

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 January 2013

Public Authority: Mid Staffordshire NHS Foundation Trust

Address: Stafford Hospital
Weston Road
Stafford
ST16 3SA

Decision (including any steps ordered)

1. The complainant submitted a request to the Mid Staffordshire NHS Foundation Trust (the Trust) for a copy of the internal investigation into the death of a baby. The Trust initially withheld the information within the scope of the request, namely the original internal incident investigation, on the basis of section 22 (information intended for future publication) of FOIA. The Trust subsequently withdrew its reliance on this exemption during the course of the Commissioner's investigation but did not formally cite any further exemptions. In the particular circumstances of this case the Commissioner took the decision to proactively consider section 41 (information provided in confidence) of FOIA in relation to this request and he has concluded that the vast majority of the withheld information is exempt from disclosure on the basis of this exemption. The only exception to this is one paragraph which, with the exception of the names of two staff members which have been withheld on the basis of section 40(2) of FOIA, the Trust has disclosed to complainant. The Commissioner has also concluded that the names of the staff members are exempt from disclosure on the basis of section 40(2).

Request and response

2. On 18 July 2012 the complainant wrote to the Trust and submitted a request for 'a copy of the internal investigation' into the death of a baby who had died on 29 June 2012. This formal FOI request followed a

number of previous requests the complainant had made for access to the report.

3. The Trust responded on 30 July 2012 and explained that it was withholding the report into the original internal incident investigation on the basis of section 22 of FOIA. The Trust explained that the report which had been requested now formed part of the wider serious incident investigation and in the Trust's opinion it was not in the public interest to publishing the requested information until the findings of the serious incident investigation was complete.
4. The complainant contacted the Trust on 31 July 2012 in order to ask for an internal review of this decision.
5. The Trust informed him of the outcome of the internal review 7 August 2012; the review upheld the application of section 22 as a basis to withhold the requested information.

Scope of the case

6. The complainant contacted the Commissioner on 15 August 2012 to complain about the way his request for information had been handled. The complainant argued that the Trust was incorrect to argue that the information he requested was exempt from disclosure on the basis of section 22. In particular he argued that in his opinion because the incident was only designated a serious incident after he had submitted his FOI request on 18 July 2012 it followed that the fact that an serious incident investigation was now under way could not therefore be used as a reason to refuse his request.
7. The complainant also asked the Commissioner to consider the fact that the refusal notice and internal review were conducted by the same person, when as a matter of good practice, the internal review should be conducted by a different person so that there is a 'fresh look' at the request.
8. On 10 October 2012 the Commissioner contacted the Trust and asked it to provide him with submissions to support the application of section 22, along with a copy of the withheld information. The Commissioner explained to the Trust that in his opinion its suggestion that disclosure of the requested information could prejudice the integrity of the serious incident investigation was not an argument that was relevant to section 22. The Commissioner explained to the Trust that if, in light of these comments, it considered other exemptions to apply to the withheld information it would need to provide the Commissioner with detailed submissions to support the application of these exemptions.

9. The Trust sent a response to the Commissioner dated 12 November 2012, albeit that the Commissioner did not receive this until 20 November 2012. In its response the Trust provided the Commissioner with a copy of the requested information and explained that it was no longer seeking to rely on section 22 of FOIA to withhold this information. However, it believed that section 30 of FOIA may be applicable, albeit that it did not provide any explanation as to why it was of this view.
10. At this stage, having reviewed the withheld information and considered the circumstances of this case the Commissioner informed both parties that he was of the view that the majority - but not all - of the information was exempt from disclosure on the basis of section 41(1) of FOIA. This was on the basis that medical records of the deceased are generally considered to be confidential and this includes circumstances where the person to whom the information relates has died. The Commissioner explained that in the circumstances of this present case he was of the view that the vast majority of the withheld information effectively reflected the content of deceased child's medical records because it detailed their symptoms and the treatment given.
11. The Commissioner therefore informed both parties that he intended to issue a decision notice which proactively applied section 41(1) to the majority of the withheld information despite the fact that the Trust had not actually cited this exemption itself. The Commissioner explained that he considered this to be an appropriate approach given his broader responsibilities under the Human Rights Act and in line with the approach he had taken in previous similar cases and supported by the decisions reached by the Information Tribunal in such cases.¹
12. The parts of the withheld information which the Commissioner did not believe were exempt from disclosure on the basis of section 41(1) was one paragraph of text which did not reveal any details about the child's condition or treatment and thus could not be said to reflect their medical record.

