

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 July 2021

Public Authority: Department of Health and Social Care
Address: 39 Victoria Street
London
SW1H 0EU
United Kingdom

Decision (including any steps ordered)

1. The complainant has requested a copy of the written statement provided by Ian Paterson to the Inquiry into his malpractice.
2. The Commissioner's decision is that the Department of Health and Social Care (DHSC) is entitled to rely upon section 41(1) (information provided in confidence) as its basis for refusing to disclose the requested information.
3. The Commissioner does not require the DHSC to take any steps to ensure compliance with the legislation.

Request and response

4. On 5 June 2020, the complainant wrote to the DHSC and requested information in the following terms:
"Please provide a copy of the written statement provided by Ian Paterson to the inquiry into his malpractice."
5. The DHSC responded on 2 July 2020 and confirmed that it held a redacted copy of the statement. It refused to disclose the statement, citing section 41.
6. Following an internal review the DHSC wrote to the complainant on 30 July 2020, upholding its original position.

Scope of the case

7. The complainant contacted the Commissioner on 31 July 2020 to complain about the way that their request for information had been handled, citing the compelling public interest in disclosure of the requested information.
8. The Commissioner considers the scope of her investigation to be to determine if the DHSC is entitled to rely on section 41(1) as basis for refusing to disclose the requested information. For the purpose of this notice the requested information will be known as 'the statement.'

Reasons for decision

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9. Section 41(1) of the FOIA states that information is exempt from disclosure under the FOIA 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."

Was the information obtained from another person?

10. The DHSC has explained that the statement was provided to the Inquiry by Mr Paterson.
11. The Paterson Inquiry subsequently provided the DHSC with a redacted version of the statement as part of a set of documents to be retained by the Government as a record of the Inquiry. By way of background, the Paterson Inquiry, the aim of which was to investigate Mr Paterson's malpractice and to make recommendations to improve patient safety, concluded with the publication of the Paterson Inquiry Report¹ in February 2020.
12. With the above in mind, the Commissioner is satisfied that the statement was provided to the DHSC by another person.

Would disclosure constitute an actionable breach of confidence?

¹ [Paterson Inquiry report - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

13. For section 41(1)(b) to be met disclosure of the withheld information must constitute an actionable breach of confidence. In line with the decision reached in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415, a breach will be actionable if it meets three criteria:

- a) The information has the necessary quality of confidence.
- b) The information was communicated in circumstances importing an obligation of confidence.
- c) Unauthorised disclosure would cause a specific detriment to either the party which provided it or any other party.

The decision reached in *Coco v Clark* is referenced within the ICO's guidance, '*Information provided in confidence (section 41)*'.²

Does the information have the necessary quality of confidence?

14. Information will have the necessary quality of confidence if it is more than trivial, and is not otherwise accessible.
15. Mr Paterson provided his statement to the Inquiry in line with the Inquiry's Information Handling and Privacy Notice which states "*The Inquiry will only share information with those who need to see it for the purposes of fulfilling the Inquiry's terms of reference.*" This would include a relevant employer, professional or quality regulator or the police or prosecuting authorities should the Inquiry receive information that indicates a criminal or disciplinary offence.
16. The DHSC has explained to the Commissioner that, in line with the Inquiry's Information Handling and Privacy Notice, the statement has not been published or reproduced as part of the Inquiry's report. In accordance with this notice, the statement has only been shared accordingly: (i) to the DHSC in redacted form, (ii) to HM Senior Coroner for the Birmingham & Solihull areas in unredacted form in response to a Notice under Paragraph 1 of Schedule 5 to the Coroners and Justice Act 2009 and (iii) to the General Medical Council in redacted form in response to a request for information under section 35A(1) to the Medical Act 1983 for fitness to practice procedures. In each instance, the information has been shared on the basis that it will be kept confidential subject to any legal requirements or provisions that the

² <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

receiving organisation is subject to and any investigation that the statement is being used to inform. This includes the provision of the statement to the Commissioner.

17. The inquiry dealt with sensitive information relating to Mr Paterson's former patients. The statement has personal significant for Mr Paterson and includes a request from Mr Paterson and his legal team to be informed if any application for disclosure is made, either pursuant to statute or via a court. The request outlines that Mr Paterson and his solicitors regard the statement as subject to a continuing duty of confidence.
18. With the above in mind, the Commissioner is satisfied that the statement is more than trivial, and is not otherwise accessible. Therefore it has the necessary quality of confidence.

