

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 November 2018

Public Authority: University Hospitals Plymouth NHS Trust

Address: Derriford Hospital
Derriford Road
Plymouth
Devon PL6 8DH

Decision (including any steps ordered)

1. Through a series of requests, the complainant has requested information from University Hospitals Plymouth NHS Trust ('the Trust') that is broadly associated with the circumstances under which his mother died. The Trust provided information relevant to some of the requests. It provided links to some relevant published information and said it did not hold other information. The Trust relied on section 12(1) with regard to two requests (cost exceeds appropriate limit) and indicated that information within the scope of another request was intended for future publication. With regard to the majority of the requests, the Trust relied on section 40(5) and 41(2) to neither confirm nor deny it holds relevant information as to do so would either release the personal data of a third party or constitute an actionable breach of confidence.
2. The Commissioner's decision is as follows:
 - On the balance of probabilities, the Trust does not hold the information requested in request 2 and complied with section 1(1)(a) with regards to this request.

- The Trust breached sections 1(1) and 10(1) with regard to request 3 as it holds information relevant to this request that it did not communicate to the complainant within the appropriate timescale.
 - The Trust breached section 17(5) with regard to requests 4d) and 11. It incorrectly relied on section 12(1) to refuse to comply with these two requests but the Commissioner finds that, on the balance of probabilities, the Trust does not hold the information requested through these two requests.
 - The information requested in requests 1, 5, 6, 7, 8, 9 and 10 does not engage the exemption under section 40(5B)(a)(i) of the FOIA but the Trust is not obliged to confirm or deny it holds this information under section 41(2).
 - The Trust is not obliged to confirm or deny it holds the information requested in requests 12, 13, 14, 15 and 16 under section 40(5B)(a)(i).
3. The Commissioner requires the Trust to take the following step to ensure compliance with the legislation:
- If it has not already done so, release the '*Ward Handover of Care and Internal Transfer of Adults (Excluding Maternity) Standard Operating Procedure*' document to the complainant.
4. The Trust must take this step 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

5. On 18 March 2018 the complainant submitted the following requests to the Trust. The majority of the requests comprise multiple parts or include other queries and questions. Due to the length and sensitive nature of the requests, only the broad headings the complainant assigned to each request are reproduced below:
1. *Did the results have time-critical consequence?*
 2. *How should staff react to time-critical results?*
 3. *How should registrars hand over?*

4. *How are critical results highlighted?*
 5. *What critical phone calls were made?*
 6. *What phone calls were made between the ward & registrar?*
 7. *Were staff questioned on why they did not act?*
 8. *What staff areas did the patient pass in front of?*
 9. *What were the roles of these staff?*
 10. *For how long were these staff absent from their areas?*
 11. *How is the time of the handover to the ward known?*
 12. *Has the registrar been questioned since the incident?*
 13. *Did the ward alert the registrar of the need for oxygen?*
 14. *Why was the registrar not questioned just after the incident?*
 15. *Has the registrar any awareness of what happened?*
 16. *Has this registrar's subsequent work been cause for concern?*
6. The Trust responded on 19 April 2018. It said it does not hold information that specifically addresses request 2, but it provided a link to where its '*Management of Diagnostic Testing and Screening Procedures*' policy is published and referred to its response to request 4. The Trust provided links to where information relevant to request 3 is published and said some further information relevant to this request was intended for future publication. The Trust answered questions that comprised some of request 4, provided links to relevant published information and indicated it was relying on section 12(1) with regard to one part of request 4. With regard to request 11, the Trust provided some relevant general information and referred to its response to request 3. It relied on section 12(1) with regard to the specifics of the request.
7. The Trust said it was relying on section 40(5)(a) and (b)(i)(ii) and 41(2) to withhold the information requested in requests 1, 5, 6, 7, 8, 9, 10. The Trust said it was relying on section 40(5)(a) and (b)(i)(ii) to withhold the information requested in requests 12, 13, 14, 15 and 16.

8. The Trust provided a review on 22 May 2018. It upheld its original position.
9. During the Commissioner's investigation, the Trust identified a small amount of information within the scope of request 3 that it considered it could release to the complainant and the Commissioner advised the Trust to do so.

