

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 May 2023

Public Authority: Liverpool Heart and Chest Hospital NHS Foundation Trust

Address: Thomas Drive
Liverpool
L14 3PE

Decision (including any steps ordered)

1. The complainant has requested a report on patient deaths. The above public authority ("the public authority") disclosed some of the report but relied on section 41 (breach of confidence) of FOIA to withhold the remainder.
2. The Commissioner's decision is that the public authority has correctly relied on section 41 of FOIA to withhold the information.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 20 January 2023, the complainant requested information of the following description:

"Royal College of Surgeons Report from September 2022, which was made available to the trust in December/January 2023 into cardiac / thoracic / cardiothoracic surgery at the trust."
5. On 10 February 2023, the public authority responded. It provided some information within the scope of the request but refused to provide the remainder. It relied on section 41 of FOIA to withhold the information.
6. The complainant requested an internal review on 19 February 2023. The public authority sent the outcome of its internal review on 21 March 2023. It upheld its original position.

Scope of the case

7. During the course of the Commissioner's investigation, the public authority indicated that it felt it "should have engaged section 40" in respect of the personal clinical information because it would be personal data. The Commissioner does not consider that this is correct as the only individuals identifiable from the withheld information are those who are now deceased. Information can only be personal data if it relates to a living individual.
8. The Commissioner has therefore considered whether section 41 of FOIA is engaged.

Reasons for decision

9. Section 41 allows a public authority to withhold information that it has received from another person and whose publication, outside of FOIA, would constitute an actionable breach of confidence.
10. The report itself was provided to the public authority by the Royal College of Surgeons and the part being withheld (Appendix A) contains details of patients' medical records and treatment – information which the public authority has received from other people (the patients).
11. Having reviewed the withheld section, the Commissioner is satisfied that individuals could be identified. The information consists of a series of case studies on patients who died during or after surgery.
12. Each case study contains the age of the patient, their gender, date of admission and the condition with which they presented. It also contains a detailed account of the course of treatment provided to the patient and their date of death.
13. The Commissioner is satisfied that the detail contained within each case study is sufficiently granular to allow each patient to be identified. For example, if a person knows their neighbour was admitted to hospital on a particular date (and has a rough idea of what caused them to be admitted), but subsequently died, they may well be able to identify their neighbour by reference to their age, gender, date of admission and presenting condition. This might not be a breach of confidence in itself (because it is information the person already knew) but, having successfully identified their neighbour, that person would then be able to use the withheld information to find a detailed description of the medical treatment that their neighbour had received – which they almost certainly would not already have known.

14. In order to establish a breach of confidence action, three conditions must be met. The first is that the information must not be trivial or in the public domain. Medical records are not trivial.
15. Whilst some of the information in the report may have been presented to the coroner, the Commissioner does not consider that this amounts to the information being in the public domain. Firstly, there is no confirmation that every part of the information was read out during a public inquest. Secondly, even if every piece of information had been read out, the pool of people likely to be able to identify the individuals from the information will be considerably larger than just those who actually attended any hearing – meaning the information is likely to receive a considerably larger audience as a result of disclosure. The Commissioner is therefore satisfied that this information is not currently in the public domain in the sense of being widely and easily available to anyone wishing to access it.
16. The second condition is that the information must have been imparted in circumstances that import a duty of confidence. Whilst no formal confidentiality agreements may exist, the Commissioner considers it not just implicit but fundamental to the doctor-patient relationship that details about a person's medical history and treatment are confidential. It is well established in law that a duty of confidence does not end just because the confider has died.
17. The third condition is that an unauthorised use of the information must be detrimental to the confider.
18. The complainant claimed (despite having not seen the information) that there was "nothing for the relatives to be upset over" as the details should already have been passed to the coroner. In his view, as each patient underwent either heart or lung surgery these were "not intimate personal details that cause embarrassment or stigma to the deceased or living relatives."
19. The Commissioner considers that there would be a considerable detriment to the families of each patient if the information were to be disclosed.
20. The arguments that the complainant has provided rather miss the point. Making a relative's confidential medical records available to the general public is, in itself, an invasion of privacy – irrespective of the type of medical care the person actually received. It is not necessary to demonstrate that publication would cause particular embarrassment – the invasion of privacy alone is sufficient to establish detriment.
21. Furthermore, the Commissioner considers that, given that most of the individuals died between seven and eight years prior to the request

being made, disclosure now would cause the family to relive the trauma of having lost their loved one – a trauma that would be compounded by knowing that confidential medical information about their loved one's final days was being published for all to see, without their consent.

22. The Commissioner is thus satisfied that the conditions necessary to establish a breach of confidence are met and that there is a high likelihood that each of the patients still has surviving relatives able to bring a claim for breach of confidence.
23. The final test for section 41 to apply is that the breach must be actionable. This means that there must be a good chance of such an action succeeding because the public authority would not have a valid defence to such a claim.
24. A public authority can defend itself against an action for a breach of confidence if it can establish a public interest defence – that the breach of confidence was necessary in the public interest. The Commissioner is not satisfied that such a defence would be viable here.
25. The public authority has disclosed the vast majority of the report. This reveals the findings of the investigation – including those specific to the patients (but in an anonymous form). There is therefore ample opportunity for the public to scrutinise the report's findings without needing access to the confidential medical details contained in Appendix A. The public authority also has the opportunity to share the complete unredacted report with its board and with any clinical staff that might need to be aware. This is clearly less intrusive to the privacy and dignity of the patients and their families than publishing the information.
26. The complainant has highlighted examples of what he claims are similar reports that have been published in apparently unredacted form. The Commissioner has considered these reports but they either do not contain the sort of granular detail that the withheld information contains, or permission has been obtained for patients to be identified. The public authority did not indicate that any of the patients had given consent and it is under no obligation to seek such consent.
27. The Commissioner is thus satisfied that it would be an actionable breach of confidence for the public authority to publish this information and, as such section 41 of FOIA applies.

Right of appeal

28. 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

29. 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.
30. 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

Roger Cawthorne
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