

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 March 2016

**Public Authority:** Homerton University Hospital NHS Foundation Trust

**Address:** Trust Offices  
Homerton Row  
London  
E9 6SR

#### Decision (including any steps ordered)

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1. The complainant has requested information on the number of mothers who had been in the care of the Trust's maternity unit at any time during their pregnancy and had subsequently died over a given period together with information on the year and month of each mother's death and where they died. The Trust provided the total number of deaths and some further details in respect of some of those deaths, but refused to provide the other details under section 41 as it believed to do so would breach a duty of confidence owed to the deceased.
2. The Commissioner's decision is that the Trust is not entitled to rely on section 41 to withhold this information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - To disclose the withheld information.
4. 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

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5. The history of this request is rather complicated. The details of the actual requests are contained in the annexe which accompanies this notice and are summarised here.
6. On the 2 October 2015 the complainant emailed the Trust. She referred to a previous response for statistics on maternal deaths which had been published via the Whatdotheyknow website. This revealed that there had been no maternal deaths between August 2012 and April 2013. She therefore asked for the number of deaths in respect of the earlier part of 2012 and for the period from April 2013 to the date of her request. The Trust felt it necessary to seek some clarification as to what periods the request related. When providing that clarification on the 5 October 2015 the complainant widened the scope of her request. She now asked for the number of maternal deaths between 2006 and October 2015. The complainant also sought to clarify that her request related to any maternal death linked to the Trust regardless of whether the mother died at the Trust's hospital, at home or at some other hospital. On the 9 October 2015 the complainant widened the scope of her request again to include the month and year of each death. Unfortunately the wording of her request of 5 October 2015 was not very precise and the Trust again sought clarification.
7. The complainant responded on 22 October 2015 and again widened the scope of her request to include not just where the mother had died but if she had died at home and to which hospital she was subsequently taken. The Trust correctly advised the complainant that this was in effect a new request and again sought to clarify its scope.
8. On 10 November 2015 the Trust provided a response to the complainant's requests. In respect of the 5 October request the Trust stated that there had been 12 maternal deaths directly linked with the Homerton between 2006 and October 2015 and that each mother had either been assigned a Homerton midwife for the full duration of their pregnancy or up until being transferred to another organisation or to home. However it refused to provide the month and year of each death as requested on 9 October 2015 or say where the mother had died as requested on the 22 October 2015. The Trust claimed this information was exempt under section 41 as to reveal this information would be a breach of confidence owed to the deceased mother
9. On the 13 November 2015 the complainant asked the Trust to carry out an internal review of this decision. The Trust informed the complainant of the outcome of that review on 11 December 2015. It maintained that the month, year and location of death was exempt under section 41.

10. The complainant submitted another request to the Trust on 17 November 2015. This request was broken down into four parts with each part covering a different period. Part 1 related to the two year period covering 2006 and 2007. Part 2 related to the two year period covering 2008 and 2009. Part 3 related to 2010 and 2011. Finally, part 4 was for a period of just under four years from the beginning of 2012 to the date of the request, ie 17 November 2015. For each of these periods the complainant asked for the number of deaths of mothers who had been under the care of a Homerton midwife regardless of whether that care had been provided throughout the pregnancy or for just part of it. She asked for the year and month of each death that occurred at the Trust's hospital. In respect of any mother who died at home the complainant asked for the month and year that they died and which hospital the deceased was subsequently taken to. If the mother had been transferred to another hospital before they died she asked for the month and year which they had been transferred.
11. There is a significant overlap between the request of 17 November 2015 and the October 2015 requests. The only difference being that the November request asks for the month and year on which the mother was transferred to another hospital, where as the October requests asked for the month and year the mother died at another hospital, together with the name of that hospital.
12. The Trust responded on the 14 December 2015. It informed the complainant that there had been no maternal deaths for the period 2006 and 2007. For the period 2008 and 2009 there had been two deaths, one of which occurred whilst the mother was under the care of the Trust. The year of that death was 2008. There had been two deaths in the period 2010 and 2011. For the period from 1 January 2012 to the date of the request there had been eight maternal deaths, six of which had been in the care of the Trust and the remaining two were under the care of another provider. In respect of the six deaths that had occurred whilst the mother was under the care of Homerton the Trust provided the year and month of death. The rest of the information covered by the November request was again withheld under section 41 – information provided in confidence.
13. The complainant sought an internal review of that decision on 23 December 2015. Following the internal review the Trust wrote to the complainant on 2 February 2016. It maintained that the information was exempt under section 41.

