Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 March 2017

Public Authority: The University of Manchester
Address: Oxford Road
Manchester
M13 9PL

Decision (including any steps ordered)

1. The complainant has requested statistics from the University of Manchester (the "University") concerning the numbers of suicides in areas which fall under the Pennine Care NHS Foundation Trust (the "Trust"). The University provided some information but at internal review applied section 22A and section 41 of the FOIA to the request.

2. The Commissioner's decision is that the University has correctly applied section 41 of the FOIA to this request. No steps are required.

Request and response

3. On 18 March 2016, the complainant wrote to the University and requested information in the following terms:

'Please provide statistics on suicides in the following areas
Stockport
Oldham
Bury
Rochdale
Tameside

These are the areas where mental health services are provided by Pennine Care NHS Foundation Trust.

The data is held by the Centre for Mental Health and Safety.

The National Confidential Inquiry data covered the period from 2003 to 2013.

Please provide the data for each of the ten years for each area ie all suicides in each year, and patient suicides in each year.

Patients are classed as persons who have had contact with mental health services in the 12 months prior to death.

Please also provide the data for 2014, 2015 and 2016 if these figures are available'.

4. On 8 June 2016 the University provided a document produced by the Pennine Care NHS Foundation Trust.

5. The University explained that the document does not break the information down into each area but does cover the areas in the request. It explained the information is broken down into male/female.

6. The University explained that any further breakdown could potentially identify the individuals and it considered that in their circumstances, the individuals are still owed a duty of confidentiality after their death.

7. The complainant requested an internal review on 8 June 2016. He explained that the information provided was not what he had requested. He again outlined his request and argued that he required:

   - for each year from 2003 to 2016 the number of patient suicides in the area covered by Pennine Care;
   - for each year from 2003 to 2016 the number of general population suicides in the geographical area covered by Pennine Care; and
   - if the data is available and it is possible, the data broken into the boroughs for each year.

8. On 21 July 2016 the University provided a review of its response. It explained that on further consideration it wished to apply Section 22A and Section 41 of the FOIA to the request.

Scope of the case

9. The complainant contacted the Commissioner on 28 July 2016 to complain about the way his request for information had been handled.

10. The Commissioner considers the scope of this case is concerned with the University's application of section 41 and section 22A of the FOIA to this request.

Background

11. The University has explained that the information requested has been obtained in relation to the National Confidential Inquiry into Suicide and Homicide by People with Mental Illness (NCISH). NCISH collects information from the Office for National Statistics (ONS) on all suicide deaths. Mental health trusts then provide confidential confirmation that the person who died was a mental health patient. This research programme was established in 1996 and is on-going (MREC ERP/96/136).

12. The University has explained that NCISH has received ethical approval from the NHS Research Ethics Committee (ERP/96/136), and has published 87 research papers in academic journals over the last 20 years. In order to carry out the research, NCISH has the following permissions in place:

- Information Governance Toolkit (Health and Social Care Information Centre (HSCIC)): an online assessment against Information Governance policies and standards, a requirement of applying for Section 251 approval.
- Section 251 approval (The Confidential Advisory Group - Health Research Authority (CAG-HRA)): this allows NCISH to hold identifiable and patient sensitive data.
- Data Access Agreement (ONS): an agreement of principals for the release of vital statistics mortality data.
- Caldicott Guardian agreements with all mental health trusts: an agreement whereby the trusts and NCISH agree data sharing, and agree to uphold the Caldicott principals.

13. The University has therefore provided the Commissioner with a copy of the following:

    - Caldicott Guardian agreement between NCISH and the Trust;
    - Section 251 approval (NB: Approval to December 2015 on-going while CAG-HRA process the renewal approval);
    - ONS Data Access Agreement;
    - HSCIC Information Governance Toolkit submission; and
    - letter sent to clinicians with questionnaire

14. The University has explained that NCISH maintains a national register of all suicides and homicides occurring in the UK. The overall aim of NCISH is to improve patient safety and it recommends changes to clinical practice and policy that would reduce the risk of suicide and homicide in mental health patients.

