

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 November 2012

Public Authority: NHS London
Address: Southside
105 Victoria Street
London
SW1E 6QT

Decision (including any steps ordered)

1. The complainant has requested that NHS London confirm the number of Serious Untoward Incidents (SUIs) of selected types which were recorded during the 2011 calendar year. In addition, he has asked NHS London to provide a description of each of the SUIs. NHS London disclosed the number of recorded incidents but considered that the descriptions were exempt information pursuant to section 41 (information provided in confidence), and in some cases section 40(2) (third party personal data), of FOIA.
2. The Commissioner's decision is that the requested information can be released subject to redactions that would anonymise the information. He therefore requires NHS London to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information with the following details redacted –
 - Times and dates
 - References to geographical place names
 - Names of individuals
 - Age of patients
 - Information described in Table 2 of the confidential annex
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the

Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 5 January 2012 the complainant wrote to NHS London and requested information in relation to the SUIs recorded during the 2011 calendar year:
 - *How many reports did you have of surgical errors? Please give a description of each one.*
 - *How many medical equipment failures did you record? Please give a brief description of each one.*
 - *How many drug incidents did you record? Please give a brief description of each one.*
5. NHS London responded on 19 January 2012. It disclosed the number of incidents that had occurred for each of the categories specified (surgical errors: 45; equipment failures: 5; drug incidents: 45) but refused to provide a description of each of the incidents, citing section 41 of FOIA as its basis for doing so.
6. The complainant wrote to NHS London again on 12 March 2012 challenging its decision not to provide the descriptions referred to in the requests. NHS London subsequently carried out an internal review, the outcome of which was sent to the complainant on 10 April 2012. This focused on the information contained in its StEIS (Strategic Executive Information System) database under the heading 'Description of what happened'. NHS London upheld its original position that this was exempt information under section 41 of FOIA but also claimed that section 40(2) applied in part.
7. NHS London did consider the possibility of redacting the description featured in each of the SUI reports in order to make it anonymous but concluded that this would render the information meaningless. It also pointed to the strain that providing summaries upon request would place on the organisation.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular, he disagrees

both with the decision of NHS London to withhold all of the information contained in the 'Description of what happened' section of an SUI report on StEIS and its view that redaction would render the information meaningless.

9. For the purposes of the investigation, the complainant has confirmed that he is content for any identifying data contained in an incident report description to be redacted. The Commissioner has therefore proceeded on this basis.
10. To ensure that the confidence of information is not undermined inadvertently when being discussed, the Commissioner has attached a confidential annex to the end of this notice.

Reasons for decision

11. In this case NHS London has sought to rely on sections 41 and, in part, 40(2) to withhold the requested information. The Commissioner has first considered the application of section 41.

Section 41 – information provided in confidence

12. Section 41 of FOIA provides 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 than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
13. In his decision on FS50299667¹ the Commissioner accepted that information contained in an SUI report was obtained by a strategic health authority, again NHS London, from a third party. Likewise, the Commissioner considers that this same finding applies here, with the information being provided by the reporting NHS organisation directly or ultimately from the patient. A confider/confidant relationship having been established, it therefore follows that the Commissioner must next consider whether disclosure would be a breach of confidence.

¹ [http://www.ico.gov.uk/~media/documents/decisionnotices/2010/fs_50299667.ashx](http://www.ico.gov.uk/~/media/documents/decisionnotices/2010/fs_50299667.ashx)

14. In the judgment of Megarry J in *Coco v AN Clark (Engineers) Limited [1968] FSR 415*, the test of whether a breach of confidence is potentially actionable depends on three elements. Firstly, the requested information must have the necessary quality of confidence. Secondly, the information must have been imparted in circumstances that introduce an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the confider. Even if all of these conditions are satisfied, however, there exists a public interest defence to a breach of confidence which means that such a breach would not necessarily be actionable in the circumstances.
15. It is common ground that the rights of an individual to privacy are vital. In the case of section 41, it is recognised that the protection of these rights should continue even after the death of an individual. Therefore, any decision which could potentially impact on the privacy of an individual must be taken with great care and sensitivity. These concerns will be amplified where the information being considered relates to a personal issue such as healthcare; the anxiety caused by an inadvertent disclosure being acute. Therefore, a tension exists between FOIA's promotion of transparency and the need on many occasions to safeguard personal information.
16. Apparently attentive to this tension, the complainant has clarified that any data which identifies a person can be redacted from the SUI case summaries. The first question that must therefore be considered by the Commissioner is whether the requested information can be anonymised without rendering it meaningless.
17. Where it is not possible to identify the subject of information from the material to be disclosed, either on its own or together with other information available to the general public, it is no longer necessary to consider each limb of the section 41 test of confidence. This is because there can be no expectation of confidence and no detriment to the confider by way of an invasion of privacy. In short, there can be no breach of confidence to action. For the sake of completeness, the Commissioner notes that personal information is only one category of information to which section 41 can apply. In this case, though, the issue is one of personal information and the possibility that an absence of identification means there can be no invasion of privacy.
18. The test of whether information is truly anonymised is if, on the balance of probabilities, a member of the public can identify individuals by cross-referencing the 'anonymised' data with information or knowledge already available to the public.
19. Perhaps the most obvious example of a situation in which a patient could be identified from information is where a record contains the name