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Mayday Healthcare NHS Trust, FS50225818,
http://www.ico.gov.uk/~media/documents/decisionnotices/2009/FS_50225818.ashx

Bluck v the Information Commissioner & Epsom St Helier University NHS Trust
(EA/2006/0090)
<http://www.informationtribunal.gov.uk/DBFiles/Decision/i25/mrspbluckvinformationcommissioner17sept07.pdf>

13. In response, the Trust explained that it accepted the Commissioner's findings in relation to the application of section 41(1), i.e. the view that the majority of the information was exempt from disclosure on the basis of this exemption with the exception of one paragraph. At this stage the Trust disclosed this particular paragraph to the complainant albeit that it redacted the names of two staff members on the basis of section 40(2).
14. For his part, the complainant explained to the Commissioner that he did not believe that section 41(1) of FOIA provided a basis to withhold any of the information he had requested and provided submissions to the Commissioner to support his position. The complainant also asked the Commissioner to consider the Trust's decision to redact the names of the two staff members from the paragraph of information it did disclose on the basis of section 40(2). The decision therefore considers the application of both exemptions.
15. As noted above, the complainant also raised his concerns with the Commissioner that the individual who issued the refusal notice in relation to his request also conducted the internal review. The Commissioner cannot consider matters associated with the conduct of internal reviews in a decision notice because such matters are not a formal requirement of FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA. However, the Commissioner has commented on the complainant's concerns regarding the Trust's conduct of the internal review in the Other Matters section at the end of this notice.

Reasons for decision

Section 41 – information provided in confidence

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

17. Therefore for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third

party **and** the disclosure of that information has to constitute an actionable breach of confidence.

18. With regard to section 41(1)(b), in most cases the approach adopted by the Commissioner in assessing whether disclosure would constitute an actionable breach of confidence is to follow the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:
 - Whether the information had the necessary quality of confidence;
 - Whether the information was imparted in circumstances importing an obligation of confidence; and
 - Whether an unauthorised use of the information would result in detriment to the confider.
19. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

Was the information obtained from a third party?

20. In the Commissioner's view the information contained in medical records constitutes information obtained from a third party, namely the patient in question. This includes scenarios where the medical records are that of a deceased patient.
21. The complainant argued that he was seeking access to an untoward incident report and that such a document was not the same as patient notes. Furthermore, he queried how the report in question could be part of the child's medical notes given that the report post-dated the child's death.
22. The Commissioner agrees with the complainant that there is a clearly a difference between a patient's actual medical records and a report into the medical treatment that they have received. However, the Commissioner has carefully examined the contents of the withheld information and is satisfied that all of this information includes details of the child's symptoms and the treatment they received. In the Commissioner's view this is exactly the sort of information that would be included in the child's medical records and therefore although the withheld information is actually contained within the format of an incident report, it effectively contains the same information that would be found in the child's medical records. The Commissioner is therefore satisfied that the withheld information qualifies as information obtained from a third party.

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; information which is of importance to the confider should not be considered trivial.
24. The Commissioner is satisfied that the withheld information is clearly not trivial in nature. Furthermore, whilst there has been some media coverage of this case, in the Commissioner's view such coverage has not referred to the details which are included in the withheld information. Therefore, the Commissioner is satisfied that withheld information is not otherwise accessible to the public. The Commissioner is therefore satisfied that the withheld information in this case has the necessary quality of confidence required to sustain an action for breach of confidence.