15. The University has therefore explained that NCISH publishes annual reports which include analysis of the most recent year of national data on patient suicides, as well as trends over time. In addition to annual reports, NCISH publishes project reports investigating specific patient sub-groups. The frequency of academic paper publication varies year by year (4-11 per year since 2010). A list of academic papers can be found at this link:

    http://research.bmh.manchester.ac.uk/cmhs/research/centreforsuicideprevention/nci/publications/

16. Analysis on this national sample therefore identifies key areas for concern in suicide prevention, and clinical messages are published from these findings with the aim of reducing suicides and improving patient safety.

17. The University has confirmed that NCISH does not publish any information on patient suicides by calendar year and borough (as requested in this case). This is to protect patient confidentiality and to comply with the information governance requirements set by the HSCIC, the ONS and the Caldicott Report.

18. The University has therefore confirmed that there is no intention to publish the level of information that has been requested.

Reasons for decision

Section 41 – information provided in confidence

19. Section 41(1) of the 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 that under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

Was the information obtained from another person?

20. The University has explained that NCISH relies on vital statistics mortality data from ONS and confidential submission of information by mental health trusts. This information includes whether a person who has died by suicide was a mental health patient, and private details about the person, recorded as part of their clinical care. The requested information from the Trust is part of this data.

21. The Commissioner is therefore satisfied that the requested information is obtained by the University from the Trust.

Would disclosure constitute an actionable breach of confidence?

22. 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 to the detriment of the confider.

Does the information have the necessary quality of confidence?

23. 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.

24. In this case the information provided by the Trust to the University includes information about its mental health patients. The information identifies whether someone had contact with mental health services in the year prior to death by suicide. The University has confirmed that this sensitive information is not publicly available elsewhere. It undoubtedly relates to personal matters and therefore cannot be said to be trivial.

25. The University has provided the Commissioner with a copy of the Caldicott Guardian agreement between NCISH and the Trust. This is an agreement whereby the Trust and NCISH agree data sharing and agree to uphold the Caldicott principals.

26. As explained above, in order to protect patient confidentiality and to comply with the information governance requirements set by the HSCIC, the ONS and the Caldicott Report, the University has confirmed that NCISH does not publish any information on patient suicides by calendar year and borough.

27. The Commissioner is therefore satisfied that the requested information does have the necessary quality of confidence.

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

28. An obligation of confidence may be explicit (for example, the terms of a contract) or implicit (for example, where information is provided in the context of the relationship between a patient and doctor).

29. The University has explained that information on whether a person who has died by suicide was a mental health patient is provided to it confidentially, and it obtains ethical approval because it is collecting sensitive patient data.

30. The University has explained that in order to reassure clinicians providing information, NCISH advises them that it will be held confidentially. The obligation is explicit, as noted in the Information Governance Toolkit (HSCIC), the Caldicott Data Sharing Agreement and the University's correspondence with the Trust.

31. It has explained that releasing data by borough and year as requested would place small numbers of patient suicides in the public domain, making it possible for individuals to be recognised by surviving families and others.

32. The University has explained that this would therefore go against the requirements placed on it by agencies such as the ONS and the HSCIC which stipulate no onward sharing with third parties. It has argued disclosure would undermine the assurances about patient confidentiality that it currently makes to the clinicians who provide the data.

33. In view of the above arguments, the Commissioner is satisfied that disclosure of the requested information would compromise NCISH's assurances of confidentiality and would also breach its research ethics.

34. The Commissioner is therefore satisfied that the information was imparted to the University by the clinicians in circumstances importing an obligation of confidence. She is also satisfied that the patients originally imparted information concerning their mental health to the Trust in circumstances importing an implied obligation of confidence (in the context of a relationship between doctor and patient).

Would disclosure be of detriment to the confider?

35. Where the information relates to a personal or private matter, the Commissioner (in accordance with current case law) considers that it should be protected by the law of confidence, even if disclosure would not result in any tangible loss to the confider. The loss of privacy can be viewed as a form of detriment in its own right.