Scope of the case

10. The complainant contacted the Commissioner on 24 May 2018 to complain about the way his requests for information had been handled.
11. The complainant confirmed to the Commissioner that he is not satisfied with the Trust's application of section 12, 21, 40(5) and 41(2) to his requests. He is also dissatisfied with the Trust's position that it does not hold some of the information he has requested.
12. The Commissioner has reviewed the Trust's responses to the complainant and finds that it has not relied on section 21 (information already reasonably accessible to the applicant) in respect of any of the requests. The Trust did not refer to a specific exemption in its response to request 3 and the complainant may believe the Trust was withholding this information under section 21. During the investigation the Trust confirmed it had originally relied on section 22(1) (information intended for future publication) to withhold information within the scope of request 3 but also confirmed that it has withdrawn its reliance on this exemption.
13. The Commissioner's investigation has therefore focussed on the Trust's compliance with section 1(1) with regard to requests 2 and 3; its refusal of requests 4d) and 11; its reliance on sections 40(5) and 41(2) with regards to requests 1, 5, 6, 7, 8, 9 and 10 and its reliance on section 40(5) with regard to requests 12, 13, 14, 15 and 16.
14. The Commissioner has commented on the submission she received from the Trust under 'Other Matters'.

Reasons for decision

Section 1 – right of access to information held by a public authority

15. Section 1(1) of the FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities:
 - a) the duty to inform the applicant whether or not requested information is held and, if so
 - b) the duty to communicate the information to the applicant.
16. In its submission, the Trust has told the Commissioner that it has carried out investigations through its service complaint procedure in relation to a complaint raised by the complainant. It says that extensive time has been spent answering the complainant's questions through that route. It invited the complainant to meet to discuss his concerns but he did not take up that offer.
17. When it received his FOIA requests the Trust says it offered him advice and assistance as to how to frame his questions so that they would fall more clearly under the FOIA (ie be framed as requests for recorded information that the Trust might hold rather than be expressed as more general queries) but the complainant declined this offer also. The Trust says it therefore worked to answer those of the complainant's questions that it felt could be captured by the FOIA.
18. In his submission to the Commissioner the complainant has indicated that he is not satisfied that the Trust has said it does not hold some information. The Commissioner has reviewed the Trust's response and internal review response to the complainant. In her view the only request to which the Trust clearly confirmed that it does not hold relevant information is request 2.
19. Request 2 is as follows: "*How should staff react to time-critical results?*"
20. In its response to the complainant the Trust had said that there is no simple written guidance that would address this question and that the answer to such questions are multifaceted. The Trust explained that different clinical areas need to manage time critical results in different ways, depending on the clinical need, urgency, the patient's condition and other known factors. The Trust had directed the complainant to a policy it considered had some relevance to request 2 and also referred to its response to parts of request 4.

21. In its submission to the Commissioner the Trust has simply said that it had consulted its experts about this request and they had advised on the answer that the Trust had given in response to request 2 ie that the specific information requested is not held.
22. The Trust has not provided further information on why it is sure it does not hold this information. However, the Commissioner has considered the specifics of the request and the fact that the Trust has said it consulted with the relevant experts. The Commissioner is satisfied that those experts would know whether or not the Trust holds a policy document or operational notes that address the complainant's specific request. She has therefore decided that, on the balance of probabilities, the Trust does not hold in recorded form the specific information that the complainant has requested in request 2, and that the policy document to which it directed the complainant is all the information the Trust holds that has some relevance to this request.
23. Request 3 is as follows: "*How should registrars hand over?*"
24. In its submission to the Commissioner the Trust has confirmed that it was relying on section 22 with regard to an updated version (version 3.3) of a policy document called '*Ward Clinic Handover of Care and Internal Transfer and Escorting of Adult Patients (Excluding Maternity)*'. It did not release this document to the complainant.
25. The Trust has noted, however, that it has now identified that it held an earlier version of this document called '*Ward Handover of Care and Internal Transfer of Adults (Excluding Maternity) Standard Operating Procedure*', which would have been current at the time of the incident that is of concern to the complainant. The Trust has told the Commissioner that it intends to release this document to the complainant.
26. The Trust's submission provides no further detail than this. However, the Commissioner understands that the earlier version of the document falls within the scope of request 3 and that, at the time of the request, the Trust did not confirm that it holds this document or communicate it to the complainant. As such the Trust breached section 1(1) with regard to request 3.
27. Under section 10(1) of the FOIA a public authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of the request. Since the Trust did not comply with section 1(1) it also breached section 10(1) with regard to request 3.
28. The Commissioner considers that the '*Ward Handover of Care and Internal Transfer of Adults (Excluding Maternity) Standard Operating*

