

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 October 2015

Public Authority: Cambridge University Hospitals NHS Foundation Trust

Address: Cambridge Biomedical Campus
Hills Road
Cambridge
CB2 0QQ

Decision (including any steps ordered)

1. The complainant has requested information from Cambridge University Hospitals NHS Foundation Trust ("the Trust") on public health funerals carried out by the Trust since January 2014. The Trust provided information for some of the request but refused to provide the names, last known addresses, dates of birth and dates of death of individuals who had a public health funeral on the basis of section 41 of the FOIA.
2. The Commissioner's decision is that the Trust has correctly applied the provisions of section 41 to withhold all but the dates of death.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the dates of death of any individuals who received a public health funeral from the Trust since January 2014
4. The public authority must take these steps 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 2015, the complainant wrote to Cambridge University Hospitals NHS Foundation Trust ("the Trust") and requested information in the following terms:
- 1) *"Does this Trust conduct Public Health Funerals (burials of individuals with no known family or next of kin)?*
 - 2) *How many public Health funerals has the Trust conducted since January 2014 to the present (if applicable)?*
 - 3) *Can you list the names of all deceased individuals the Trust has carried out public Health funerals for since January 2014 (if applicable)*
 - 4) *Can you list the last known address of all the deceased individuals the Trust has carried out public Health funerals for since January 2014 (if applicable)*
 - 5) *Can you list the date of birth and date of death of all the deceased individuals the Trust has carried out public Health funerals for since January 2014 (if applicable)*
 - 6) *Can you list whether or not the deceased individuals the Trust has carried out public Health funerals for since January 2014 have been referred, or will be referred (or even might be referred) to the Treasury solicitor (if applicable).*
 - 7) *Has the Trust passed on any of this information (or similar information) on an informal basis or as a formal FOI request to another individual or company, if yes, what is the name of the individual/company*
 - 8) *Is there an individual or department in charge of carrying out the Trusts public Health Funerals? If yes, can you send me their names, emails and phone numbers?*
 - 9) *What is the name of the person(s) who refers information to the Treasury Solicitor? Can you send me their name, email and phone number?"*
6. The Trust responded on 14 April 2015. It provided answers to parts 1 and 2 and parts 6 – 9 of the request but refused to provide the information requested in parts 3 – 5 of the request on the basis of section 41 of the FOIA.

7. Following an internal review the Trust wrote to the complainant on 27 May 2015. It stated that it upheld its decision to withhold the information requested in parts 3 – 5 of the request under section 41.

Scope of the case

8. The complainant contacted the Commissioner on 30 June 2015 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of his investigation to be to determine if the section 41 exemption has been correctly applied by the Trust to withhold the names, last known addresses, dates of birth and dates of death of any individuals the Trust conducted public health funerals for since January 2014.

Reasons for decision

Section 41 – information provided in confidence

10. Section 41 applies to information obtained from a third party whose disclosure would constitute an actionable breach of confidence. This exemption is absolute and is therefore not subject to a public interest test.
11. Section 41(1) states:
"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."
12. 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.
13. 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. In this case the information being withheld by the Trust is the name, address and date of birth of the deceased individual. This information is clearly information obtained from a third party, in this case the deceased individual. As such the requirement of section 41(1)(a) is met.
 14. However, the Trust has also withheld the dates of death. This information was not obtained by a third party and so cannot meet the requirement of section 41(1)(a) and therefore does not engage the section 41 exemption.
 15. For the remaining information – the names, last known addresses and dates of birth – the Commissioner has considered whether the information can be said to be otherwise accessible.
 16. The complainant has argued that the withheld information is already in the public domain. He has stated that anyone can get a list of the recently deceased using death certificates from the General Register Office, these would contain the deceased's name, dates of birth/death, and last known addresses.
 17. The complainant has also stated that the British Library publishes and regularly updates a list of all the recently deceased persons in the country, complete with full names, dates of birth/death, locality of death and a reference to order a death certificate. Therefore the complainant's argument is that because most of the information is already publicly available it is substantially more difficult to argue that section 41 is engaged as it is otherwise accessible.
 18. The Commissioner has considered the complainant's argument. However, he notes that the information which is already publicly available does not detail whether the deceased had a public health funeral which is the core of the request in this case. He has taken into consideration his own guidance on 'Information in the public domain'¹ and believes that disclosure in response to this request would provide ready-collated information in a more easily useable form than obtaining information from the British Library or General Register Office. The Commissioner further notes that in order to access death certificates or information held by either of the two bodies mentioned, an applicant

¹ <https://ico.org.uk/media/for-organisations/documents/1204/information-in-the-public-domain-foi-eir-guidance.pdf>

would need to be in possession of some of the information requested by the complainant and refused by the Trust i.e. the name, date of death, date of birth or address of the deceased.