## Scope of the case

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14. The complainant contacted the Commissioner on 16 December 2015 to complain about the way her requests of October 2015 had been handled. She contacted him again on 9 February 2016 to raise her concerns over the refusal of her request of 17 November 2015.
15. During a telephone conversation between the complainant and an officer of the Commissioner's office on 25 February 2016 the complainant confirmed that she no longer wished to pursue her request of the 17 November 2015 in respect of the month and year that any mother was transferred to another hospital or service provider. Since the complainant has now withdrawn this element her complaint, the issues which remain outstanding from the 17 November request are captured by those outstanding from the October requests. The Commissioner therefore considers it appropriate to deal with the requests within the same decision notice.
16. In summary, in response to the October requests the Trust disclosed that between 1 January 2006 and the start of October 2015 there had been a total of twelve maternal deaths where the mothers had, at some stage in their pregnancy, been under the care of a Homerton midwife. In response to the 17 November request the information disclosed is summarised in the table below:

Number of deaths	Year	Month	Was the mother under Homerton's care at time of death
0	2006		
0	2007		
1	2008	n/k	Yes
1	2008/09	n/k	No
2	2010/11	n/k	No
2	2012 – 17 Nov 2015	n/k	No
1	2012	Jan	Yes

1	2013	Jul	Yes
1	2013	Oct	Yes
1	2014	March	Yes
1	2014	April	Yes
1	2015	January	Yes

17. The withheld information comprises of:

a) The month of the death which occurred in 2008 while the mother was under the care of Homerton.

b) The month and year of the other death which occurred in the period 2008/09 together with details of where the mother died, ie whether in another named hospital, or at home, and if the mother died at home, the name of the hospital where the deceased was then taken.

c) The month and year of the two deaths that occurred in the period 2010/11 together with details of where the mothers died, ie whether in another named hospital, or at home, and if at home, the name of the hospital where the deceased was then taken.

d) The month and year of the two deaths that occurred in the period 2012/17 November 2015 while the mother was under the care of a service provider other than the Trust, together with details of where the mothers died, ie whether in another named hospital, or at home, and if at home, the name of the hospital where the deceased was then taken.

e) In respect of each of the remaining six deaths, all of which occurred while the mother was under the care of Homerton, the withheld information consists of confirmation of whether the mother died at Homerton or at home, and if they died at home the hospital to which the deceased was then taken.

18. The matter to be decided is whether disclosing the information detailed above is exempt from disclosure under section 41.

## Reasons for decision

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19. Section 41 of FOIA states that information is exempt from disclosure if it was obtained from another person and its disclosure to the public would constitute a breach of confidence actionable by that person or any other person.
20. In order for the information to be covered by the exemption it has to have been provided by a third party. Based on previous decisions of the Tribunal, the Commissioner considers that information will have been obtained by a third party if it has been created by the Trust's own staff if it is based on information obtained directly from third parties (for example information disclosed by a patient during a consultation), or gleaned from the treatment of the patient. The Commissioner is satisfied that information such as the month and year of death, together with details of where the death occurred would form part of the deceased mothers' medical records and was, in effect, obtained by the Trust from the mothers. The Commissioner has therefore gone onto consider whether its disclosure would constitute an actionable breach of confidence.
21. 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 twelve mothers in this case each 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.
22. Even though in this case any breach of confidence would need to be brought by a personal representative it is important to remember that the duty of confidence serves to protect the privacy and interests of the person from whom the information was obtained, ie, in this case, the mothers. Furthermore, 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.
23. It is now necessary to consider whether disclosing the requested information to a 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.

24. At the start of his investigation the Commissioner was not satisfied that the requested statistics would allow any of the mothers to be identified. This has an obvious bearing on whether there would be a breach of confidence as there could be no expectation that anonymised statistics would be treated as confidential, nor could there be any detriment in terms of an intrusion of privacy if the mother could not be identified. Therefore the Commissioner specifically asked the Trust to explain who would be able to identify the mothers and by what means that identification could be achieved.
25. The Trust has explained in its submissions to the Commissioner and in its various refusal notices and internal reviews that it is concerned that disclosing the information would potentially enable the public to re-identify the mothers. In addition the Trust has said the family and friends of the deceased could identify the mother from the information.
26. The Commissioner notes that the relevant test when applying section 41 is whether disclosing the information to the **public** would constitute an actionable breach of confidence. Although the Commissioner is sensitive to any upset those close to the deceased may feel if the information was disclosed. However, the potential for friends or relatives to recognise a mother is based on their knowledge of the circumstances around the death which they are already privy to because of their closeness to the deceased. Revealing to someone information they already knew would not be a breach of confidence.
27. There could be a breach of confidence if the requested information could reveal something new about the mother's treatment to a friend or relative. However given the very limited nature of the information captured by the request the Commissioner does not consider this is a risk. Nor is it an argument presented by the Trust.
28. The Trust did not provide any argument as to how a member of general public could use the withheld information to identify a particular mother. However the Commissioner recognises that as the withheld information relates to maternal deaths, a number of which are relatively recent, its disclosure has the capacity to upset the friends and relatives of those it relates to. The request also relates to information that would be held as part of an individual's medical record. Therefore even though the onus is on the Trust to substantiate its application of section 41, the Commissioner has considered what could be learnt from the requested



