

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 17 August 2015

**Public Authority:** Staffordshire and Stoke on Trent Partnership  
NHS Trust

**Address:** Morston House  
The Midway  
Newcastle-under-Lyme  
Staffordshire  
ST5 1QG

### **Decision (including any steps ordered)**

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1. The complainant has requested the social care records of her late mother. The Trust volunteered to provide some information relating to the funding of arrangements of her mother's care outside the scope of FOAI. However it refused to provide a full copy of the social care records under section 40 – personal information, and section 41 – information provided in confidence.
2. The Commissioner's decision is that the Trust is entitled to rely on section 41 to withhold the information. In light of this the Commissioner has not considered the Trust's application of section 40.
3. The Commissioner does not require the Trust to any further action in this matter.

### **Request and response**

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4. On 16 February 2015, the complainant wrote to the Trust regarding her late mother and requested information in the following terms:  
"... can I please request formal access to my mom's records and information from your Governance Team on mom's whole funding arrangement and if any contribution mom paid ...".

5. The request was understood by both the complainant and the Trust to relate to the funding arrangements for the social care provided to the complainant's late mother. During subsequent phone conversations the complainant extended the request to cover all her late mother's social care records.
6. The Trust provided copies of information on the funding arrangements. This was done on a discretionary basis ie, outside the scope of FOIA, having taken account of the complainant's relationship to their client. However on 2 April 2015 the Trust refused access to the remaining social care records. The Trust did not cite a particular exemption under FOIA, but explained that it was withholding the information due to issues around confidentiality.
7. Following an internal review the Trust wrote to the complainant on 29 April 2015. It stated that the information was exempt under section 41 of FOIA – information provided in confidence.
8. The right of access to information under FOIA is triggered by an applicant making a request and, under section 8, that request must be made in writing. During the Commissioner's investigation it became apparent that the social care records had never been requested in writing. The complainant therefore made a fresh request on 3 July 2015 in the following terms:

"I would like to apply to have access to my late mother's social care records. I am already in receipt of the funding arrangements."
9. The Trust, which had agreed to expedite this fresh request, provided a response on 13 July 2015. It refused to provide the information, relying on section 40 – personal information relating to someone other than the applicant, and section 41 – information provided in confidence. It advised the complainant that she need not seek an internal review of this refusal and could complain directly to the Information Commissioner.

### **Scope of the case**

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10. The complainant contacted the Commissioner on 16 May 2015 to complain about the way her original request for information had been handled. Following the refusal of her fresh request, she complained to the Commissioner on 13 July 2015, ie the same day as the Trust provided its response to her request.
11. The Commissioner considers that the matter to be determined is whether the Trust handled the fresh request in accordance with FOIA

and, in particular, whether it is entitled to rely on sections 40 and 41 to withhold the requested information.

12. The Trust has applied section 41 to all the withheld information. Therefore the Commissioner will consider its application first. He will only consider the application of section 40 to any information which he concludes is not protected by section 41.

## **Background**

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13. The Trust provides social care services on behalf of the relevant local authorities under section 75 of the Health and Social Care Act 2012. This is part of a drive to provide a more integrated service for those accessing health and social care provision.

## **Reasons for decision**

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### **Section 41 – information provided in confidence**

14. Section 41 of FOIA states that information is exempt from disclosure if it was obtained by the public authority from a third party and its disclosure to the public would constitute a breach of confidence.
15. In order for the information to be covered by the exemption it has to have been provided by a third party. The Commissioner has viewed the withheld information. In broad terms, it comprises of support plans for the mother and case notes relating to her social care needs and which also record some aspects of her medical needs and history in so far as they are relevant. The support plans were produced in consultation with the mother and are based on information provided by the mother and the social worker's assessment of her needs. The case notes cover many aspects of the mother's care and are based on consultations with the mother and a number of other agencies, organisations and individuals.
16. Based on previous decisions of the Tribunal the Commissioner considers that information obtained from third parties will include information that has been created by the Trust's own staff if it is based on information obtained from third parties. Applying this rationale to the social care records in this case the Commissioner is satisfied that the information has been provided by a third party. He has therefore gone onto consider whether its disclosure would constitute an actionable breach of confidence.

