

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 27 June 2024

**Public Authority:** Lancashire and South Cumbria Integrated Care Board

**Address:** Jubilee House  
Lancashire Business Park  
Leyland  
PR26 6TR

### Decision (including any steps ordered)

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1. The complainant has requested any reports relating to HCRG Care Groups performance held by the Integrated Care Board (ICB). The ICB confirmed a report was held but this was being withheld under sections 40, 41 and 38 FOIA.
2. The Commissioner's decision is that the ICB has demonstrated that section 41 FOIA is engaged in relation to the whole report and there is no public interest defence to a breach of confidence applicable. The information has therefore been correctly withheld. As the Commissioner has found that section 41 is engaged he has not gone on to consider the other exemptions cited.
3. The Commissioner does not require any steps.

### Request and response

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4. On 17 March 2023, the complainant wrote to the ICB and requested information in the following terms:  
  
"HCRG who carry out West Lancashire care in the community have informed me the commissioning boat carry out regularly on their performance, so can you supply with copy's of your regular performance

report over the last 2 years. [see screenshot of HCRG regional director and their email to contact your department.]”

5. The ICB refused the request on 7 June 2023 under section 41 FOIA. The internal review of the 16 October 2023 upheld this position and added in reliance on section 40(2) and 38 FOIA.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 1 February 2024 to complain about the way their request for information had been handled.
7. The Commissioner considers that the scope of his investigation is to be to determine if the ICB has correctly withheld the requested information under any of the cited exemptions.

### **Reasons for decision**

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

8. Section 41(1) of the FOIA states that:

“Information is exempt information if –

- a) it was obtained by the public authority from any other person (including another public authority), and
- b) the disclosure of the information to the public (otherwise that under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

#### **Was the information obtained from another person?**

9. The information in this case, the performance report that is dated within the time frame set out by the complainant, was provided to the ICB by HCRG Care Group Ltd.
10. The Commissioner is satisfied that the information was obtained from another person and therefore the requirement of section 41(1)(a) is satisfied.

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

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

- 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 to the detriment of the confider.

### **Does the information have the necessary quality of confidence?**

12. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. The information in the report isn't trivial – the ICB explained (and the Commissioner has seen) the report contains detail on incidents, investigations and learning points from incidents. The information is not otherwise accessible as it was provided to the ICB in confidence and hasn't been published.
13. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.

### **Was the information imparted in circumstances importing an obligation of confidence?**

14. A breach of confidence will not be actionable if the information was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.
15. The ICB argues that a high reporting culture is one where incidents are reported freely to ensure lessons can be learned and quality improvements can be made to prevent more serious incidents and harms in the future. HCRG informed the ICB that it considered almost all of the report contained commercially sensitive information and disclosing this would be a breach of confidence. As well as this information in the report could be used to identify individuals as it details specific incidents with reference to age, medical conditions and dates. HCRG advised the ICB it had taken legal advice on this matter and explicitly informed the ICB the information should not be released.
16. The information on patients was imparted in circumstances imparting a duty of confidence as it was obtained through a doctor/patient relationship which is explicitly confidential. The other information in the report on HCRG's performance and its methodologies was explicitly made clear to the ICB by HCRG that it should not be disclosed.
17. The Commissioner is therefore satisfied that the report contains sensitive and confidential information and the information in the report

was imparted to the ICB in circumstances importing an obligation of confidence.

**Would disclosure be of detriment to the confider?**

18. The ICB considers disclosure would cause detriment to HCRG and any specific individuals who may be identified from the information in the report.
19. In terms of the individuals the report contains case studies in which situations are described involving individuals and serious incidents. Whilst names are not mentioned there are references to ages, injuries suffered, hospitals attended and specific dates. This is information that the Commissioner agrees could lead to identification and there is a very real argument that disclosing this information would be to the detriment of those individuals who had no expectation their information would be in this report or that this information may be disclosed.
20. Turning to HCRG; the ICB has stated that much of the information in the report is commercial in nature and that this can be accounted for under section 41 FOIA. The Commissioner's guidance on section 41<sup>1</sup> states that if the information is commercial in nature it will only constitute a breach of confidence if it would have a detrimental impact on the confider. He expects for commercial information that an explicit case is put forward for detriment and how disclosing the information would affect the confider's (HCRG's) commercial interests.
21. The ICB was concerned detriment could be caused to HCRG as the information could be misrepresented. The ICB considered that due to the sensitivity of the subject matter in the report and the potential to misrepresent that information it was reasonable to assume disclosure would damage the open and transparent culture needed to discuss and assess topics of incidents and clinical quality. The ICB considers this risk is particularly relevant as there is no comparative element or contextualisation within the report to enable anyone to understand HCRG's position relative to other similar services.
22. The Commissioner has viewed the report and he agrees with the ICB that there's a significant amount of information that is sensitive and revealing, much of it relates to specific members of staff and their roles in reporting incidents and difficulties they have faced. Identifying members of staff from this information would not be difficult for anyone with a small degree of knowledge of HCRG or their community

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<sup>1</sup> [information-provided-in-confidence-section-41.pdf \(ico.org.uk\)](https://ico.org.uk/information-provided-in-confidence-section-41.pdf)

healthcare services. The reports intention is to provide an open and honest assessment of its performance and its incident handling and reporting. Whilst the Commissioner is not convinced that the ICB has provided evidence to show that there would be commercial detriment to HCRG if the report was disclosed, he does accept there would be detriment to HCRG in terms of its relations with staff who are referenced throughout by role and with specific examples of incidents in the community. Disclosing this level of detail on such sensitive subjects is likely to lead to detriment to not only the staff who reported incidents to HCRG but also the HCRG's relationships.

**Is there a public interest defence for disclosure?**

23. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a defence to an action for breach of confidentiality. The Commissioner is therefore required to consider whether the ICB could successfully rely on such a public interest defence to an action for breach of confidence in this case.
24. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure of the information requested against both the wider public interest in preserving the principle of confidentiality and the impact that disclosure of the information would have on the interests of the confider. As the decisions taken by courts have shown, very significant public interest factors must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality.
25. The Commissioner has not been presented with any evidence to suggest that the public interest in disclosing the report is of such significance that it outweighs the considerable interest in maintaining the trust between confider and confidant.
26. Having considered all the circumstances of this case, and the withheld information, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information.

Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA.

## **Right of appeal**

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27. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

28. 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.
29. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Jill Hulley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**