information and what other information may be available to the general public from which they might be able to recognise any of the mother who the statistics related to. In the absence of arguments presented by the Trust, this consideration is necessarily speculative.

29. The Commissioner has first considered what information could be gleaned solely from the requested statistics. The Commissioner understands that where a mother dies at home she is taken to mortuary at her local hospital. This would mean that naming the hospital would reveal the general locality of the mother's home. However the Commissioner considers that would not provide sufficient detail to identify her.
30. The Commissioner will now consider what sources of additional information exist which may allow a member of the public to identify any of the mothers. These include obituaries in local newspapers, the reports from a coroner's court in the event any death lead to an inquest and, in exceptional circumstances, any news reports of a death. The Commissioner considers it unlikely that an obituary, if there was one, would contain the necessary level of detail to allow someone to link the individual named in the obituary to the statistics that have been requested.
31. There would however be more detailed information available from any inquest or in any newspaper report into a death, where either of these existed. The Commissioner has accessed news articles from both the Nursing Times and the Mail on Line which report on concerns about what is alleged to be the high number of maternal deaths linked to the Trust. However although these reports contained high level statistics on the number of deaths, they did not provide any details capable of identifying any of the mothers involved. The Commissioner has also been made aware by the complainant that one of the mothers did tragically die in circumstances that may have led to local press coverage. He considers that in respect of that mother there is the potential for there to be information in the public domain which identified her and which could be used to link her to the relevant statistics. However it is not clear that disclosing the statistics would put anything new into the public domain, over and above that which would already be contained in any press articles.
32. If a death resulted in an inquest the Commissioner considers that a significant amount of information concerning the death could have been made public. This may mean that it would be possible to recognise who the requested statistics related to. However it is again unlikely that the statistics would provide any information over and above that which is already public domain as a result of the inquest.



33. In light of the above the Commissioner finds that the requested statistics on their own are not capable of identifying any of the mothers and therefore, where no additional information exists, the requested statistics is not confidential as there could be no expectation of confidentiality, or intrusion of privacy if the information was anonymised.
34. In the event that there is additional information about particular deaths in the public domain, either through inquests or newspaper reports relating to a particular death, it is possible that a member of the public would be able to recognise who the relevant statistics related to. However the Commissioner considers that disclosing the requested information would not place anything new in the public domain over and above that contained in already publicly available sources used to identify the mother.
35. The first element of confidentiality as set out in paragraph 23 above is that the information must possess the quality of confidence. Information will have the necessary quality of confidence if it is more than trivial and if it is not already accessible. The Commissioner readily accepts that the information is far from trivial. However if it was only possible to recognise someone from the statistics because the information was already in the public domain via newspaper reports or the reports of an inquest, it follows that the information is already accessible and therefore lacks the necessary quality of confidence.
36. In conclusion the Commissioner finds that disclosing the information would not constitute an actionable breach of confidence and that therefore section 41 does not apply. The Trust is required to disclose the withheld as set out in paragraph 17. Having viewed the withheld information the Commissioner recognises that there is at least one instance where the circumstances of the mother's death do not conform to those envisaged by the requests. The Commissioner has provided the public authority with a confidential annexe explaining how this information should be presented.

## Right of appeal

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37. 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)

38. 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.
39. 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**

## Open Annex

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This annex sets out the series of requests made by the complainant, the clarification of those requests sought by the Trust, together with the Commissioner's interpretation of those requests and Trust's responses to the requests.

