

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 November 2015

Public Authority: Camden and Islington Foundation Trust

Address: St Pancras Hospital
4 St Pancras Way
London
NW1 0PE

Decision (including any steps ordered)

1. The complainant has requested information about two 'clusters' of deaths referred to in a particular Care Quality Commission report. Camden and Islington Foundation Trust ('the Trust') has refused to disclose the information, which it says is exempt under sections 40(2) (third person personal information) and section 41(1) (information provided in confidence).
2. The Commissioner's decision is that Camden and Islington Foundation Trust has breached section 1 and section 10 of the FOIA because it did not initially identify all the information that it holds that falls within the scope of the request. It therefore did not provide the complainant with a full response within 20 working days.
3. The Commissioner has decided that the Trust correctly applied the exemption at section 41(1) of the FOIA to the majority of the requested information that it has now identified that it holds, and that the inherent public interest favours protecting the confidence.
4. However, he considers that one element is not exempt under section 41(1) or section 40(2) and he requires the Trust to take the following step:
 - Release the 'Cluster Review Summary Analysis' report to the complainant, having removed from it the information relating to serious injuries, which was not requested by the complainant.
5. The public authority 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

6. The complainant submitted the following request on 28 August 2014:

"Under provisions in the Freedom of Information Act 2000 please provide me with copies of all reports in relation to the clusters of deaths referred in the Care Quality Commission Quality [CQC] report dated 22 August 2014 at page 15.

The CQC report can be found here

http://www.cqc.org.uk/sites/default/files/taf_provider_camden_and_islington_nhs_foundation_trust_scheduled_20140805.pdf

7. Camden and Islington Foundation Trust ('the Trust') said that the request was vexatious under section 14(1) and refused to comply with it. Following the Commissioner's decision in [FS50564436](#), the Trust issued a fresh response on 12 June 2015. It said that the information is exempt from disclosure under section 40(2) and section 41 of the FOIA.
8. The Trust reconsidered its response following communication with the Commissioner and confirmed to him on 18 June that it maintains this position. The Commissioner considers this to have been an internal review.

Scope of the case

9. The complainant contacted the Commissioner on 12 June to complain about the way his request for information had been handled.
10. The Commissioner has focussed his investigation on the Trust's application of section 41 and section 40(2) to the request. He has also considered its obligations under section 1 and section 10.

Reasons for decision

11. In [FS50564436](#), the Trust had said that the withheld information comprised two summary analysis reports and 12 investigation reports that concern a 'cluster' of unexpected deaths of individuals using Trust services. The Trust explained to the Commissioner that it had

subsequently identified that the 12 investigation reports referenced in that case concerned unexpected deaths not all of which had, in fact, occurred within the timeframe of the Care Quality Commission report that is the subject of the request ie March and April 2013.

12. The Trust has confirmed to the Commissioner that the withheld information that falls within the scope of the request, and which the Commissioner has seen, comprises six investigation reports and nine statements. These concern a 'cluster' of unexpected deaths of individuals using Trust services that occurred in March and April 2013. It also included two summary reports: a 'Cluster Review Summary Analysis Detail' report and a 'Cluster Review Summary Analysis' report.
13. During the Commissioner's investigation, when the request was being reconsidered, it became apparent that the CQC report refers to a second series of serious incidents associated with people linked to the Camden Crisis Pathway. The Trust then identified further information that it holds that relates to these incidents; namely a further six investigation reports and six coroner statements. It said that this information is also exempt under section 41.
14. Again, during the investigation it was further identified that, with regard to the second series of serious incidents, the CQC report refers to an internal review that was about to take place. At the time of the complainant's request therefore, this review had concluded and the Trust has confirmed to the Commissioner that it is published on the Trust's website. On 6 October, the Commissioner advised the Trust to provide the complainant with a fresh response with regard to this particular information.
15. Section 1(1) of the FOIA says that anyone requesting information from a public authority is entitled to be told by the authority whether it holds the information and, if so, to have the information communicated to them. Section 10(1) of the Act says that public authorities must comply with section 1(1) within 20 working days of receiving the request.
16. In this case, the Trust does not appear to have identified all the information that falls within the scope of the request, at the time it received the request. Having considered the request carefully, it may have been appropriate to clarify with the complainant the specific information he was seeking at that point. As a consequence, it has taken over 12 months for the complainant to receive a full response to his request. The Trust has therefore clearly breached section 1 and section 10 in its handling of the request.

Section 41 – information provided in confidence

17. Section 41(1) of the FOIA says that information is exempt from disclosure if (a) it was provided to a public authority by another person and (b) disclosing it would be an 'actionable' breach of confidence (ie the aggrieved party would have the right to take the authority to court as a result of the disclosure). Although section 41 is an absolute exemption and is therefore not subject to a public interest test under the FOIA, the common law duty of confidence contains an inherent public interest test.