Procedure document addresses the complainant's request. As has been noted at paragraph 12, any reliance the Trust may have had on section 22(1) has been withdrawn. The Commissioner has not therefore considered whether the Trust was correct to withhold the *'Ward Clinic Handover of Care and Internal Transfer and Escorting of Adult Patients (Excluding Maternity)'* document under this exemption. However, she notes that the Trust has advised her that this particular document has now been published under 'Operational Management' at <https://www.plymouthhospitals.nhs.uk/trust-policies>

Section 17 – refusing a request

29. The Commissioner has next considered the Trust's response to requests 4d) and request 11. In its response to the complainant and its submission to the Commissioner the Trust confirmed that it is relying on section 12(1) with regard to part d) of request 4. The Trust also referred to section 12(1) with regard to request 11 in its response to the complainant.
30. Section 12(1) of the FOIA allows a public authority to refuse to deal with a request where it estimates that it would exceed the appropriate cost limit to comply with the request in its entirety.
31. The estimate must be reasonable in the circumstances of the case. The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. Public authorities can charge a maximum of £25 per hour to undertake work to comply with a request; 18 hours work in accordance with the appropriate limit of £450 set out above, which is the limit applicable to the Trust. If an authority estimates that complying with a request may cost more than the cost limit, it can consider the time taken to:
 - determine whether it holds the information
 - locate the information, or a document which may contain the information
 - retrieve the information, or a document which may contain the information, and
 - extract the information from a document containing it.
32. Where a public authority claims that section 12(1) of the FOIA is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit, in line with section 16(1) of the FOIA.
33. Under section 17(5) of the FOIA a public authority that is relying on a claim that section 12(1) applies to a request should give the applicant a

notice stating that fact. The Trust effectively issued such a refusal to the complainant in its responses to requests 4d) and 11.

34. Request 4 is as follows: "*How are critical results highlighted?*"
35. Part d) of request 4 concerns particular steps associated with 'critical results' for staff that perform triage in the Emergency Department that might be different from steps taken by staff that care for a patient in a ward.
36. In its response to the complainant, the Trust had advised that triage is the assignment of degrees of urgency to wounds or illnesses to decide the order of treatment of a large number of patients or casualties. It went on to give a little more general information about this process. The Trust then advised that it has 59 different wards. It advised that wards do not normally provide formal triage processes and that it could not within the 18 hour/£450 limit under section 12(1) of the FOIA provide a comparative response to the complainant's question.
37. In its submission to the Commissioner the Trust has simply confirmed that there are 59 different wards and that to comply with request 4d) would mean meeting with each ward and discussing how handover takes place. This therefore would take 59 hours.
38. As has been discussed at paragraph 14, the FOIA concerns information a public authority holds in recorded form at the time of a request. A public authority is not obliged to create new information in order to respond to a request. With regard to request 4d) it appears to the Commissioner that the Trust does not hold in recorded form information that addresses this request and was aware that it did not hold it at the time it received the request. By holding meetings with each ward and discussing how handover takes place – and then recording this information – the Trust would, in effect, be creating new information, which the FOIA does not oblige the Trust to do.
39. The Commissioner's decision is that the Trust was wrong to rely on section 12(1) with regard to request 4d) because it does not, in fact, hold the requested information in recorded form. The Trust was therefore incorrect to issue a section 17(5) refusal notice with regard to request 4d).
40. Request 11 is as follows: "*How is the time of the handover to the ward known?*"
41. In its response to the complainant the Trust provided a little general information about the two different types of handover process and said that different multi-disciplinary groups will each have different handover arrangements. The Trust said it could not provide information on all

those different arrangements within the section 12(1) cost and time limit. Again, it had effectively issued a section 17(5) refusal notice.