### The October requests

On 2 October 2015 the complainant emailed the Trust. She referred to the Trust's responses to information requests made via the Whatdotheyknow website regarding its Maternity Services Unit. She explained that those responses stated that there had been no maternal deaths between 2008 and 2011 and, likewise, there had been no maternal deaths between August 2012 and April 2013. She therefore asked to be provided with the missing statistics in the following terms:

"Leaving out Jan – Aug 2012 so I am requesting an FOI on any Maternal deaths during these months please."

She also asked for:

"Also any Maternal deaths from April 2013 until this present month which is October 2015."

The Commissioner understands the 2 October request to be for the total number of maternal deaths in the period from 1<sup>st</sup> January 2012 to 31 May 2012 inclusive, and the total number of deaths for the period from 1<sup>st</sup> April 2013 to 30 September 2015 inclusive.

On 5 October 2015 the Trust sought clarification regarding which periods the request related to.

When responding to the Trust's request for clarification, the complainant widened the scope of her request. She now asked for:

"Could you please clarify how many Maternal deaths there have been between 2006 until present October 2015.

All deaths linked to Homerton Maternity, no matter whether the Mother died at Homerton Maternity – at home or another Hospital.

All these Mothers had Midwives from Homerton Maternity through their pregnancy."

The objective interpretation of the first element of this request is that is that she was seeking the total number of maternal deaths that occurred between 1<sup>st</sup> January 2006 and 30 September 2015 inclusive.

In the second element of the request she clarifies that the statistics sought should include any maternal death where the mother had received **any** care from the Trust's maternity unit during their pregnancy.

It is not absolutely clear what she intended to seek by the third element of your request, ie "All these Mothers had Midwives from Homerton Maternity through their pregnancy". The Commissioner considers that, when read in the context of the rest of the request, the complainant was simply trying to reiterate that she was seeking information on maternal deaths where the mother had received at least some care from the Trust's midwives.

On 9 October the Trust contacted the complainant and asked her to clarify what if any information she was seeking when she said:

"All these Mothers had Midwives from Homerton Maternity through their pregnancy"

Although it is not clear from the email chains provided by both the complainant and the Trust, the Commissioner understands that on 9 October 2015 the complainant emailed the Trust in response to its request for clarification and again widened the scope of her request in the following terms:

"Hi, also just to clarify I would like month and year of each death."

On 22 October 2015 the complainant emailed the Trust. She again broadened the scope of her request. In addition to seeking the month and year of each maternal death over the periods in question she now asked the Trust to detail, for each death, where the mother had died and, if they died at home, to identify the hospital to which they were taken after death. This request was made in the following terms:

"Could I please ask for Month and year of each death.

Also link month – year and where the Mother died and if at home what Hospital this lady was taken to."

The Trust contacted the complainant the same day to inform her that this was a request for additional information and therefore was in effect a new request. Following a telephone conversation that same day the Trust emailed the complainant to explain its understanding of her latest request in the following terms:

"From what we can gather from your latest request you would now want a further breakdown which we are classifying as a new request – link month – year and the mother died and if at home what hospital was this lady taken to after death – "

The Commissioner's understanding of the information requested by the 22 October 2015 is summarised in the table below:

**Example** (ie the information in the body of the table is not based on the actual statistics)

Year	Month	Number of deaths	Place of death	Hospital taken to if mother died at home
2007	June	1	Homerton Hospital	n/a
2010	January	1	Home (as opposed to the actual address)	Named Hospital
2011	March	1	Name of Hospital other than Homerton	n/a

The Commissioner understands that in cases where a mother died at home the complainant was not seeking the actual home address, but simply confirmation that the death occurred at home. However, where the mother died at a hospital other than the Trust, the request is seeking the name of that hospital.

### The Trust's Response

On 10 November 2015 the Trust responded to these requests. In doing so it led with the request as phrased on the 5 October 2015 ie:

"Could you please clarify how many Maternal deaths there have been between 2006 until present October 2015.

All deaths linked to Homerton Maternity, no matter whether the Mother died at Homerton Maternity – at home or another Hospital.

All these Mothers had Midwives from Homerton Maternity through their pregnancy."

In response to the first part of the request, it disclosed that the total figure for the number of deaths between 2006 and October 2015 was 12. It clarified that this figure was also the total figure in respect of the second element of the request.

In addition it stated that that all the mothers who died had either been assigned a Homerton midwife throughout their pregnancy, or up until they were transferred to another organisation or home.

However the Trust refused to break the twelve deaths down into the year or month in which they occurred. It also withheld the information on where the mother died and, in the event they died at home, the hospital to which they were later taken. The Trust relied on section 41 – information provided in confidence, to withhold this information.

