
11. Having previously sought advice from the Information Commissioner's Office, he is of the view that the information he has requested cannot

- be classed as personal data because the individual concerned is deceased. Any funding is awarded to the deceased's estate, and not to the deceased's son; therefore the requested information is not the son's personal data.
12. The Commissioner therefore initially focussed his investigation on the CCG's application of section 40(2) to the requested information.
 13. During his investigation, having reviewed the withheld information and considered the circumstances of this case, the Commissioner came to the conclusion that the information is exempt from disclosure on the basis of section 41(1) of FOIA. This is on the basis that medical records of individuals are generally considered to be confidential and this includes circumstances where the person to whom the information relates has died.
 14. In the circumstances of this present case, the Commissioner considers that the withheld information effectively reflects the content of the deceased individual's health and social care records because the deliberation panel concerned drew on these to form the decision recorded in the information. The state of the deceased individual's health when they were alive may consequently be inferred from that decision. The Commissioner notified both parties about the approach he intended to take.

Reasons for decision

15. **Section 40(2)** of the FOIA says information is exempt from disclosure if it is the personal data of a third party (ie someone other than the applicant) and the conditions under either section 40(3) or 40(4) are also satisfied.
16. The Commissioner therefore first considered whether the requested information is the personal data of a third party.

Is the information personal data?

17. The Data Protection Act says that for data to constitute personal data, it must relate to a living individual, and that individual must be identifiable.
18. The Commissioner has first considered whether the withheld information relates to a living individual. The Commissioner has seen the information, which is held in an 'Eligibility Decision – Panel Deliberation' document. He notes that it relates to an individual who is

- deceased. The information cannot therefore be categorised as personal data.
19. The CCG is not correct when it says that, because the deceased's son is the deceased's legal representative, the information is now the son's personal data. One individual's personal data cannot be transferred to another individual in this way, or any other way.
 20. The Commissioner has therefore decided that the exemption under section 40(2) cannot be applied to the requested information. The CCG did not cite any other exemptions.
 21. As discussed earlier in this notice, the Commissioner recognises his duty as a responsible regulator, and his broader responsibilities under the Human Rights Act, to proactively protect information that he considers should not be released, since the release of information under the FOIA is effectively release to the world at large. Since he has decided that section 40(2), which the CCG relied on, cannot be applied, he has considered whether this health-related information is exempt under section 41.
 22. In taking this step he has noted his decisions in previous, similar cases which have been supported by the Information Tribunal¹.
 23. **Section 41(1)** of the FOIA says that information is exempt from disclosure if (a) it was provided to a public authority by another person and (b) disclosing it would be an 'actionable' breach of confidence (ie the aggrieved party would have the right to take the authority to court as a result of the disclosure). Although section 41 is an absolute exemption and is therefore not subject to a public interest test under the FOIA, the common law duty of confidence contains an inherent public interest test. The Commissioner has therefore also considered this in order to decide if the information is exempt.

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Mayday Healthcare NHS Trust, FS50225818
https://ico.org.uk/media/action-weve-taken/decision-notice/2009/482874/FS_50225818.pdf

Bluck v the Information Commissioner & Epsom St Helier University NHS Trust
EA/2006/0090
<http://www.informationtribunal.gov.uk/DBFiles/Decision/i25/mrspbluckvinformationcommissioner17sept07.pdf>

41(1)(a) - Was the information provided by another person?

24. The Commissioner considers the information was provided by another person, namely the deceased. He considers this remains the case despite the fact that the information was provided indirectly by the deceased, through access by the deliberation panel in question to health and social care evidence relating to, and originally provided by, the deceased.

41(1)(b) Would disclosing the information be an actionable breach of confidence by that or any other person?

26. When considering whether disclosing information would be a breach of confidence, the Commissioner takes into account whether:

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

This follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415.

Does the information have the necessary quality of confidence?