41(1)(a) - Was the information provided by another person?

18. The majority of the information to which the Trust has applied the section 41 exemption is contained in statements of witnesses to the circumstances of particular deaths of individuals who had been using Trust services. It has also applied the exemption to investigation reports (including coroner statements) into particular incidents. The Commissioner is satisfied that this information was provided other people.

19. A small amount of the information is held in a Summary Analysis Detail report and a Summary Analysis report. The Summary Analysis Detail report briefly summarises the particulars and circumstances of each of the unexpected deaths. The Commissioner considers that this information was provided by other people, including coroners, witnesses and medical staff. He considers that it was also provided indirectly by the deceased, through access to their medical records. The Commissioner is satisfied that the information held in the witness statements, investigation reports and Summary Analysis Detail report was provided by other people.

20. The second report, the Summary Analysis Report, collates information from the Detail report into two pages of anonymised, numerical data. It is less clear cut to the Commissioner that this information has been provided by another person. This is because it is at least three steps removed from the original source and has been generated by the Trust from its own Detail report. In the Commissioner's view, this element of the withheld information has not been provided by another person.

41(1)(b) – Would disclosing the information be an actionable breach of confidence by that or any other person?

21. When considering whether disclosing information would be a breach of confidence, the Commissioner takes into account whether:

- the information has the necessary quality of confidence

- 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.

22. This follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415.

Does the information have the necessary quality of confidence?

23. 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. Information which is of importance to the confider should not be considered trivial.

24. Because this information is now being requested under the FOIA and no evidence to the contrary has been put before him, the Commissioner is satisfied that the information is not otherwise accessible to the public. He is also satisfied that the witness and coroner statements, investigation reports and Summary Analysis Detail report being withheld are clearly not trivial in nature. This is because they concern the circumstances surrounding the unexpected deaths of people who had been using Trust services. The Commissioner is therefore satisfied that the statements, investigation reports and Detail report do have the necessary quality of confidence.

25. The Commissioner accepts that the Summary Analysis report is not otherwise accessible and is not trivial but it is not immediately clear to him that this report has the necessary quality of confidence. This is because of its numerical and anonymous nature. It also does not have any confidential markings.

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

26. As discussed, the witness statements, investigation reports and Detail report concern the circumstances surrounding the deaths of particular individuals. The information contains the medical opinions of various professionals and information from police reports and coroners' reports. It also contains information provided indirectly by the deceased individuals via their medical records and their previous consultation with health and social care professionals.

27. In the Commissioner's opinion 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, he is satisfied that an obligation of confidence is created by the very nature of the doctor/patient relationship and the duty is therefore implicit. This is further supported by the oath taken by doctors guaranteeing to protect doctor/patient confidentiality.

28. The Commissioner is also satisfied that the wider circumstances in which all the information held in the witness statements, investigation reports and the Detail report was imparted – the unexpected death of a number of individuals – imports an implicit duty of confidence and sensitivity to this information. He notes that the investigation reports are marked as 'Strictly Confidential'.
29. The CQC report mentioned in the request says at page 15 that the Trust undertook a 'cluster review' in order to identify any "overarching systemic issues" in the services the Trust provided. As part of its 'cluster review', the Trust has drawn information from the longer reports and collated it into the Cluster Review Summary Analysis report. This report does not appear to be about the deceased individuals specifically. It is a more general and statistical tool that the Trust used to analyse the 'cluster' of unexpected deaths (this particular report also includes incidents of serious injury) in order to identify the possible overarching systemic issues, referenced by the CQC. The Commissioner is not convinced that the circumstances in which the Trust itself generated this particular information impart the same obligation of confidence.

Would disclosing the information be an unauthorised use of the information to the detriment of the confider?

30. The Commissioner has first considered the witness statements, investigation reports and Summary Analysis Detail report. The loss of privacy can be a detriment in its own right. The Commissioner considers that health and social care records, police and coroners' reports constitute information of a highly sensitive and personal nature. It is therefore not necessary for there to be any detriment to the confider in terms of tangible loss, for this information to be protected by the law of confidence. The Commissioner has therefore not considered this issue further.
31. With regard to 41(1)(b), the Commissioner notes that the Tribunal in *Bluck*¹ confirmed that even though the person the information concerns

¹ *Bluck v the Information Commissioner & Epsom St Helier University NHS Trust*
EA/2006/0090
<http://www.informationtribunal.gov.uk/DBFiles/Decision/i25/mrspluckvinformationcommissioner17sept07.pdf>

may have died, action for a breach of confidence could be taken by the personal representative of that person, and therefore the exemption continues to apply. The Commissioner considers that in the circumstances of this case the duty of confidence is similarly capable of surviving the death of the confiders. 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 people have personal representatives who would take action.