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

25. In the Commissioner's opinion when patients submit to treatment from doctors and other medical professionals, whether that is in surgeries, hospitals or other institutions, they do so with the expectation that the information will not be disclosed to third parties without their consent. In other words, he is satisfied that an obligation of confidence is created by the very nature of the doctor/patient relationship and the duty is therefore implicit. This is further supported by the oath taken by doctors guaranteeing to protect doctor/patient confidentiality. The Commissioner is therefore satisfied that the withheld information, reflecting as it does the medical records of the child, was obtained in circumstances importing an obligation of confidence.

Would disclosure be detrimental to the confider?

26. The Commissioner considers that as medical records constitute information of a personal nature there is no need for there to be any detriment to the confider, in terms of any tangible loss, in order for it to be protected by the law of confidence. He has not therefore considered this issue any further.

Would disclosure of the confidential information be actionable?

27. Although section 41 of the FOIA is an absolute exemption and thus not subject to the public interest test contained at section 2 of FOIA, the common law concept of confidence suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. The Commissioner must therefore consider

whether the public interest in disclosing the information overrides the duty of confidence that is owed. The test to be applied in deciding whether the public interest provides a defence to a breach of a duty of confidence is that the duty should be maintained unless the public interest in disclosing the information outweighs the public interest in protecting confidences.

Public interest in maintaining the confidence

28. In light of the fact that the Trust did not cite section 41 itself it did not advance any specific arguments regarding the maintenance of confidence in the context of this exemption. However it did explain to the Commissioner that it considered it entirely inappropriate to disclose the withheld information elsewhere before it had gained the consent of the child's family, something which it had been unable to do. However, the Commissioner would concur with the comments of the Information Tribunal in *Bluck* that it is in the interest of patients to have confidence that medical staff will not disclose sensitive medical data before they divulge full details of their medical history and lifestyle. Without that assurance patients may be deterred from seeking advice and without adequate information doctors cannot properly diagnose or treat patients. This is counter to the public interest as it could endanger the health of patients, or in the case of transmissible diseases, the wider community.²

Public interest in disclosing the information

29. The complainant emphasised that this was a high profile and sensitive case about which there was considerable public interest: An ambulance was called to attend to a baby but the patient had could not be admitted to Stafford hospital, despite it being closest, because the accident and emergency ward was closed and the children's ward was full. (From 1 December 2011 the A&E department at Stafford Hospital was closed temporarily between 10pm and 8am seven days a week). The child was instead taken to University Hospital of North Staffordshire, some distance away. The complainant argued that as the A&E remains closed overnight this type of incident could happen again and there is a compelling public interest in disclosure of information that would reveal whether any errors had occurred, and if so, whether any lessons had been learnt from the incident. The complainant also believed that the Trust, to date, had not provided an accurate representation of incident in question. The complainant also argued that this particular case had to be seen a wider context, namely that the Trust had a particularly poor

² Paragraphs 19 and 26 of *Bluck*.

record of care and concealment and this had led to a number of investigations.

Balance of the public interest

30. The Commissioner acknowledges that it is clearly in the public interest that public authorities are open and transparent about actions and decision they take. Such openness can increase the public's trust in the bodies that serve them. In the context of this particular case disclosure of the withheld information would provide the public with details of the incident in question which go beyond the details already released by the Trust at the time. The Commissioner acknowledges that disclosure of this information would be in the public interest because it could either serve to reassure the public about the Trust's actions or alternatively could reveal, as the complainant suggests, details of errors that may have occurred. In the latter scenario the Commissioner agrees that if this were indeed the case – and he is not suggesting that it either is or is not – then he agrees with the complainant that there would be a clear public interest in disclosing the information so as to reassure the public that any lessons, if necessary, have been learnt from the incident. The Commissioner is also prepared to accept that the public interest in disclosing the information in this particular case is further heightened given the historic previous failures of the Trust deliver adequate levels of care and moreover certainly attracts further weight in light of the continuing closure of the A&E department overnight.
31. However, the Commissioner believes that the public interest in disclosing the withheld information, notable though it is, does not outweigh the very considerable, and in his opinion, compelling public interest in preserving the confidential nature of a patient's medical records. As noted above, although the withheld information does not actually comprise part of the child's medical records, in the Commissioner's opinion the content of the incident report effectively contains details of those records. Disclosure of the information in this case would breach the confidentiality of this particular patient's treatment and more broadly would undermine the confidence of all patients that their medical information would be treated confidentially. Furthermore, in the particular circumstances of this case the Commissioner agrees with the Trust that when considering the medical records of a baby it is relevant to consider the duty of confidence owed to the parents as guardians of the baby. Therefore, in the Commissioner's opinion further weight is added to the public interest in maintaining the duty of confidence in order to prevent any distress caused to the parents by disclosure of the withheld information under FOIA. (The Commissioner considers such an approach to be compatible with Article 8 of the Human Rights Act which provides a right to respect for both a private and a family life). Consequently, taking into account