36. It is therefore not necessary for there to be any detriment to the original confiders (the mental health patients) in terms of tangible loss, for this private information to be protected by the law of confidence.

37. The Commissioner considers the Trust and the University clearly have a duty of confidence to the individuals whose data it has used in its research. It is relevant that the duty of confidence continues to apply after the death of the person concerned. This position was confirmed by the Tribunal in *Pauline Bluck v Information Commissioner and Epsom & St Helier University Hospitals NHS Trust (EA/2006/0090)*. In this case the Tribunal found that even though the person to whom the information related had died, action for breach of confidence could still be taken by the personal representative of that person.

38. The Commissioner does not consider it necessary to consider who that personal representative would be. It is sufficient that the principle has been established that a duty of confidence can survive death and that an actionable breach of that confidence could be initiated by a personal representative.

39. The Commissioner is satisfied that the disclosure of the requested information under the FOIA in this case would be an unauthorised use of that information, as the patients would not have consented to this use.

40. In relation to the question of detriment to the Trust, in this case, the University has explained that NCISH defines individuals participating in the programme as people who have died by suicide while under mental health care. It has argued that once small numbers (such as those requested here) are made available to the public, this information could be recognisable to the families.

41. The University has explained that NCISH publishes data at a national level, and eliminates factors with low counts in line with disclosure guidance from the ONS, who provide vital statistics mortality data. ONS recommend suppression of all counts under 3, including 0, as well as secondary suppression as necessary to avoid the possibility of disclosure through subtraction.

42. The University has explained that the Healthcare Quality Improvement Partnership (HQIP), who commissions this programme on behalf of NHS England, fully supports its position regarding disclosure control of low numbers of patient suicides.

43. The University has confirmed that with respect to the requested data, providing numbers of patient suicides by calendar year and borough would result in very low counts. It has argued that disclosure of these small counts would be likely to be misinterpreted and could result in erroneous conclusions.

44. For example, the University has explained that there may be differences in numbers of suicides between locations or in a single location from one year to the next. These are likely to be random fluctuations, or could be explained by unmeasured area factors. It considers that with small numbers these differences are to be expected, but could be easily misinterpreted to mean failures of care, or poor clinician competence, even though these were not the causes.

45. The Commissioner also accepts that even if the data were not to be misinterpreted the disclosure of information that patients would expect to be kept confidential could have a detrimental effect on the reputation of the Trust in relation to its ability to protect patient information.

46. The Commissioner is satisfied that disclosure of the information may lead to identification by the families of the individuals concerned (and possibly to identification by others), thereby confirming that the individuals had accessed mental health services. The Commissioner accepts that this loss of privacy to the patient can be viewed as a detriment in its own right. She also accepts that disclosure of the data would be detrimental to the reputation of the Trust. She therefore accepts that this limb of the test for confidence is met.

Conclusion: would disclosure constitute an actionable breach of confidence?

47. In view of the above, the Commissioner is satisfied that the three tests for breach of confidence have been met. She is therefore satisfied that disclosing the requested information would be a breach of confidence where action could be taken by the families of the individuals in question and by the Trust.

Is there a public interest defence for disclosure?

48. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a *defence* to an action for breach of confidentiality. The Commissioner is therefore required to consider whether the University could successfully rely on such a public interest defence to an action for breach of confidence in this case.

49. The Commissioner recognises that the courts have taken the view that very significant public interest factors must be present in order to override the strong public interest in maintaining confidentiality.

50. The complainant has argued that it is clear from information the Trust has released that there is a trend of increasing numbers of patient suicides in the Pennine Care area over time, and the trend is even more marked in one particular area.

51. The complainant has therefore argued that whilst other mental health trusts nationally are coping with increased numbers of patients without seeing a significant increase in patient suicides, this is not the case here.

52. He considers this reinforces the public interest in revealing the requested data.

53. The University has acknowledged that the public interest arguments in favour of releasing the data relate to openness and transparency around suicide and local mental health care.

54. However it has argued that it is hard to see positive public benefit arising from the release of such a small sample of figures from such a limited area, from which few valid conclusions could be made. The University has explained that NCISH puts a large amount of data into the public domain in what it considers to be a meaningful and useful form.