32. Section 41 of the FOIA is an absolute exemption and thus not subject to the public interest test contained at section 2 of FOIA. However, as noted at paragraph 17, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under the FOIA).

Inherent public interest test

Public interest in maintaining the confidence

33. The Trust has not advanced any specific arguments for maintaining the confidence, but has argued that the information was provided in confidence and, being health and social care information, has the necessary quality of confidence. In addition to this, the Commissioner concurs with the comments of the Information Tribunal in *Bluck*. Namely, there is significant public interest in patients having confidence that medical staff will not disclose sensitive medical data before they themselves 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. This is counter to the public interest as it could endanger the health of patients, or in the case of transmissible diseases, the wider community.

Public interest in disclosing the information

34. Neither the complainant nor the Trust has provided arguments for disclosing the information. The Commissioner notes that the CQC observed that the Trust had already undertaken one Cluster Review and that, while there were lessons that could be learned from each unexpected death or serious injury, there were no overarching systemic issue identified regarding the Trust's services. The published internal review of the second series of serious incidents also found that a 'cluster' of deaths was not suggested in that the incidents were not found to be linked in some way or to share the same cause.

35. The Commissioner considers that there will be some public interest in disclosing the information to make transparent the Trust's response to the incidents in questions and to demonstrate that its subsequent investigations were robust.

Balance of the public interest

36. The Commissioner has not been presented with any evidence to suggest a degree of public interest regarding the two possible 'clusters' of serious incidents that is of such significance that it outweighs the considerable interest in maintaining the confidence of the health and social care information in question. The two 'clusters' of incidents were investigated and no significant concerns regarding the services provided by the Trust were identified.
37. To summarise, the Commissioner is therefore satisfied that the information held in the witness and coroner statements, investigation reports and Cluster Review Summary Analysis Detail report was provided by other people and that disclosing it would be an actionable breach of confidence by that or any other person. This information is therefore exempt under section 41.
38. However, he does not consider that the Cluster Review Summary Analysis report meets the necessary criteria for exemption under section 41. He has gone on to consider whether section 40(2) can be applied to this report.

Section 40(2) – third person personal data

39. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of a third person ie someone other than the requester and the conditions under either section 40(3) or 40(4) are also satisfied.
40. The Commissioner therefore first considered the information contained in the Summary Analysis report and whether the information that is within the scope of the request is the personal data of third parties.
41. The information contained in the Cluster Review Summary Analysis report concerns the number and the dates of unexpected deaths *and serious injuries* in a particular period. The Trust rightly pointed out to the Commissioner that the complainant's request concerned unexpected deaths only. It said that if it was to remove the information about serious injuries in order to disclose the remainder to the complainant, the report would not make sense, and would possibly be misleading. This alone would not be a valid reason for withholding the entire Summary Analysis report.

Is the information personal data?

42. The Data Protection Act says that for data to constitute personal data, it must relate to a living individual, and that individual must be identifiable.
43. In addition to the number and the dates of unexpected deaths (and serious injuries) in the period covered, the information in the Cluster Review Summary Analysis report constitutes a number of measures about the individuals, and their care, under headings such as: Age, Gender, Marital Status, Medication, Staffing and Handover, with a series of options under each. Against each option is a number. This is the number out of the total number of deceased (or seriously injured) individuals to whom that particular option applies.
44. For data to be personal data it must relate to a living individual. The information in this particular report that concerns deceased individuals is therefore not personal data. This is principally because it does not relate to living individuals, but also because no individual can be identified from the information. No individual is named in this report, nor are any aspect of their addresses. Consequently, the Commissioner does not consider that any specific, deceased individual could be identified from it; either from this report alone or in combination with any other information that might already be in the public domain.
45. Because the Commissioner is satisfied that the information in the Summary Analysis report is not personal data, it has not been necessary to consider the conditions under section 40(3) and 40(4). He is satisfied that the exemption under section 40(2) cannot be applied to this specific information.
46. He notes his conclusion regarding the majority of the requested information – that it is covered by section 41 – but considers that the situation regarding the Summary Analysis report differs. Some of the remaining information may also not be personal data because it does not relate to living individuals. The Commissioner has found that, nonetheless, it is protected under the FOIA because it was provided in confidence and action for a breach of confidence could be taken by the personal representatives of the deceased individuals. In his discussion of the section 41 exemption and in his reasoning above, the Commissioner has explained why the information held in the Summary Analysis report does not warrant the same protection.

Right of appeal

47. 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

48. 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.
49. 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