### **Internal Review**

The complainant asked the Trust to carry out an internal review on 13 November 2015. The Trust provided her with the outcome of its internal review on 11 December 2015 under the reference 'FOI Review 2111 – Maternal Deaths'. It maintained its position that providing the detailed information she had requested would breach its duty of confidence to the late mothers and their family. This is on the basis that providing this information would allow the mothers to be identified.

### **17 November 2015 request**

Having requested an internal review of the October requests on the 13 November the complainant wrote to the Trust on 17 November under the heading 'Maternal Deaths' and requested the following information:

"I am now requesting 4 further FOI's please.

NO.1 A breakdown of Maternal Deaths between 1st JAN 2006 to 31st Dec 2007 linked to Homerton Maternity.

Had Homerton Midwives thru their Pregnancy - whether all of Pregnancy or part way thru their Pregnancy.

If they died at Home what MONTH - YEAR and what HOSPITAL were they taken to, or what MONTH - YEAR were they taken to another HOSPITAL if they became ill and died there.

Or what MONTH - YEAR did they die at Homerton Maternity Unit.

NO.2 A breakdown of Maternal Deaths between 1st JAN 2008 to 31st DEC 2009 linked to Homerton Maternity.

Had Homerton Midwives thru their Pregnancy - whether all of Pregnancy or part way thru their Pregnancy.

If they died at Home what MONTH - YEAR and what HOSPITAL were they taken to, or what MONTH - YEAR were they taken to another HOSPITAL if they became ill and died there.

Or what MONTH - YEAR did they die at Homerton Maternity Unit.

NO.3 A breakdown of Maternal Deaths between 1st JAN 2010 & 31st DEC 2011 linked to Homerton Maternity.

Had Homerton Midwives thru their Pregnancy - whether all of Pregnancy or part way thru their Pregnancy.

If they died at Home what MONTH - YEAR and what HOSPITAL were they taken to, or what MONTH - YEAR were they taken to another HOSPITAL if they became ill and died there.

Or what MONTH - YEAR did they die at Homerton Maternity Unit.

NO.4 A breakdown of Maternal Deaths between 1st JAN 2012 & 17th NOV 2015 linked to Homerton Maternity.

Had Homerton Midwives thru their Pregnancy - whether all of Pregnancy or part way thru their Pregnancy.

If they died at Home what MONTH - YEAR and what HOSPITAL were they taken to, or what MONTH - YEAR were they taken to another HOSPITAL if they became ill and died there.

Or what MONTH - YEAR did they die at Homerton Maternity Unit."

Collectively these four requests seek the year and month of any maternal death, where the mother had received any care from a Homerton midwife during their pregnancy, for the period starting 1 January 2006 and ending 17 November 2015. It also seeks information on which hospital the deceased was taken to if the mother died at home and, if the mother was transferred from Homerton to another hospital, the month and year they were transferred.

### **The Trust's response**

On 14 December 2015 the Trust responded under the reference FOI2189.

In response to part 1 of the request the Trust stated that there had been no maternal deaths in the period for 2006 and 2007.

In response to part 2 the Trust stated that there had been two deaths during the period 2008 to 2009, one of which was in 2008 while the mother under the care of the Trust.

In response to part 3, the Trust stated that there were two deaths during the period 2010 and 2011, both of which occurred while the mother was under the care of other service providers.

In respect of part 4 the Trust stated that there were eight maternal deaths, six of which were in the care of the Trust and the remaining two in the care of other service providers. The Trust provided the month and year for each of the six deaths that occurred while the mother was in the care of the Trust.

The information disclosed by the Trust is summarised in the table which appears in paragraph 16 of the main notice.



The Trust refused to provide any of the other information which fell within the scope of the request under section 41 on the basis that it was confidential information.

### **Internal Review**

The complainant sought an internal review on 23 December 2015. The Trust provided the outcome of its review, under the reference: FOI Review 2189 – Hospital Maternal Deaths, on 2 February 2016.

It explained that five of the maternal deaths that took place did so while the mothers were under the care of other service providers. It went to say that it was therefore unable to provide any further information in relation to those deaths. In respect of the remaining information which had been withheld the Trust maintained its reliance on section 41 - confidential information.

The Commissioner notes that the Trust said that it was unable to provide information relating to those deaths which occurred while the mother was in the care of another service provider. The Commissioner understands the Trust to mean that it considers it would be more appropriate for the requester to ask those service providers for the information as they would better understand any sensitivity around the information as opposed to saying that it does not hold the information.