

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 2 July 2014

**Public Authority:** Nottinghamshire Healthcare NHS Trust

**Address:** Duncan Macmillan House  
Porchester Road  
Nottingham NG3 6AA

### Decision (including any steps ordered)

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1. The complainant has requested information relating to the death of a relative whilst in custody at a secure unit.
2. The Commissioner's decision is that Nottinghamshire Healthcare NHS Trust (the Trust) has correctly applied section 41(1) to the withheld information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

### Request and response

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4. On 11 September 2013, the complainant wrote to the Trust and requested information in the following terms:
  - i. *"I would like you to provide me with any remaining records you have on [redacted] and related to his stay at your facility and particularly the records of any investigation that may have been conducted following his death.*
  - ii. *I'd like to know who responsible overall was for patients and the facility at that time and what staff members were on duty at the time of his death.*

- iii. I'd like to know their names and how they can be contacted and have copies of their statements about the incident.*
  - iv. And I would like to know if anyone was found to be negligent in their duty of care to [redacted] around the time of his death or soon after – and if not, why not?*
  - v. I'd like to know whether the room he died in had any staff members present at the time of his death or whether there were any surveillance devices monitoring him at the time of his death.*
  - vi. I'd like to know whether he was medicated at the time and how much medication he had been given – or whether he had received any other treatment before he was allowed to bathe. Was he left to bathe alone or was he supervised?*
  - vii. Were any reports made that suggested [redacted] was at risk of harming himself, and if not how were the signs missed? If so, why – if he was – was he left unsupervised and given opportunity to take his own life – if, indeed, he did take his own life.*
  - viii. Were the police called in to investigate? If so, I'd like a copy of the police report. If not, why not? Was foul play suspected, as it is common knowledge that foul patients in these sorts of facilities have been abused and murdered by staff in the past and will probably happen to some poor soul in the future?*
  - ix. Please can you provide me with all of the above requested information and any other relevant information I may have neglected to ask for – including the coroner's report. If there is CCTV footage I would like that also.*
  - x. Please can you provide me with the names and addresses of other relevant bodies, NHS Trusts etc., where I can lodge a formal complaint about this matter and seek to have [redacted] death, under what I consider to be suspicious circumstances, investigated."*
5. The Trust responded on 31 October 2013 and refused to provide the requested information citing section 41 of the FOI as its basis for doing so.
  6. Following an internal review the Trust wrote to the complainant on 5 March 2014 and maintained its original position.

7. With regard to part x. of the request, in its internal review, the Trust explained the time limit for making a complaint as detailed in the National Health Service Complaints (England) regulations 2009<sup>1</sup>.

## Scope of the case

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8. The complainant contacted the Commissioner on 26 March 2014 to complain about the way his request for information had been handled.
9. In correspondence with the Commissioner the complainant explained that he no longer required the information requested in parts ii and iii above.
10. The Commissioner considers the scope of this case to be to determine if the Trust has correctly applied section 41 of the FOIA to the remaining withheld information.
11. Further information relating to the background is contained in a confidential annex to be provided to the complainant and the Trust.

## Reasons for decision

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12. 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."*
13. 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.
14. With regard to section 41(1)(b), in most cases the approach adopted by the Commissioner in assessing whether disclosure would constitute an

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<sup>1</sup> [http://www.legislation.gov.uk/ukxi/2009/309/pdfs/ukxi\\_20090309\\_en.pdf](http://www.legislation.gov.uk/ukxi/2009/309/pdfs/ukxi_20090309_en.pdf)

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 judgement 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 the detriment to the confider.
15. 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?*

16. In its submissions to the Commissioner, the Trust stated that it came into possession of the records following its acquisition of the service. At the time of the incident the Lodge was operated by Leicestershire Area Health Authority (Teaching) East District, now defunct.
17. The Trust stated that the information it holds which is subject to this request is contained within the deceased relative's medical records and the information effectively came from him. Therefore it was obtained from a third party.
18. The Trust referred to a previous decision notice issued by the Commissioner<sup>2</sup> which considered a similar complaint where the Commissioner noted:

