

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 June 2013

Public Authority: South Eastern Health & Social Care Trust

Address: Lough House
Church Street
Newtownards
Co. Down
BT23 4AS

Decision (including any steps ordered)

The complainant has requested from the South Eastern Health and Social Care Trust ("the Trust") the number of Serious Adverse Incident reports compiled within the Trust during the 2011/12 financial year. He also requested copies of those reports. The Trust disclosed the number of reports and a brief summary of each incident, however it refused to disclose copies of the reports, citing sections 40(2) and 41 of FOIA as a basis for non-disclosure. The Commissioner's decision is that the Trust has correctly applied the above exemptions to the withheld information.

Request and response

1. On 10 September 2012 , the complainant wrote to the Trust and requested information in the following terms:

"I am writing in relation to Serious Adverse Incidents (SAIs). I wish to apply for a full disclosure of the following information under the Freedom of Information Act 2000.

- Please state the number of Serious Adverse Incident reports compiled within your Trust during the 2011/12 financial year.
- Please provide copies of each report. (Personal details and the date may be redacted where applicable). I would ask that the summary of the report/SAI stays intact where possible."

2. The Trust responded on 8 October 2012. It provided the complainant with a list of SAIs reported during the specified period and a brief description of each incident. It stated that copies of the reports themselves would not be provided to the complainant and cited sections 40(2) and 41 of FOIA as a basis for non-disclosure.
3. Following an internal review the Trust wrote to the complainant on 24 October 2012. The reviewer upheld the original decision.

Scope of the case

4. The complainant contacted the Commissioner on 26 November 2012 to complain about the way his request for information had been handled.
5. The Commissioner has considered the Trust's handling of the complainant's request, in particular whether it was correct to apply the above FOIA exemptions as a basis for non-disclosure of the withheld information.

Reasons for decision

Section 41 of FOIA

6. Section 41 of FOIA provides that:-
 - (1) 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.
 - (2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.
7. 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 and to the detriment of the confider.
8. 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.
 9. In this case, the majority of the withheld information consists of Serious Adverse Incident Reports relating to deaths of individuals. The Trust has confirmed to the Commissioner that these reports contain information from the individuals' medical records and also from police reports and coroners' reports. The Commissioner accepts therefore that these reports consist of information obtained from third parties. Therefore, the requirement of section 41(1)(a) is satisfied.
 10. No evidence has been put before the Commissioner that the specifically withheld information in question has been put into the public domain. The Commissioner would not generally expect such information to be put into the public domain, since access to the withheld information is restricted to health and social care professionals and those who, within their professional capacity and remit, can examine the reports. He is therefore satisfied that the information is not accessible by other means.
 11. The Trust provided the Commissioner with copies of the relevant reports, which the Commissioner has examined. They contain information about the deceased's health, medical opinions of various professionals, and the circumstances surrounding the death of the individuals. Given the nature of the information the Commissioner is satisfied that the information is not trivial.
 12. The Commissioner is therefore satisfied that the withheld information has the necessary quality of confidence.
 13. The Commissioner has gone on to consider whether the information was imparted in circumstances importing an obligation of confidence.
 14. The information relates to the medical and social care of the deceased patients and includes information provided in confidence by the patient to the health and social care professionals involved in their care. When patients receive treatment from doctors and other medical and social care professionals, they do so with the expectation that information will not be disclosed to third parties without their consent. The Commissioner is satisfied that an obligation of confidence is created by

the very nature of the relationship between the individuals and the health and social care professionals who treat them, and that the duty of confidence is therefore implicit.

15. The Commissioner went on to consider whether disclosure of the information would be to the detriment of the confider. The loss of privacy can be a detriment in its own right. The Commissioner considers that, as medical records, also police and coroners' reports, constitute information of a highly sensitive personal nature, there is no need 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.
16. In this case, the Commissioner considers that disclosure would be contrary to the deceased persons' reasonable expectations of maintaining confidentiality in respect of their private information. He therefore considers the absence of detriment would not defeat a cause of action.
17. The Commissioner also considers that, while disclosure would cause no harm to the confider, knowledge of the disclosure of the deceased persons' medical information, together with information from police and coroners' reports regarding the circumstances of the individuals' deaths could distress surviving relatives. The Commissioner considers that the knowledge that confidential information has been passed to those to whom the confider would not willingly convey it, may be sufficient detriment.
18. The Commissioner then considered whether there is a public interest defence for a breach of confidence. Disclosure of confidential information will not constitute an actionable breach of confidence if there is a public interest in disclosing the information which outweighs the public interest in keeping the information confidential.
19. In considering whether the disclosure was in the greater public interest, the Commissioner was mindful that in some circumstances there may be a public interest in the disclosure of such information, such as instances where there were suspicious circumstances surrounding a person's death – although he considers such circumstances will be rare.
20. In reaching a view on this the Commissioner has had regard for certain information contained within the reports, the specific nature of which it would not be appropriate to discuss in this notice. Having considered this, the Commissioner has formed the view that in this case there is no overriding greater public interest, and that therefore the public interest does not override the duty of confidentiality.