the inverse nature of the public interest test under section 41(1), the Commissioner accepts that in this particular case, the public interest in protecting the confidence outweighs the public interest in disclosing the withheld information.

32. The Commissioner notes that the Tribunal in *Bluck* confirmed that even though the person to whom the information relates may have died, action for a breach of confidence could be taken by the personal representative of that person, and that therefore the exemption continues to apply. The Commissioner considers that in the circumstances of this case the duty of confidence is similarly capable of surviving the death of the confider. It is the Commissioner's view that in determining whether disclosure would constitute an actionable breach of confidence, it is not necessary to establish that, as a matter of fact, the deceased person has a personal representative who would take action.

Further submissions by the complainant

33. For the above reasons, the Commissioner is satisfied that the withheld information is exempt from disclosure on the basis of section 41(1) of FOIA. In his submissions to the Commissioner the complainant highlighted a number of reasons why he believed that the application of this exemption was incorrect. These reasons do not align directly to the Commissioner's analysis of the exemption contained at section 41(1) and therefore rather than consider these submissions above, he has set these out below and has then gone on to explain why he does not believe that they undermine his findings in respect of section 41(1). The complainant made the following points:
 34. Firstly, the complainant explained that he did not want to see any personal information about the child in question, rather simply to know the facts regarding any errors that may have occurred and lessons that needed to be learnt. He suggested that the withheld information he had requested could be disclosed in an anonymised form.
 35. Secondly, the complainant explained that he had received, and he knew other individuals who had received copies of serious untoward incident forms under FOIA and therefore to conclude that the information in this case was exempt from disclosure was inconsistent.
 36. Thirdly, the complainant argued that concluding that section 41(1) applied in this case would have broader consequences, namely: it would mean that serious untoward incident reports could not be passed onto other organisations for learning. (The complainant noted that such information was clearly passed on and reported at the Strategic Health Authority trust board). Furthermore, doctors would not be able to use case studies involving patients. The complainant also argued that such a

decision would be fundamentally perverse with respect to this particular Trust given that it has been reporting serious untoward incident reports to the Trust board and putting details of those meetings into the public domain.

37. With regard to the first point, given the way in which the withheld information is structured in the Commissioner's opinion it is not possible to separate out the details of the child's symptoms and treatment from other information contained within the information, e.g. actions or decisions made by individuals, beyond the paragraph of information which the Trust has now disclosed to the complainant. Furthermore, the Commissioner does not believe that this information could be disclosed in an anonymised format because the media coverage at the time of this incident – some of which is still available online – would allow any informed or motivated member of the public to identify the child in question.
38. With regard to the second point, in the Commissioner's opinion each request has to be treated on its own merits and simply because information of a similar nature to that requested here may have been disclosed in the past, this does not mean that such previous disclosures set a precedent which the Commissioner must follow. For the reasons set out above, in the particular circumstances of this case, the Commissioner is satisfied that the withheld information is exempt from disclosure on the basis of section 41(1).
39. Finally the Commissioner does not accept that the broader consequences of this decision which the complainant envisages will be very likely to actually occur. In relation to the sharing of serious untoward incident reports with other organisations, the Commissioner believes that it is vital to remember that disclosure of the withheld information in this case would be under FOIA and thus would result in disclosure of information to the world at large. This is clearly not the same as healthcare organisations, such as the Trust, sharing the details of patients' treatment, including serious untoward incident reports, with other healthcare bodies or NHS regulators. The Commissioner also does not accept that this decision would mean that doctors would not be able to use case studies involving patients because as the Commissioner understands it any information about such case studies which is placed into the public domain will be anonymised to protect patient confidentiality. Similarly, whilst the Commissioner understands that the Trust board has been presented with details of serious untoward incident

reports for some time, such information is presented in a way which protects the confidentiality of both patients and staff.³

