

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 July 2018

Public Authority: Homerton University Hospital NHS Foundation Trust

Address: St. Leonards Hospital
A Block, 2nd Floor
Nuttall Street
London, N1 5LZ

Decision (including any steps ordered)

1. The complainant has requested information about maternal deaths since 2013 and the serious incident reports. Homerton University Hospital NHS Foundation Trust (the Trust) provided the statistical information for Q1 of the request but refused to provide the serious incident reports for Q2 of the request.
2. The Information Commissioner's decision is that the requested information is exempt from disclosure by virtue of section 41 of the FOIA (information provided in confidence) to withhold the remaining information at Q2. The Commissioner does not require any steps to be taken.

Request and response

3. On 24 July 2017 the complainant requested the following:

'This information relates for maternal deaths which have occurred at the trust or whilst a patient was under the trust's care in the following years: 2013, 2014, 2015, 2016, 2017.

Please send me the below information.

1. *How many maternal deaths have occurred at the trust or whilst a patient was in the trust's care during or after their pregnancy in each of the following years: 2013, 2014, 2015, 2016, 2017.*

2. For each maternal death mentioned in question 1, please send through the anonymised serious incident report in to each patient's death. (Please feel free to remove/redact any reference to the patient's identity and any reference to a member of staff's identity)

4. On 31 August 2017 the Trust provided a full response for Q1 and refused to provide the information for Q2 citing confidentiality to deceased patients.
5. The complainant requested an internal review on 31 August 2017. The Trust sent the outcome of its internal review on 9 November 2017 upholding the decision.

Scope of the case

6. The complainant contacted the Commissioner on 21 December 2017 to complain about the way her request for information had been handled.
7. The Trust did not specify an exemption in the responses to the complainant for Q2 but cited 'confidentiality'. Therefore, the Commissioner considers the focus of the investigation to be whether the Trust was entitled to rely upon the exemption at section 41 (information provided in confidence) to withhold the remaining information at Q2.

Reasons for decision

Section 41 – information provided in confidence

8. 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."*
9. The Trust provided the Commissioner with the withheld information. The documents contain the anonymised Serious Incident – Root Cause Analysis Reports with Recommendations/Action Plans.
10. The complainant states that she has received this information from the Trust before relating to two serious incidents. The Trust confirmed that it

has never released anonymised or redacted serious incident reports as part of a FOI request:

'We made it clear in that response, that apart from acknowledging that two patients had died, that we would not provide any further personal sensitive information...However, we did provide you with generic information around process issues that were identified, lessons learned and appropriate process changes made. This was adjudged to be generic information and not likely to re-identify the two deceased patients or cause potential undue distress to family and relatives. We therefore do not believe that a precedent was set in relation to that request.'

Was the information obtained from another person?

11. The Trust stated that the information contained within the serious incident reports was provided by the patient themselves, their family members or their medical history. The reports contain identifiable information such as the date of admission, date of death, details of treatment and highly sensitive information. The Commissioner is satisfied that the information was obtained from another person(s).

Would disclosure constitute an actionable breach of confidence?

12. 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?

13. 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.
14. Having viewed the withheld information, the Commissioner is clear that the serious incident reports (as a whole) contain detailed and sensitive information on medical health, treatment and death, and in some reports (but not all) information on access to reproductive medicine and outcome, genetic health, mental health, social care, religious beliefs that affect access to care, drug and alcohol misuse, ethnicity, rare medical conditions, previous or family health problems and post-natal care of the patient's children.

15. The Trust has stated that all information provided to it in relation to the patients' care has the necessary duty of confidence – it is highly sensitive, is not otherwise accessible, and the patients or their representatives would attach importance to it.
16. The Commissioner notes that although the principal confider, i.e. the mother/patient has died, the duty of confidence can survive beyond death and can be enforced by the deceased's personal representative.
17. Based on the above, the Commissioner accepts that the information cannot be said to be trivial as it contains detailed information about each patient which is not publicly available or otherwise accessible. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.

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

18. As discussed above, the requested reports concern the circumstances surrounding the medical care and deaths of particular individuals. The information contains the medical actions of various professionals. It also contains information provided indirectly by the deceased individuals via their medical records and their previous consultation(s) with health professionals.
19. The Trust has stated that the information was provided in conditions where there was an obligation of confidence, in that the patients were accessing medical care: *'confidentiality of medical information is well understood to be implicit; and it is not reasonable to suppose the patient or their representatives would authorise or expect disclosure of the information contained in the reports.'*
20. The Commissioner is mindful of the test set out in *Coco v AN Clark (Engineers) Ltd [1969] RPC 41*, specifically:

"...if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence".

21. Following this, the Commissioner considers that the circumstances, nature of and way in which the withheld information was supplied to it by the patients and their families impliedly and expressly confirmed that it would retain a confidential quality and that the Trust would not share information provided as part of this process under FOIA. The Commissioner is satisfied that an obligation of confidence has been created.

Would disclosure be of detriment to the confider?

22. The Trust has confirmed that it considers the distress caused by disclosure of the information to the world at large *'would constitute a detriment to others in terms of distress that would be actionable.'*
23. The Commissioner accepts that disclosure of the requested information, which, as stated above, contains detailed and highly sensitive medical information would be a loss of privacy which can be a detriment in its own right. It is therefore not necessary for there to be any detriment to the confider in terms of tangible loss, for this information to be protected by the law of confidence.
24. The Commissioner accepts the Trust's contention that disclosure of the withheld information would be likely to constitute a breach of confidence and the confider would be entitled to take action against the Trust.

Is there a public interest defence for disclosure?

25. 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 Trust could successfully rely on such a public interest defence to an action for breach of confidence in this case.
26. The Commissioner has not been presented with any evidence to suggest that the public interest in disclosing these serious incident reports is of such significance that it outweighs the considerable interest in maintaining the confidence of the health and medical care information in question.
27. The Commissioner accepts that there is a general public interest in public authorities being open and promoting transparency and accountability.
28. The Trust considered whether each report could be potentially redacted further to remove all of the confidential information. However, the Commissioner's view is that this would be extremely difficult to do as there is confidential, identifiable or highly sensitive information in every part of the report. Even the Recommendations part of the serious incident reports contain references to confidential information and would be difficult to redact meaningfully.
29. The Commissioner is mindful of the wider public interest in preserving the principle of confidentiality. 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.

30. Having considered all the circumstances of this case, and the withheld information, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information.
31. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA.

Right of appeal

32. 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

33. 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.
34. 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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