of that patient. This is not a relevant consideration in this case, however, because the StEIS descriptions do not feature names of patients. Nevertheless, the Commissioner is not blind to the possibility that identification could still occur by piecing together the relevant facts of an incident. For instance, even in the absence of a name, it is conceivable that a person could be recognised from the information by a member of the public living in the local area if a characteristic of a patient was referenced, such as their age, and the incident in question was particularly memorable or noteworthy.

20. A test used by both the Commissioner and the Information Tribunal in borderline cases is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of re-identification of an individual from information which, on the face of it, appears truly anonymised.
21. Of course, the risk of re-identification will be even more vivid where someone has personal knowledge of an individual. However, the Commissioner considers that in these circumstances the privacy risk is low, given that re-identification would depend on an individual already having access to a significant amount of information about that identified person.
22. Taking into account these considerations, the Commissioner has explored whether a consistent approach to the anonymisation of the 95 summaries of the incidents can be made which would protect the identities of individuals from a motivated intruder. As stated, the Commissioner must also bear in mind that the anonymisation of information is only appropriate where the information that is left intact, ie is not redacted, retains some descriptive value. On this point, NHS London has argued that effective anonymisation is not possible, which would potentially have the effect that the exemption provided by section 41 comes into effect.
23. To place the request in context, the Commissioner has first familiarised himself with the process relating to the reporting of SUIs, now referred to as Serious Incidents (SIs).
24. In March 2010 the National Patient Safety Agency (NPSA) launched the first release of a National Framework for Reporting and Learning from Serious Incidents Requiring Investigation. This was intended to provide national consistency in the definition of a serious incident and clear roles, responsibilities and timescales for completing Serious Incident

investigations. NHS London has endorsed NPSA's framework, adopting its recommendations within its policy on Serious Incident Reporting.²

25. According to this policy all London organisations, including Foundation Trusts, must use StEIS to report SIs. StEIS is a web-based system developed by the Department of Health which allows Strategic Health Authorities to gather report information and data directly from Trusts. A SI must be reported as soon as possible after the incident is detected and no later than two working days of the incident being identified. Furthermore, the StEIS record must be updated as the situation changes, which could be weeks or months after the original incident. In this case the withheld material comprises summary information of SIs which is contained within the StEIS database under the category "Description of what happened".
26. NHS London itself is the Strategic Health Authority for the whole of the Greater London area. It has overall responsibility for the performance of 31 primary care trusts – which operate in five clusters, 16 acute trusts, three mental health trusts and the London Ambulance Service. It is clear then that NHS London oversees organisations which, together, cover a large geographical area.
27. In terms of the disputed information, the complainant has clarified what categories of information are not required by him and can therefore be removed from consideration –
 - The times and dates of incidents.
 - The geographical location of the incident. This includes the hospital where a patient was admitted.
 - The age of a patient.
28. Generally speaking, the summaries of the incidents share common characteristics – they briefly describe the circumstances in which an incident took place, recount what had occurred and, where appropriate, detail any outcome arising from an incident. By definition, SIs are of a serious nature. However, it would be a mistake to assume that all, or indeed most, SIs attract wider attention or publicity.

²<http://www.london.nhs.uk/webfiles/Corporate/Serious%20incidents/NHSL%20Serious%20Incident%20Policy%20November%202010.pdf>