42. In its submission to the Commissioner the Trust has confirmed that it had consulted the relevant experts to advise on its response to the complainant and that it provided the complainant with an answer to this question ie it had relied on section 12(1).
43. The Commissioner has considered the complainant's request. She considers it to comprise a set of very specific questions generated by a set of circumstances particular to the complainant. She agrees with the Trust that these are general questions rather than a request for recorded information. Nonetheless, the Commissioner has considered whether the Trust would hold information in recorded form that would address the complainant's specific questions. If it does hold such information it could then issue a section 17(5) refusal notice if it considered that the cost of locating, retrieving and extracting the information would exceed the appropriate limit.
44. The Trust's response to the complainant indicates that, in order to gather information on the handover arrangements of different multi-disciplinary groups, the Trust would have to liaise with those groups and then record its findings. This in turn suggests that, at the time of the request, the Trust did not hold that specific information in recorded form, that it was aware it did not hold it, and that it would have had to create new information in order to comply with request 11.
45. As with request 4d), the FOIA does not oblige a public authority to create new recorded information in order to comply with a request. The Commissioner considers that, on the balance of probabilities, the Trust does not hold information within the scope of request 11 and was therefore wrong to issue a refusal notice under section 17(5).

Section 40 – personal data

46. The Trust has applied section 40(5)(a) and (b)(i)(ii) to requests 1, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15 and 16. Requests 1, 5, 6, 7, 8, 9 and 10 broadly concern the complainant's mother. Requests 12, 13, 14, 15 and 16 concern a particular registrar.
47. As above, a public authority has a duty under section 1(1) of the FOIA to confirm whether it holds requested information and to communicate it to the applicant if it is held.
48. However, section 40(5B)(a)(i) of the FOIA says that a public authority is not obliged to comply with section 1(1) (ie confirm or deny that it holds requested information) if, by confirming or denying the information is held, the authority would breach one of the data protection principles.

49. This subsection is about the consequences of confirming or denying whether information is held, and not about the content of the information. The criterion for engaging it is not whether disclosing the information would contravene data protection principles, but whether the simple action of confirming or denying that it is held would do so.
50. The Commissioner has first considered whether section 40(5B)(a)(i) can be applied to requests 1, 5, 6, 7, 8, 9 and 10. These requests are as follows:
1. *Did the results have time-critical consequence?*
 5. *What critical phone calls were made?*
 6. *What phone calls were made between the ward & registrar?*
 7. *Were staff questioned on why they did not act?*
 8. *What staff areas did the patient pass in front of?*
 9. *What were the roles of these staff?*
 10. *For how long were these staff absent from their areas?*
51. The Commissioner's guidance on section 40(5) explains that there may be circumstances, for example a request for information about criminal investigations or disciplinary records, in which simply to confirm whether or not a public authority holds that information about an individual can itself reveal something about that individual. To either confirm or deny that information is held could indicate that a person is or is not the subject of a criminal investigation or a disciplinary process.
52. In this case, confirming whether or not the information requested in the above 7 requests is held would indicate whether or not the complainant's mother had a health condition, had been in receipt of hospital treatment, and the nature of that treatment.
53. For section 40(5B)(a)(i) to apply to a request the following conditions must be met:
- confirming or denying whether information is held would reveal the personal data of a third person; and
 - confirming or denying whether information is held would contravene one of the data protection principles.
54. The Commissioner has first considered whether confirming or denying relevant information is held would reveal the personal data of a third person as defined by the Data Protection Act 1998 (DPA), which was still

in force at the point that the Trust responded to the complainant's request.

Is the information personal data?

55. The DPA says that for data to constitute personal data, it must relate to a living individual and that individual must be identifiable from it. The Commissioner understands that the complainant's mother is deceased. As such, confirming or denying whether particular information is held could not release that individual's personal data, as personal data must relate to a living individual.
56. Section 40(5B)(a)(i) cannot therefore be applied to requests 1, 5, 6, 7, 8, 9 and 10 because the information is not personal data. It has therefore not been necessary to consider any of the data protection principles with regard to this information. The Commissioner has, however, considered these requests under the section 41 analysis below.
57. The Commissioner has next considered whether requests 12, 13, 14, 15 and 16 engage the section 40(5B)(a)(i) exemption. These requests are as follows:

12. *Has the registrar been questioned since the incident?*
13. *Did the ward alert the registrar of the need for oxygen?*
14. *Why was the registrar not questioned just after the incident?*
15. *Has the registrar any awareness of what happened?*
16. *Has this registrar's subsequent work been cause for concern?*

58. With regards to these requests, confirming or denying whether or not the requested information is held would release information about a particular registrar. Again, the Commissioner has considered whether this information is the registrar's personal data.