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

19. The DHSC has explained that the statement was provided to the Inquiry in confidence and in accordance with its Information Handling & Privacy Notice which specifically refers to the Inquiry's obligation of confidence. Specifically, the Notice highlights that all members of the Inquiry team are subject to professional obligations regarding confidential and official information, both during their employment with the Inquiry and afterwards. The Notice makes it clear that information would be used only to the extent necessary to exercise of the Inquiry's functions and for the purposes of fulfilling the objective outlined in paragraph 11.
20. Mr Paterson's legal team have outlined the voluntary basis under which Mr Paterson provided his statement to the Inquiry under the assurance that it would be treated with the strictest confidence. The Inquiry was not a statutory one and did not have the power to compel a witness to provide a statement. Had the possibility of disclosure been discussed, it is likely that Mr Paterson's legal team would have advised him against providing such a statement.
21. With the above in mind, the Commissioner is satisfied that the statement represents information that was imported by Mr Paterson in confidence. This was not an implicit, reasonable expectation of confidence but an explicit reassurance. Furthermore, this information was then provided to the DHSC by the Inquiry under the same reassurance.

Would unauthorised disclosure cause a specific detriment to either the party which provided it or any other party?

22. The DHSC has confirmed it considers disclosure would cause a specific detriment to Mr Paterson, the DHSC itself and other parties.

23. Firstly, there is a concern that disclosure of information not already in the public domain could fall into the hands of the media which would not only cause distress to Mr Paterson, and the patients and their families whose accounts are relayed within the statement, but jeopardise the ongoing Senior Coroner's investigation as referred to within paragraph 16.
24. Furthermore, the DHSC has explained that should the statement be disclosed, given the obligation of confidence under which it was imparted, Mr Paterson would consider a claim for breach of confidence against the DHSC.
25. With the above in mind, the Commissioner is satisfied that disclosure would cause a specific detriment to both the party that provided it as well as other parties.

The common law duty of confidence and the public interest

26. While section 41(1) of the FOIA is an absolute exemption, and therefore not subject to the public interest test, 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 which is usually applied under the FOIA).
27. Within their internal review request of 2 July 2020, the complainant argued strongly that disclosure is within the public interest and the wider public would not consider the information worthy of protection. Furthermore, the complainant explained that any court action sought as a result of the breach of this confidence would be unlikely to succeed as the public interest in this information, given the number of patients that Mr Paterson treated, is so high.
28. The DHSC has acknowledged the public interest in transparency, specifically in relation to information that may reveal evidence of malpractice, wrongdoing, maleficence, negligence, maladministration and gross misconduct and the Commissioner considers that these factors carry significant weight in support of disclosure.

The Commissioner's view

29. Returning to paragraph 26, the Commissioner does not consider that the public interest in disclosure outweighs the public interest in maintaining the duty of confidence. She notes that details of Mr Paterson's offenses are already in the public domain.
30. Whilst the Commissioner acknowledges the complainant's arguments, she notes the difference between what the public may be interested in

and what is in the best interests or greater good of the public. Whilst the Paterson Inquiry has been widely reported in the media, this does not necessarily mean that the public would be best served by the disclosure of this information.

31. The Commissioner notes that the Paterson Inquiry, the aim of which was to investigate allegations of malpractice and to make recommendations to improve patient safety, has been concluded and the findings published without the disclosure of the statement to the world at large. The statement has been considered by the Inquiry and used to inform the Paterson Inquiry Report which is within the public domain.
32. The full statement has been provided to the Senior Coroner for the purposes of its investigations and to the GMC in redacted form in relation to its fitness to practice procedures. The Commissioner is satisfied that the organisations that require the statement to inform their regulatory and statutory functions, in the interest of public safety and health, have received it. Keeping in mind that the findings of the Inquiry are in the public domain, the Commissioner concurs that there is no addition to public safety that would be achieved in the disclosure of the statement.
33. Furthermore, the Commissioner concurs with the DHSC's assertion that any residual public interest in the Paterson Inquiry does not outweigh the 'chilling effect' upon future non-statutory inquiries should the DHSC disclose the statement which has been provided under an obligation of confidence. The willingness of witnesses to provide voluntary evidence to inquiries is crucial to the ability to conduct thorough and independent investigations. It is within the public interest that inquiries are conducted as thoroughly and robustly as possible so they may produce the most appropriate lessons and outcomes.
34. Having fully considered the circumstances of this case and the withheld information, the Commissioner's decision is that the DHSC has correctly withheld the information under section 41(1) of the FOIA.

Right of appeal

35. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

36. 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.
37. 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

Alice Gradwell
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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