

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 April 2019

Public Authority: Betsi Cadwaladr University Health Board

Address: bcu.foi@wales.nhs.uk

Decision (including any steps ordered)

1. The complainant has requested various information in respect of patient safety incidents referred to in the National Reporting and Learning system – NHS Improvement, June 2018 publication. Betsi Cadwaladr University Health Board provided some information, but refused the remainder on the basis of section 41 FOIA as it considered it was information given in confidence. The Commissioner's decision is that Betsi Cadwaladr University Health Board was entitled to rely on section 41 to withhold the disputed information. However, in failing to provide its response within the required timescales, the Health Board breached sections 10 and 17 of the FOIA. The Commissioner does not require the public authority to take any steps.

Request and response

2. On 22 June 2018, the complainant wrote to the Health Board and requested the following information in respect of patient safety incidents referred to in the National Reporting and Learning system NHS Improvement, June 2018 publication which for the period from June 2017 to May 2018 recorded 15 deaths:

The date and place of each death

Was the deceased a child, adult or older person

The cause of death in each case

From the total number of deaths recorded how many post mortem examinations were performed.

From the total number of deaths recorded how many were reported HM Coroner

From the total number of deaths recorded the number of cases in which a death certificate was issued without formal reference to HM Coroner

In each of the recorded deaths a synopsis of the circumstances leading to the cause of death.

3. The Health Board responded on 10 August 2018. It provided information where held in respect of items 3, 4, 5 and 6, some information in respect of item 2, whilst withholding the actual date of death and item 7 by virtue of section 41 of the FOIA on the basis that it was information given in confidence. In respect of item 2, the Health Board informed the complainant that as it does not record the date of birth it was unable to respond that item of his request.
4. Following an internal review the Health Board wrote to the complainant on 6 September 2018. It informed the complainant that it had reviewed and updated the spreadsheet which was initially presented to him in an attempt to make it clearer. It further stated that the post-mortem is conducted, and death certificate produced by the Coroner and it does not usually receive this information formally from the Coroner's Office. In terms of its reliance on section 41 FOIA, the Health Board upheld its original decision.

Scope of the case

5. The complainant contacted the Commissioner on 11 September 2018 to complain about the way his request for information had been handled. He is not satisfied with the Health Board's part refusal to disclose information in relation to patient deaths.
6. The Commissioner considers that the scope of her investigation is to consider the Health Board's reliance on section 41 FOIA and its procedural handling of the request.

Reasons for decision

Section 41 – Information provided in confidence

7. 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 than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person"*
8. Section 41 is an absolute exemption, therefore is not subject to the public interest under the FOIA.
 9. The Health Board has confirmed that for incidents involving patients, the information stored within its Datix system will primarily be taken from patient health records, which will include information provided in confidence to health professionals. The source of the information will either have been imparted by the patient, the patient's family, to the relevant health professional by a witness to the investigator or the police, or in confidence as part of a confidential report such as a post mortem report.
 10. The Commissioner is therefore satisfied that the information was obtained from a third party.
 11. In her analysis of whether disclosure of the information would constitute an actionable breach of confidence the Commissioner must consider:
 - whether the information has the necessary quality of confidence;
 - whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information and to the detriment of the confider.
 12. 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.
 13. In this case, the Health Board has stated that the disputed information is of a highly sensitive personal nature and not to the best of its knowledge accessible to the public.
 14. The Health Board has argued that the information was imparted with an implicit obligation of confidence and considers that there would be an expectation on the part of the family and friends of the deceased patients and the various public bodies, that the information would remain confidential.

15. The Commissioner has seen no evidence that the withheld information has been put in the public domain and accepts the assurances from the Health Board that the information remains confidential. She is therefore satisfied that the information is not accessible by other means. The Commissioner is also satisfied that the withheld information was imparted in circumstances importing an obligation of confidence and has therefore gone on to consider whether disclosure of the information would be to the detriment of the confider.
16. The Commissioner is mindful of the Tribunal's decision in the case of *Bluck v ICO & Epsom and St Helier University Hospital NGHS Trust [EA/2006/0090] paragraph 15* that the loss of privacy can be a detriment in its own right. There is no need therefore 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 other than the loss of privacy in its own right.
17. In this particular case, the Health Board considers that whilst disclosing the information would not result in any tangible loss to the deceased patients, it would cause unnecessary harm and distress to the patients' family. The Commissioner acknowledges that disclosure into the public domain of the information is likely cause distress and detriment to the deceased patients' family and friends.
18. Section 41 is an absolute exemption therefore there is no requirement to consider the public interest test. However, within the Common Law of Confidence, there is a defence to an action for a breach of confidence, if it can be demonstrated there was an over-riding public interest defence. The Commissioner has therefore gone on to consider whether there is a public defence for a breach of confidence.
19. The Commissioner accepts that there may be a public interest in the disclosure of the information and acknowledges that the complainant has a personal interest in this information. However, in weighing this against the public interest in keeping the information confidential, the Commissioner has been mindful of the need to protect the relationship of trust between the confider and the confident; and the need not to discourage or otherwise hamper a degree of public certainty that such confidences will be respected by a public authority.
20. The Commissioner considers that public interest in disclosing the information does not outweigh the public interest in maintaining that trust. She therefore finds that the Health Board would not have a public interest defence for breaching its duty of confidence and that the request for information is exempt under section 41 of the FOI. She has therefore concluded that the exemption has been applied appropriately.

Section 10(1) – time for compliance with request

21. Section 10 of the FOIA states that, subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

Section 17 – refusal of the request

22. Section 17 of the FOIA concerns the refusal of the request and section 17(1) states that:

"A public authority which, in relation to any request for information, is to any extent relying on a claim ... that information is exempt information must, within the time for complying with section 1(1) give the applicant a notice..."

23. The Commissioner notes that the complainant submitted his request for information on 22 June 2018 and did not receive a response until 10 August 2018. Whilst the Commissioner notes that the Health Board provided an explanation for the delay to the complainant, its failure to provide a response until 10 August 2018 represents a breach of both section 10 and section 17 of the FOIA.

Right of appeal

24. 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

25. 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.
26. 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

Catherine Dickenson
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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