Is the information personal data?

59. With regards to the registrar, if the Trust was to confirm whether or not information requested in the above five requests is held it would indicate whether or not that individual was questioned after the incident in question or just after it; was alerted of the need for oxygen; was aware of what happened and whether or not their subsequent work has been cause for concern.

60. Taking account of the definition of 'personal data' at paragraph 54, the Commissioner is satisfied that this information can be categorised as the registrar's personal data. The registrar is a living individual, the information 'relates' to him or her and he or she can be identified from it – by, for example, other staff working in the Trust and potentially by patients and visitors.
61. The Commissioner has gone on to consider whether confirming or denying this information is held would breach one of the data protection principles.

Would confirming or denying the information is held contravene one of the data protection principles?

62. Section 40(3A)(a) says that personal data is exempt from release if disclosing it would contravene any of the data protection principles. The Commissioner has considered whether confirming or denying the requested information is held would breach the first data protection principle: that personal data '*shall be processed fairly and lawfully...*'
63. When assessing whether confirming or denying information is held would be unfair, and so constitute a breach of the first data protection principle, the Commissioner takes into account factors such as whether the information relates to their public or private life, whether it is sensitive personal data, whether the individual has consented to the authority confirming or denying the information is held, and their reasonable expectations about what will happen to their personal data.
64. The Trust's submission on this point is thin. It has simply stated that it would not be appropriate to confirm or deny it holds the requested information as the FOIA concerns putting information into the public domain.
65. In his submission to the Commissioner, the complainant's focus appears to be on the fact that his requests do not identify any particular person. However section 40(5) has been discussed above. Confirmation or denial under the FOIA is confirmation or denial to the wider world, not just to the requester. If the Trust was to confirm or deny it holds the information requested in requests 12, 13, 14, 15 and 16 it would release the personal data of the registrar who could be identified from this information; by staff and patients for examples.
66. The Commissioner notes that the information – if held - concerns the registrar's professional life, and is not sensitive personal data. She assumes the registrar has not given his or her consent for the Trust to confirm or deny it holds the information. The Commissioner considers it likely that the registrar concerned would have the reasonable

expectation that their personal data would not be placed into the public domain through confirming or denying particular information is held as the result of an FOIA request. Further, she considers it likely that confirming or denying the information is held would be likely to cause the registrar a degree of distress.

67. Despite the above, the Trust might still confirm or deny it holds the requested information if there is a compelling public interest in doing so that outweighs the legitimate interests of the data subject; that is, the registrar in this case.
68. The registrar's personal data may be of interest to the complainant but, in his submission to her, he has not presented the Commissioner with arguments to support a position that this information has any wider public interest. The Commissioner is therefore satisfied that it would not be fair to confirm or deny the requested information is held and would breach the first data protection principle.
69. The Commissioner is therefore satisfied that the Trust has correctly applied section 40(5B)(a)(i) to the information requested in requests 12, 13, 14, 15 and 16 and finds that the Trust is not obliged to confirm or deny it holds this information. Confirmation or denial would release information into the public domain that is the personal data of a third person. This would not be fair and therefore confirmation or denial would contravene the first data protection principle.

Section 41 – information provided in confidence

70. The Trust also applied section 41(2) to requests 1, 5, 6, 7, 8, 9 and 10. These requests broadly concern the complainant's mother and any health condition and hospital treatment she may have had. Again, the requests are as follows:

1. *Did the results have time-critical consequence?*
5. *What critical phone calls were made?*
6. *What phone calls were made between the ward & registrar?*
7. *Were staff questioned on why they did not act?*
8. *What staff areas did the patient pass in front of?*
9. *What were the roles of these staff?*
10. *For how long were these staff absent from their areas?*

71. Section 41(1) of the FOIA says that information is exempt information if a) it was provided by any other person and b) disclosing it would constitute an actionable breach of confidence.
72. Section 41(2) removes the duty to confirm or deny the information is held if confirmation or denial would constitute an actionable breach of confidence.
73. If the Trust was to confirm or deny under the FOIA that it holds the requested information, it would indicate whether the complainant's mother had any health condition, whether she had received hospital treatment and the nature of any treatment. The Commissioner has considered whether such information was information provided in confidence.

41(1)(a) - was the information obtained from a third person?