17. It is important to note that the test established by the exemption is whether a disclosure to the 'public' would constitute a breach of confidence. Therefore in reaching a decision in this case the Commissioner has to disregard the fact that the complainant is the daughter of the individual whose records have been requested. He must treat the request as if it had been made by any, unrelated, member of the public.
18. The Commissioner considers that the duty of confidence will continue to apply after the death of the person concerned. This position was confirmed by the Tribunal in *Pauline Bluck v Information Commissioner and Epsom & St Helier University Hospitals NHS Trust (EA/2006/0090)* in which the Tribunal found that even though the person to whom the information relates has died, action for breach of confidence could still be taken by the personal representative of that person. The Commissioner does not consider it necessary to determine whether the complainant's late mother had a personal representative, or who that personal representative is. It is sufficient that the principle has been established that a duty of confidence can survive death and that an actionable breach of that confidence could be initiated by a personal representative.
19. It is now necessary to consider whether disclosing the mother's social care record to an unrelated member of the public would actually constitute a breach of confidence. There are three elements to a breach of confidentiality. The first is that the information must have the necessary quality of confidence. The second is that the information was provided in circumstances importing an obligation of confidence and finally the unauthorised disclosure of that information would be to the detriment of the individual to whom the duty of confidence is owed.
20. In respect of the first element, information cannot be regarded as confidential if it is trivial in nature. The Trust has argued that the information is not trivial. Having viewed the withheld information the Commissioner is satisfied that it is of a personal and sensitive nature. The Trust has stated that it treats the information as confidential and only allows access to it on a need to know basis. The Commissioner is therefore satisfied that it has the necessary quality of confidence.
21. The second element concerns the circumstances in which the information was obtained. The Trust explained that there is an implied obligation on health and care organisations to treat social care records confidentially. That is, where a service user directly or indirectly gives information to a care worker, they do so with the expectation that it will remain private.

22. This expectation is reinforced by a Code of Practice on Confidentiality produced by the Health and Social Care Information Centre which has responsibilities derived from the Health and Social Care Act 2012. The Code of Practice requires social care providers to follow a series of rules, including "Confidential information about service users or patients should be treated confidentially and respectfully.
23. In light of the above the Commissioner accepts that the circumstances in which the information was obtained meant that all concerned would have understood that it was to be treated as confidential.
24. The third element of an actionable breach of confidence is that an unauthorised disclosure of the information would be detrimental to the person to whom the duty of confidence was owed, in this case the complainant's late mother. Information about an individual's private life can be protected by the law of confidence, even if disclosure would not result in any tangible loss. Any invasion of privacy resulting from the disclosure would be viewed as a form of detriment.
25. The Commissioner is satisfied that disclosing the mother's social care records to the general public would infringe the mother's privacy and dignity. The Commissioner is satisfied that the third element of an actionable breach of confidence is in place.
26. However before deciding whether the exemption provided by section 41 is engaged, the Commissioner needs to consider whether any action for breach of confidence is likely to succeed. Such an action would not succeed if the Trust was able to argue that it had disclosed the confidential information in the public interest. This public interest defence considers whether there is a public interest in disclosing the information which overrides the public interest is maintaining the confidence.
27. The Trust has argued that there is very limited public interest in disclosing the information as there is no evidence of wrong doing on the part of the Trust. Having viewed the information the Commissioner is satisfied that it does not contain anything which would suggest otherwise, nor is he aware of any other allegation against the Trust. The Commissioner recognises the complainant has a significant interest in accessing the care records so that she can better understand the care provided to her mother. However this is very much a private interest as opposed to a public one. The Commissioner therefore accepts the Trusts argument that there is a limited public interest in disclosure.
28. Against this there is a weighty public interest in the principle of respecting confidences and more specifically around maintaining the confidentiality of social care records. To disclose these records would

signal to other users of the social care services that there was the potential for their records to be released too. This would undermine their willingness to provide personal information to their care providers or could result in care workers not being as candid when recording assessments or reporting any concerns they had. This could only reduce the level of care provided to vulnerable members of our society.

29. The Commissioner concludes that the Trust would not have a public interest defence against an action for breach of confidence if it disclosed the requested information to the public.
30. Therefore the Commissioner finds that section 41 is engaged and that the Trust is entitled to withhold the information. He does not require the Trust to take any further action in respect of this request under FOIA.
31. As the Commissioner is satisfied that all the information is exempt under section 41 he has not gone on to consider the Trust's application of section 40(2).

## Right of appeal

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32. 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: 0870 739 5836

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)

33. 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.
34. 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**