27. The Commissioner considers that 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.

28. The Commissioner is satisfied that the withheld information is clearly not trivial in nature, as it concerns an important decision about the deceased individual's health when they were alive. Because it is now being requested under the FOIA, he is also satisfied that this information is not otherwise accessible to the public. The Commissioner therefore considers that the information does have the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

29. As previously discussed, the information was provided indirectly by the deceased, through access by the panel in question to health and social care evidence relating to the deceased. This was originally provided by the deceased through consultation with healthcare professionals.

30. In the Commissioner's opinion when patients submit to treatment from doctors and other medical professionals, whether that is in surgeries, hospitals or other institutions, they do so with the expectation that the information will not be disclosed to third parties without their consent. In other words, 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 taken by doctors guaranteeing to protect doctor/patient confidentiality. The Commissioner is therefore satisfied that the withheld information, reflecting as it does the medical records of the deceased individual, was obtained in circumstances importing an obligation of confidence.

Would disclosure be an unauthorised use of the information to the detriment of the confider?

31. 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. He has not therefore considered this issue any further.
32. With regard to 41(1)(b), the Commissioner notes that the Tribunal in *Bluck* 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 therefore the exemption continues to apply. The Commissioner considers that in the circumstances of this case the duty of confidence is similarly capable of surviving the death of the confider. It is the Commissioner's view 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 take action.
33. Section 41 of the FOIA is an absolute exemption and thus not subject to the public interest test contained at section 2 of FOIA. However, as noted at §23, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under the FOIA).

Inherent public interest test

Public interest in maintaining the confidence

34. The CCG did not cite section 41 itself and so did not advance any specific arguments for maintaining the confidence in the context of this exemption. However, the Commissioner would concur with the

comments of the Information Tribunal in *Bluck*. Namely, the interest of patients to have confidence that medical staff will not disclose sensitive medical data before they themselves divulge full details of their medical history and lifestyle. Without that assurance, patients may be deterred from seeking advice and without adequate information doctors cannot properly diagnose or treat patients. This is counter to the public interest as it could endanger the health of patients, or in the case of transmissible diseases, the wider community.

Public interest in disclosing the information

35. The Commissioner notes that the complainant has provided him with a copy of a consent form signed on behalf of the deceased by the deceased's son. This awards consent to the complainant to obtain disclosure of confidential/personal information relating to the deceased.
36. As discussed at §21, release of information under the FOIA is release to the world at large, not just to the complainant – hence the Commissioner's decision detailed in this notice. He is of the view that there may be more appropriate channels through which the complainant can pursue the concerns he has regarding the CCG and the outcome of the particular panel hearing.
37. The Commissioner appreciates that the circumstances and outcome of the panel hearing is of interest to the complainant and the deceased's family, although for different reasons. The panel outcome does not appear to the Commissioner to have any significant, wider public interest. He has not, for example, received evidence that the particular panel deliberation attracted media interest or the involvement of other agencies. Nor is the outcome of the panel hearing in dispute – the complainant simply wants to know what the outcome was.

Balance of the public interest

38. The Commissioner acknowledges that it is clearly in the public interest that public authorities are open and transparent about actions and decision they take. Such openness can increase the public's trust in the bodies that serve them.
39. However, the Commissioner's view in this case is that these general interests are clearly outweighed by the compelling public interest served in patients being able to have confidence that medical staff will not disclose their medical history to the world at large, before they themselves divulge this history. Disclosing the information in this case would breach the confidentiality of the deceased individual's healthcare records and, more broadly, would undermine the confidence of all patients that their medical information would be treated confidentially.

As discussed at §33, losing this assurance could endanger patients' health or the health of the wider community.

40. Consequently, taking into account the inverse nature of the public interest test under section 41(1), the Commissioner accepts that in this particular case, the public interest in protecting the confidence outweighs the public interest in disclosing the withheld information.
41. Since the Commissioner is satisfied that the conditions under section 41(1)(a) and 41(1)(b) have been met, he is satisfied that the withheld information is exempt from disclosure on the basis of section 41(1) of FOIA because it is information that has been provided in confidence.

Right of appeal

42. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

43. 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.
44. 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
SK9 5AF