74. The Commissioner is satisfied that, if held, the information in question – associated with the complainant's deceased mother – would have been obtained from a third party, as it would have originated from the deceased. The Commissioner is also satisfied that this information, if held, constitutes the deceased's medical records. In the Commissioner's view information contained within medical records will qualify as information obtained from a third party.

41(1)(b) – would confirmation or denial constitute an 'actionable' breach of confidence?

75. When determining if confirmation or denial would constitute a breach of confidence, a public authority will usually need to consider:
 - whether the information has the quality of confidence
 - whether it was imparted in circumstances importing an obligation of confidence; and
 - whether confirmation or denial would be an unauthorised use of the information to the detriment of the confider.

Does the information have the necessary quality of confidence?

76. 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. As indicated previously, confirmation or denial under the FOIA would be confirmation or denial not just to the complainant but to the public as a whole. For this reason the Commissioner has considered whether the information that would be released if the Trust confirmed or denied it holds the specific information requested is otherwise accessible

to the public, rather than just to the individual complainant in this case. She has concluded that the information, if held, is neither trivial nor otherwise accessible to the public – since it concerns an individual's health records. The Commissioner is therefore satisfied that 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?

77. The Commissioner considers that 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, she is satisfied that an obligation of confidence is created by the very nature of the doctor/patient relationship and the duty is therefore implicit. The Commissioner therefore concludes that this information, if held, was obtained in circumstances importing an obligation of confidence.

Would confirmation or denial be to the detriment of the confider?

78. 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. She has not therefore considered this issue any further.

Would there be a defence to confirmation or denial in the public interest?

79. In the Commissioners view confirmation or denial will not constitute an actionable breach of confidence if there is a public interest in confirmation or denial which outweighs the public interest in keeping the information confidential.
80. The Trust did not provide any public interest arguments its submission to the Commissioner. However, the Commissioner would concur with the comments of the Information Tribunal in *Bluck v the Information Commissioner & Epsom St Helier University NHS Trust (EA/2006/0090)* 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."*
81. In his submission to the Commissioner the complainant has argued that as one of his mother's executors, the Trust should confirm or deny it

holds the information he has requested. That he is an executor is immaterial. As has been discussed, confirmation or denial under the FOIA is effectively confirmation or denial to the wider world, and not just to the complainant. The complainant has also indicated that he could himself publish certain information and that this would invalidate the Trust's reliance on section 41(2). The complainant is not a public authority and is not obliged to comply with the FOIA; he is therefore free to do as he wishes with particular information. The Trust is a public authority, however, and as such has a duty to comply with the FOIA.

82. The complainant has not given the Commissioner any compelling argument as to a wider public interest in confirmation or denial sufficient to outweigh the considerable public interest in maintaining the confidentiality of medical information. She therefore considers that the Trust would not have a public interest defence for breaching the confidence in this case.

Does the breach remain actionable after the death of the confider?

83. In *Bluck* the Tribunal confirmed the ICO's position, 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 Tribunal stated that;

"In these circumstances we conclude that a duty of confidence is capable of surviving death of the confider"

84. 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 confirmation or denial 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.
85. In light of the above the Commissioner concludes that the requested information engages the exemption under section 41(2) of the FOIA and that the Trust is not obliged, under the FOIA, to confirm or deny it holds the requested information.
86. In certain circumstances an individual may have access to a deceased person's medical records through Access to Health Records legislation. This is something the complainant has referred to in his submission to the Commissioner and that he may want to consider.

Other Matters

87. The Commissioner has remarked in the above notice that the Trust's submission to her was weak. When she wrote to the Trust on 28 September 2018, the Commissioner asked it a series of detailed questions about its position – both in respect of whether or not certain information is held and the exemptions it had applied to other information. The Trust's resulting submission did not address these questions; either at all, or in the level of detail that the Commissioner would expect.
88. Given that the Commissioner's position in relation to deceased people's medical records is so well established - in the past she has even proactively applied section 41 in situations where she has found section 40 is not engaged - the Commissioner considered that, on this occasion, there was no benefit in going back to the Trust to seek out further arguments.
89. However, the Commissioner advises the Trust that it should have provided her with a more detailed response and she expects to be provided with appropriate arguments and explanation in any future complaint she considers that involves the Trust.

Right of appeal

90. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

91. 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.
92. 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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