19. In any event the information requested specifically links the information which can be obtained from the British Library or General Register Office with the fact that the deceased individual had a public health funeral and it is this information which is not publicly available elsewhere. The Commissioner is therefore satisfied the information is not otherwise accessible.
20. The Commissioner has next gone on to consider whether the information is more than trivial and therefore has the necessary quality of confidence. As the information in question was provided to the Trust as part of its treatment of the deceased individual and it reveals that the individual had a public health funeral the Commissioner does not consider this to be trivial and therefore has the necessary quality of confidence.
21. The Commissioner has gone on to consider whether the information was imparted in circumstances importing an obligation of confidence. The Trust considers there would have been a clear expectation from the individual when they provided their information to the Trust that this would be held under a duty of confidence. The Commissioner agrees that there is a general implied expectation of confidence for information provided to a medical professional or body. As such the Commissioner accepts the information was imparted in circumstances importing an obligation of confidence.
22. The Commissioner has gone on to consider whether disclosure of the information would be to the detriment of the confider. The Trust has argued that information provided by a person for the purpose of their health care should not be disclosed as it would breach the general privacy under which this information is expected to be held. The detriment that would be caused would therefore be a loss of privacy. The Trust considered whether confidence extends beyond a person's death and concluded that action for a breach of confidence can still be taken by a representative of the deceased, should they exist, so the duty of confidence does not dissipate after death in relation to information provided for the purposes of health care.
23. The loss of privacy as a detriment in its own right has previously been confirmed by the Information Tribunal² and the Commissioner therefore considers that as the information in this case is of a personal nature

² *Bluck v ICO & Epsom and St Helier University Hospital NHS Trust [EA/2006/0090]*

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.

24. Following this argument through, the Commissioner recognises that if disclosure would be contrary to the deceased's reasonable expectation of maintaining confidentiality in respect of their private information, the absence of detriment would not mean that there could not still be an actionable breach of confidence.

25. In previous decision notices³ the Commissioner argued that:

"The Commissioner considers that while disclosure would cause no positive harm to the confider, knowledge of the disclosure of the deceased's medical records could distress surviving relatives of the deceased. Knowledge that confidential information has been passed to those whom the confider would not willingly or otherwise failed to convey it may be sufficient detriment⁴. It follows then that in determining whether disclosure would constitute an actionable breach of confidence, it is not necessary to establish whether, as a matter of fact, the deceased person has a personal representative who would take action as the complainant argues."

26. The Commissioner has considered these arguments in the context of this complaint and does accept that there is the potential for an actionable breach of confidence. The Commissioner recognises the Trust has a responsibility to take confidentiality seriously, particularly in relation to information it receives from patients as part of their healthcare, and as such it would be improper to disclose the information unless there is a public interest defence for a breach of confidence. In the Commissioner's view disclosure will not constitute an actionable breach of confidence if there is a public interest in disclosure which outweighs the public interest in keeping the information confidential.

27. The Commissioner recognises that the Courts have taken a 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. As the decisions taken by courts have shown, very serious public interest matters must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct or illegality.

28. The complainant has made a number of arguments to support his view that disclosure would be in the public interest. These are that:

³ FS50416397

⁴ *EY v ICO & Medicines and Healthcare Products Regulatory Authority* [EA/2010/0055]

- Disclosure increases the likelihood of relatives being made aware of deceased's passing.
 - Once found, relatives may pay for the funeral (next of kin are often asked to do so by the council when they are found) thus saving public money.
 - Speeding up the probate process will save the Government Legal Department (if there is an estate to refer) time and research in finding a next of kin which in turn would save public funds.
29. The Commissioner recognises that there is always some public interest in the disclosure of information. He also recognises that there is interest to certain members of the public who may have an entitlement to the estate of a particular deceased person's estate, and/or organisations enabling individuals to exercise that entitlement. However, he has not given this argument significant weight as there are other mechanisms in place for the administration of estates of persons who die intestate and without a known kin, such as the Bona Vacantia Division of the Government Legal Department. He notes that the routine publishing of estates that have been referred to the Bona Vacantia division has enabled more people to claim their entitlement from estates⁵.
30. In determining whether there is a public interest defence to an actionable breach of confidence, the Commissioner has taken into account the arguments presented and has considered the inherent public interest in the preservation of the principle of confidentiality. The Commissioner considers it important to protect the relationship between those who provide healthcare services and the recipients of such services and there is an expectation by the public that these confidences will be upheld.
31. The Commissioner acknowledges there is some merit to the complainant's argument but he is not minded to accept that there are strong public interest arguments for the disclosure of this information and he does not consider that disclosure of information detailing who has been the recipient of public health funerals and their last known address to the world at large would meet any wider public interest in increasing transparency or accountability.
32. On this basis, and taking into account the strong public interest in preserving the principle of confidentiality, the Commissioner considers the Trust would not have a public interest defence for breaching its duty of confidence. Therefore, the Commissioner finds that the information

⁵ <https://www.gov.uk/government/news/transparency-transforms-total-estates-claimed-by-relatives>

within the scope of the request, with the exception of the date of death, is exempt under section 41 and the Trust has correctly withheld it.

Right of appeal

33. 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

34. 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.
35. 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