*"It is common ground between the parties that medical records contain information obtained from a third person, namely the deceased. Therefore the requirements of section 41(1)(a) is satisfied."*

19. Given the above, the Commissioner is satisfied that the first limb of section 41 is met.

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<sup>2</sup> [http://ico.org.uk/~media/documents/decisionnotices/2012/fs\\_50416397.ashx](http://ico.org.uk/~media/documents/decisionnotices/2012/fs_50416397.ashx)

**Would disclosure constitute an actionable breach of confidence?**

20. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:

*i. Whether the information has the necessary quality of confidence;*

21. For the information to have the necessary quality of confidence it must not be trivial and otherwise available to the public. Information which is of a trivial nature or already available to the public cannot be regarded as having the necessary quality of confidence.

22. The Trust explained that the information in the records contains the individual's personal data, relating to his mental disorder and treatment, including details of his criminal offences and psychiatric reports prepared of Court proceedings. There are no details about the individual's death in the records, save for a brief report provided to the Coroner.

23. The Commissioner has carried out his own research and notes the complainant's representation that there is information held by the Coroner's Officer. However, this is held as a matter of public record, and having carried out searches via the internet, the Commissioner is satisfied that the information is not otherwise accessible. The withheld information is medical records and access would be restricted to medical staff and others who, within their professional capacity, can examine the deceased's records. The Commissioner would not expect the requested information to generally be put into the public domain.

24. Having reviewed the withheld information the Commissioner is satisfied that the information does have the necessary quality of confidence.

*ii. Whether the information was imparted in circumstances importing an obligation of confidence;*

25. The Trust referred to a previous decision notice issued by the Commissioner which stated:

*"The information relates to the medical care of the deceased patient and includes information provided in confidence by the patient to the health professionals involved in his care. When patients submit to treatment from doctors and other medical professionals, they do so with the expectation that information would not be disclosed to third parties without their consent. The Commissioner is satisfied that an obligation of confidence is created by the very nature of the doctor/patient relationship and the duty is therefore implicit."*

26. The Trust submitted that the individual concerned is no different in this respect, and he had every reason to expect that information relating to him and his medical care would not be disclosed to third parties without consent. As a result, it is clear that an obligation of confidence existed which the Trust now holds by virtue of possessing the records.

27. In addition, the Trust referred to the decision by the Upper Tribunal in the Webber\_decision, and in paragraph 46 stated as follows:

*"Approaching the matter more generally, the underlying information is patently intimate personal information about C. Much, if not all, of it would plainly be obtained in circumstances where C could assume that it would be treated in confidence."*

28. The Trust considered that this paragraph further confirmed the point that the individual's records and the information contained therein are clearly of a confidential nature, in respect of which the Trust owes a duty of confidence which continues notwithstanding the individual's death.

29. The Trust considered the fact that the complainant has received information from the Coroner's report, and as a result information is already in the public domain.

30. The Commissioner considered that if the Trust held statements from staff that had been provided to the Coroner it would be unlikely that these would be exempt from disclosure under section 41. However, having reviewed the withheld information the Commissioner can confirm that the Trust does not hold any statements from staff. In addition, the Commissioner can confirm that there is no information relating to an internal investigation.

*iii. Whether disclosure would be an unauthorised use of the information to the detriment of the confider.*

31. The Trust again referred to the Commissioner's decision notice issued in respect of the J Webber complaint. The question of detriment caused by disclosure was considered in paragraphs 28 to 30:

*"28. The loss of privacy can be a detriment in its own right and so 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 tangible loss, in order for it to be protected by the law of confidence.*

*29. It follows then that where on this occasion the disclosure would be contrary to the deceased's reasonable expectation of maintaining*

*confidentiality in respect of his private information, the absence of detriment would not defeat a cause of action.*

*30 The Commissioner considers that while disclosure would cause no positive harm to the confider, knowledge of the disclosure of the deceased's medical records could distress surviving relatives of the deceased. Knowledge that confidential information has been passed to those whom the confider would not willingly or otherwise failed to convey it may be sufficient detriment. It follows then that in determining whether disclosure would constitute an actionable breach of confidence, it is not necessary to establish whether, as a matter of fact, the deceased person has a personal representative who would take action as the complainant argues."*