29. In two instances, both of which record failures of medical equipment, the Commissioner has found that the incidents described are not linked to a particular person. As the issue of identification does not therefore arise, the Commissioner considers that these descriptions should be disclosed in their entirety. For clarity's sake, this information is reproduced in the confidential annex attached to the notice (table 1).
30. For the remaining information, the Commissioner has accepted that the redaction of the above categories of information will be sufficient to anonymise a number of the descriptions. This is because they remove to a greater degree the contextual information upon which the identification of a patient hinges.
31. In forming this opinion, the Commissioner has linked the fact that the complainant does not require details of the organisation where an incident occurred with the status of NHS London itself. Specifically, he has reminded himself of the significant number of organisations that report to NHS London and the large geographical territory that these organisations cover.
32. In the Commissioner's view, the removal of an incident's location imposes a barrier to an attempt made by a motivated intruder to trace the SI to a patient or any individual that features in a description, such as a member of staff. This point has particular resonance when we consider the number of patients treated by the various organisations, the numerous procedures that are performed and the relatively wide timeframe, 12 months, in which an incident could have taken place.
33. The Commissioner, though, accepts that caution must be exercised when considering information of a sensitive nature. For example, it is not difficult to imagine that a motivated intruder could contact the various individual Trusts with the aim of seeking similar SI information relevant to a specific organisation. Through a process of comparison, it might be possible to 'map' where the SIs took place. This would not, of course, necessarily result in the re-identification of an individual but it could bring a motivated intruder one step closer towards this goal.
34. The Commissioner has therefore explored the wider consequences of disclosure. Building on this point, the Commissioner has decided that the scope of the three categories listed above would need to be strengthened, or expanded upon, for the anonymisation steps to be effective.
35. Firstly, having had sight of the withheld information, the Commissioner believes that *any* times and dates included in the descriptions should be removed. Secondly, he would wish to clarify that, in conjunction with the removal of any information identifying a hospital, it is appropriate that

any information relating to the site where a patient was tended to or any other place or business name should be redacted. This would also include the names of any staff members included in the descriptions, on the basis that they could be linked to a specific hospital.

36. These precautions should, to the Commissioner's mind, defend against a motivated intruder being able to identify an individual by piecing together an SI summary with external information. In making this finding, the Commissioner has reminded himself of references made in the information to job titles of staff. However, he is satisfied that by taking the above steps a particular member of staff could not be identified from this information. Furthermore, the Commissioner considers that the overall effect of the redactions would not render the descriptions meaningless.
37. As a general rule, the Commissioner has decided that by taking the action described above NHS London could facilitate the disclosure of the requested information within the provisions of FOIA. However, as with many rules, there are exceptions. Here, the wide differences in the descriptions mean there is a limited amount of outlying information which nevertheless deserves protection. This is where the features included in a description are especially recognisable or uncommon. In the Commissioner's view these unusual aspects would increase the likelihood that a patient could be connected to an incident summary.
38. In each of these cases the Commissioner has decided that further redactions are warranted but is satisfied that the extent of these would not ultimately undermine the value of the information. These redactions are set out in the confidential annex (table 2).
39. In order for section 41 to apply it is necessary for all of the relevant elements of the test of confidence to be satisfied. Therefore, if one or more of the elements is not satisfied then section 41 will not apply. The Commissioner has explained why he considers it would not be possible to reliably identify an individual as the subject of the withheld information from its contents or if it is linked with other material available to the general public if the specified redactions were made. In such circumstances, he considers there can be no expectation of confidence or that disclosure would cause detriment by way of an invasion of privacy. It therefore follows that there can be no breach of confidence to action and section 41 does not apply.

Section 40(2) – third party personal data

40. In addition to the application of section 41 of FOIA, NHS London has argued that section 40(2) will be engaged where the summary of an incident relates to a living person. Section 40(2) of FOIA states that

information is exempt if it constitutes the personal data of a third party (other than the applicant) and one of the conditions listed in sections 40(3) or 40(4) is satisfied.

41. Personal data is defined by section 1 of the Data Protection Act 1998 (DPA). This describes it as data which relate to a living individual, who can be identified from that data, or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
42. For the reasons previously stated, the Commissioner has accepted that disclosure of some of the requested information is likely, on the balance of probabilities, to lead to the identification of living individuals. Where this could occur, a summary would comprise personal data for the purposes of the DPA and, in turn, potentially be subject to section 40(2) of FOIA.
43. The central question that has been addressed by the Commissioner in this case is whether the requested information is, or can be made to be, anonymous. It is the view of the Commissioner that truly anonymised information is not personal data and thus there is no need to consider the application of any data protection principles when considering whether the information should be disclosed.
44. In his analysis of the application of section 41, the Commissioner has explained that the requested summaries could be redacted in a way that would prevent the reliable identification of any individuals. This finding equally applies here. In effect, the redaction of the information means that the definition of personal data would not be met. This is because a living individual could not be identified from the requested information which is in the possession of, or is likely to come into the possession of, a member of the public. The consequence of this is that section 40(2) is not engaged.

Right of appeal

45. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

46. 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.
47. 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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