55. The University has explained that the primary public interest is patient safety in mental health care and the suicide risk of future mental health patients. It has explained that NCISH publishes aggregate information on a national sample of people who have died by suicide while under mental health care, from which conclusions are drawn by clinical and research experts. The University has explained that these have been shown to improve patient safety.

56. The University has argued that the national size of the NCISH dataset is a strength of the study, ensuring that conclusions drawn are likely to be valid. It has explained that providing numbers of patient suicides by calendar year and borough as requested would result in very low counts.

57. The University has argued that misinterpretation of small numbers released publically could falsely attribute fluctuations in numbers of patient suicides to quality of mental health care. This could in turn affect confidence in mental health care in a particular area, and therefore ultimately affect the safety of patients under the mental health trust.

58. The University has confirmed that NCISH would not draw conclusions from either low numbers or compare small areas. The University has explained that presenting aggregate data at higher levels has a smoothing effect of reducing any random variations which might occur in any one area.

59. As already argued, publishing low numbers of patient suicides in a given area would breach NCISH Information Governance and ethics requirements. As a consequence, the University considers that such a breach could affect the relationship between NCISH and mental health trusts. It could compromise the current level of co-operation between them which enables the clinicians to be honest and transparent in the data provided. This could impact on NCISH high response rates and therefore the quality of the research.

60. A reduction in the response rates would mean that conclusions were not drawn from national data and this in turn would affect interpretation of the data and clinicians' willingness to adopt recommendations on patient safety.

61. The University also considers any such erroneous conclusions are likely to be attributed to NCISH and are likely to contradict its own analysis and undermine its own conclusions. This is also likely to compromise NCISH's research reputation.

62. The University has explained that NCISH currently receives an excellent response from clinicians, allowing its research to present robust conclusions with firm recommendations for improving patient safety and reducing suicide in people under mental health care. It has argued that this level of cooperation is unique internationally.

63. The University has therefore argued that loss of confidence in its ability to preserve confidentiality is likely to undermine its research and the benefits of its findings to patient safety. Furthermore, if the research reputation of NCISH were damaged, recommendations to aid suicide reduction may be less likely to be adopted by mental health services.

64. The Commissioner is satisfied that the reputation of the University as a centre of research would be called into question if NCISH released data which had been provided to it on a confidential basis. If this data was then misinterpreted on the basis of the small numbers and small areas concerned, the Commissioner is satisfied that the potential prejudice to the University's reputation is likely to be highly damaging.

65. As this is likely to jeopardise the response rates and the research reputation of NCISH, by extension the Commissioner accepts that it is also likely to prejudice its ability to influence safety measures in mental health care. This would not be in the public interest.

66. The Commissioner has accorded some weight to the argument that there is some public interest in knowing how a particular area is managing its mental health patients. She appreciates the need for openness and transparency.

67. However the Commissioner understands that this research relies upon the trust and confidence of the agencies concerned. She is also mindful of the potential difficulties which would be caused by the disclosure and misinterpretation of a small sample of figures.

68. The Commissioner also considers that there is a weighty public interest in maintaining the confidentiality of patient information so that patients are not put off from seeking medical treatment for fear of the details of their medical history being made public.

69. The Commissioner therefore considers that the public interest in disclosing this information is not of such significance that it outweighs the considerable interest in maintaining the confidentiality of the information in question.

Conclusion

70. In conclusion, the Commissioner is satisfied that the requested information was provided in confidence by the Trust to the University and originally by the patients to the Trust. She is satisfied that disclosing the requested information would be a breach of confidence where action could be taken by the families of the individuals in question and the Trust. Furthermore, in such circumstances, the Commissioner does not consider that a public interest defence could be relied upon.

71. Therefore, the Commissioner finds that in this case, the information was correctly withheld under section 41 of the FOIA.

72. Because the Commissioner has found that section 41 is engaged, she has not gone on to consider the application of section 22A in this case.

Right of appeal

73. 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

74. 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.

75. 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 ……

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