32. The Trust contends that the individual would have had a reasonable expectation that his medical records and personal information would remain confidential. It is not a prerequisite to prove that there would be detriment caused to the individual by disclosure, and it is evident that it would not be possible to do so. However, there is a very real possibility of any of his surviving relatives becoming distressed as a result of disclosure of the information.
33. The Trust stated that it understood the individual had a number of children and is also survived by his wife. The Trust has not been given any information about these individuals, or their attitudes towards disclosure of their father's medical records and so the Trust cannot have any confidence that there would be no distress caused.
34. The Trust stated that it takes its responsibilities of confidentiality very seriously, and if it disclosed this information improperly then it could give rise to actionable claims for breach of confidence. In these circumstances, it would be improper to disclose the information, unless doing so would be in the public interest.

### **The public interest in confidence**

35. As Section 41 is an absolute exemption there is no requirement for an application of the conventional public interest test. However, case law 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 has therefore gone on to consider whether there would be a defence to a claim for breach of confidence.
36. 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. As the decisions taken by courts have shown, very serious public

interest matters must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality.

37. The Trust stated it considered the public interest in maintaining confidence in the records was against disclosure. This point was again considered in the Webber Decision Notice. One particularly relevant point assessed by the ICO was an argument made by the complainant that disclosure would answer "*unanswered questions*" on the circumstances which led to the patient's death in that case.
38. It further noted that this is a similar argument to the one advanced by the complainant in this matter, and so it has given it careful consideration.
39. In assessing this, the Trust took into account the ICO's comments in paragraphs 34 to 36:

*"34 The Commissioner accepts that there is a strong public interest in the public understanding how such an incident occurred within a hospital. The Commissioner also accepts that the disclosure of the information would in turn cast light on whether the incident had provoked an appropriate investigation from the Trust and indeed whether wider issues concerning patient care might be highlighted.*

*35 In weighing this against the public interest in keeping the information confidential, the Commissioner has been mindful of the wider public interest in preserving the principle of confidentiality.*

*36 It is in the public interest that confidences should be respected. The encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence. The Commissioner is mindful of the need to protect the relationship of trust between confider and confidant and not to discourage or otherwise hamper a degree of public certainty that such confidences will be respected by a public authority."*

40. The Trust accepts that there is a strong interest in the public understanding how a patient within a secure facility came by their death. In this particular case, however, this does not outweigh the public interest in maintaining confidence. Firstly, the individual's death was investigated by the Coroner shortly after he died and nothing untoward was found.
41. Secondly, the records themselves do not contain information relating to the circumstances of death and so disclosing them cannot be said to further the public interest of investigating the death. It is also important



to bear in mind that although the request has come from the complainant specifically, the question the Trust is required to consider is whether the information ought to be disclosed into the public domain, which is clearly far wider than to one specific individual.

42. The Trust stated that it does not consider that the obligation of confidence diminishes as a result of the confider of the information passing away. It is a public body, with duties to hold such personal, sensitive information in a manner which respects privacy and confidence. It is subject to a number of duties, imposed by both law and professional obligation. This is recognised by the ICO, and even in a case where the records could have helped to shed light on the circumstances of death, this was found to be outweighed by the public interest in maintaining confidence as the ICO was unable to conclude that "*there is a strong enough public interest argument to disclose the requested information*". Having gone through the same process of consideration as the ICO, the Trust also concluded that the public interest lies in favour of maintaining confidence.

### **The Commissioner's decision**

43. The Commissioner has reviewed the withheld information and considered the representations of the Trust and the complainant.
44. The Commissioner would not expect an individual's medical records (deceased or not) to be disclosed to the public. In addition, he is mindful of the public interest in maintaining confidentiality. This is particularly strong in terms of a 'doctor/patient' relationship.
45. The Commissioner acknowledges the complainant's desire to obtain as much information as possible of the circumstances surrounding his relative's death. He also acknowledges the distress this will have caused to the complainant and his family.
46. However, the Commissioner has decided that the Trust was correct to apply section 41 to the withheld information.

## Right of appeal

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47. 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: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

48. 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.
49. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**