21. One of the requirements for section 41 to apply is that the disclosure of the information would constitute an actionable breach of a duty of confidence. Given that the Commissioner accepts that in this case a duty of confidence exists, the questions to be addressed are whether such a disclosure would be actionable, and if so, who could bring the action?
22. With regard to whether this disclosure would be actionable, the Commissioner considers this to be the case, though it is unlikely that damages could be awarded for a breach of the duty of confidence to the deceased person as there is no obvious financial loss. Instead, any remedy would most likely be in the form of an injunction to prevent publication of the information requested.
23. After reaching this view, it is therefore necessary to establish who would be able to bring the action if the duty of confidence was breached.
24. In the case of *Bluck v Information Commissioner and Epsom & St Helier University Hospitals NHS Trust*¹² 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 and that in the circumstances of this case it does survive" (para 21).
25. Although these issues did not come up in *Bluck* it is the Commissioner's view, supported by Counsel's opinion, that this action would most likely be by way of an application to the court for an injunction seeking to prevent disclosure of the information. It should be noted that there is no relevant case law in support of this position.
26. Furthermore it is the Commissioner's view that in determining whether disclosure 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 be able to take action. This is because it should not be the case that a public authority should lay itself open to legal action because at the time of a request it is unable

² EA/2006/0090

to determine whether or not a deceased person has a personal representative.

27. The Commissioner is satisfied that the breach of confidence which would arise from disclosure of the relevant reports would be actionable by the personal representatives, if any, of the deceased individuals.
28. In view of the above, the Commissioner considers that disclosure of this information is exempt under section 41 of the Act, and that the Trust was correct to apply this exemption in relation to the parts of the withheld information which contain information regarding deceased individuals.
29. In weighing this against the public interest in keeping the information confidential, the Commissioner has been mindful of the wider public interest in preserving the principle of confidentiality.
30. It is in the public interest that confidences should be respected. The encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence. The Commissioner is mindful of the need to protect the relationship of trust between confider and confidant; and the need not to discourage or otherwise hamper a degree of public certainty that such confidences will be respected by a public authority.
31. The Commissioner considers that the public interest in disclosing the information does not outweigh the public interest in maintaining trust between medical and social care professionals and the individuals they treat. He finds that the public interest in preserving that trust to be particularly strong.
32. The Commissioner considers that the Trust would not have a public interest defence for breaching its duty of confidence. Therefore, he finds that the request information is exempt under section 41 and the Trust applied this exemption appropriately.

Section 40(2) of FOIA

33. The Trust stated that section 40(2) of FOIA was applicable to some of the withheld information, as it contains sensitive personal data. Having examined the withheld information, the Commissioner has ascertained that a small amount of information in the SAI reports relates to living individuals.
34. Section 1 of the Data Protection Act 1998 (the "DPA") defines personal data as data which relate to a living individual, who can be identified:
 - from those data, or

- from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
35. As the Commissioner is satisfied that some of the information in the reports is the personal data of living individuals, he has gone on to consider whether this information is exempt from disclosure under section 40(2).
 36. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied.
 37. One of the conditions listed in section 40(3)(a)(i) is where disclosure of the information to any member of the public would contravene any of the principles of the DPA.
 38. The Commissioner has primarily considered the first principle of the DPA which requires, amongst other things, that personal data is processed fairly and lawfully. The Commissioner has therefore first considered whether the disclosure of this information would be fair.
 39. As the Commissioner believes that the disclosure of this information would be unfair he has formed the view that disclosure would be in breach of the first principle of the DPA. Therefore he believes that section 40(2) is engaged and that this information is exempt from disclosure.
 40. The complainant has argued that the withheld information cannot be confidential as there is no possibility of identifying individuals from the reports should their names and identifying details be redacted, as he has requested.
 41. However, the Trust has informed the Commissioner that there are small populations within the Trust's catchment area. When this is extended to the region of Northern Ireland, there remains a very significant possibility that the release of anonymised information could identify individuals through linkage from other data sources.
 42. The circumstances of some incidents will usually be reported in the local media, and cross-referencing with information provided by different organisations may build up a scenario which would lead to identification of individuals or families involved. This is a very serious consideration given the small population of each Trust area. The Trust considers that the identification of individuals in such circumstances would be an infringement of their privacy. The Trust has taken the view that the relevant individuals and their relatives have a right to

privacy and confidentiality and it would be unfair to release information of this nature into the public domain.

43. The Trust further argues that, once information is disclosed to the media, even in a redacted format, the Trust has no control over the actual editing of newspaper articles, which could be written with redacted information provided by the Trust having been aggregated with other sources of information to form the basis of the article. The Commissioner accepts that this is a very valid argument.
44. The Commissioner accepts that the personal data contained within the withheld information is of a highly sensitive nature. The Trust has informed the Commissioner that it has not sought the consent of the individuals concerned to the disclosure of the information. The Trust informed the Commissioner that it deemed the seeking of such consent to be totally inappropriate from a health and social care point of view, as the information contained in SAI reports is of such an extremely sensitive nature that the seeking of consent would be highly likely to cause undue distress to the individuals concerned and which may lead to causing harm to those individuals. The Commissioner fully accepts that this is a very valid and strong argument against disclosure.
45. As the Commissioner, having examined the reports and the submissions of both the Trust and the complainant, is satisfied that the disclosure of this information would be unfair, he has formed the view that disclosure would be in breach of the first principle of the DPA. Therefore he believes that section 40(2) is engaged and that this information is exempt from disclosure.

Right of appeal

46. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

47. 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.
48. 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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