Section 40 – personal information

40. The Trust redacted the names of two staff members from the paragraph of information disclosed to the complainant during the course of the Commissioner's investigation on the basis of section 40(2).

41. Section 40(2) of FOIA states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the Data Protection Act (DPA). The Trust argued that disclosure of the withheld information would be unfair and thus breach the first data protection principle which states that:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

42. Clearly then for section 40(2) to be engaged the information being withheld has to constitute 'personal data' which is defined by the DPA as:

'...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'

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http://www.cqc.org.uk/sites/default/files/media/documents/20100712_mid_staffs_12_month_follow_up_report.pdf - see page 6

43. The Commissioner is satisfied that the names of the two individuals in question clearly constitute their personal data as such information could be used to identify them.
44. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:
- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - particular circumstances of the case, e.g. established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
 - The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
45. Furthermore, notwithstanding the data subject's reasonable expectations of any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
46. In considering 'legitimate interests' in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a

proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.

47. The Trust argued that it believed that disclosure of the two names would be unfair because the individuals in question were not sufficiently senior that they would expect their names to be disclosed in response to an FOI request. The Trust noted that the individuals in question, in the context of this case, were simply following the appropriate Trust process and policies within their job roles in investigating the incident; they were not involved in developing policies or procedures relating to such incidents. Furthermore, the Trust argued that given the media interest in this story, and the potential for further coverage of the incident, it believed that disclosure of the staff names would lead them to be referred to in any future media coverage and it believed that this would be unfair given their relatively junior role.
48. In general, as his guidance explains the Commissioner accepts that the more junior a role a public official holds, the greater expectation that they will have that their names would be not be disclosed under FOIA.⁴ In the circumstances of this case the Commissioner accepts that the two staff in question occupied roles that were sufficiently junior that they would be unlikely to expect that their names would be disclosed in response to a request such as this. Furthermore, the Commissioner accepts that it is possible that further media coverage of this story could lead these two staff members to be associated with the incident which would be contrary to their expectations given their relatively junior roles. Moreover, beyond the generic interests of transparency and accountability, the Commissioner does not believe that disclosure of the two names would serve any specific legitimate interest. The Commissioner is therefore satisfied that disclosure of the two staff names would be unfair and thus they are exempt from disclosure on the basis of section 40(2) of FOIA.

⁴ 'Requests for personal data about public authority employees'
http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Practical_application/section_40_requests_for_personal_data_about_employees.ashx

Other matters

49. The section 45 Code of Practice includes recommendations as to how public authorities should operate a complaints procedure in relation to FOI requests.⁵ It notes that the procedure should enable a fresh decision to be taken on a reconsideration of all of the factors relevant to the issue and where reasonably practicable the review should be undertaken by someone senior to the person who took the original decision.
50. The complainant was concerned that both the request and internal review appeared to have been handled by the same individual given that both of these responses were signed by the same person.
51. The Trust informed the Commissioner that although the responses were provided by the same person, a number of people at the Trust reviewed and discussed the complainant's appeal and the Chief Executive/Chief Operating Officer approved the internal review response. The Trust provided the Commissioner with an email trail to evidence such discussions.
52. The Commissioner is therefore satisfied that the internal review in this case was conducted in line with the requirements of the Code of Practice. However, in the Commissioner's opinion – and to avoid the complainant's understandable concerns in relation to this issue – the Trust should in future make it explicitly clear that although an internal review response may be issued by the same individual who issued a refusal notice, the review itself was in fact conducted by a different member of staff.

⁵ <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

Right of appeal

53. 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

54. 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.
55. 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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