

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 4 October 2016

**Public Authority:** Barts Health NHS Trust  
**Address:** Royal London Hospital,  
John Harrison House  
Philpot Street  
London  
E1 2DR

#### Decision (including any steps ordered)

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1. The complainant requested information about the personnel and payroll records of a deceased doctor. Barts Health NHS Trust (the Trust) refused to provide the information, citing the exemption under section 41 of the FOIA.
2. The Information Commissioner's decision is that the requested information is exempt from disclosure by virtue of section 41 of the FOIA. The Commissioner does not require any steps to be taken.

#### Request and response

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3. On 18 March 2016 the complainant requested the following:  

'Could you email me a copy of Dr [name redacted]'s personnel records and pay records?'
4. On the same day, the complainant confirmed that he was not related to the doctor.
5. On 20 April 2016 the Trust responded and refused to provide the information citing section 41(1) of FOIA:  

*'we consider these documents to be personal information concerning the late Dr [name redacted] and, as such exempt from disclosure in accordance with Section 41 of the Freedom of Information Act. We have*

*taken this decision in the light of our duty of care to the late Dr [name redacted] and to her family and of the potential distress that could result from disclosure. As this is an absolute exemption, we do not have to consider the public interest test with regard to your request. We are required to inform you that we do hold the records requested.'*

6. The complainant requested an internal review on 21 April 2016. The Trust sent him the outcome of its internal review on 20 May 2016 which upheld the decision.
7. The complainant sent a further letter to the Trust on 23 May 2016 containing photographs of the doctor and another person as he was convinced that the records are for an '*invented person designed to populate the fake 7/7 bombings*'.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 13 June 2016 to complain about the way his request for information had been handled.
9. The Commissioner notes that the doctor in this case died on the day before the date of the request and that the death had been reported in the media. The Trust did not cite the exemption section 40 (third party personal data) as the Data Protection Act covers information relating to living individuals.
10. During the Commissioner's investigation, the Trust also stated that it would like to apply the exemption at section 31(1)(a) (the prevention or detection of crime) as disclosure of the information (medical, financial, identifiable) could lead to fraudulent claims.
11. The Commissioner therefore considers the focus of the investigation to be whether the Trust was entitled to rely upon the exemption at section 41 to withhold the information. The Commissioner will consider the exemption at section 31 if she finds that the exemption at section 41 does not apply.

### **Reasons for decision**

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

12. 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?**

13. The Trust stated that the majority of the information was provided by a third party, by the doctor. The complainant is not the data subject of the information and is not related to the third party.
14. Based on previous decisions of the Information Tribunal, the Commissioner considers that information will have been obtained by a third party if it has been created by the Trust's own staff if it is based on information obtained directly from third parties. (For example, personal and financial details.)
15. The Commissioner is satisfied that personal and financial details would form part of the deceased doctor's personnel records and pay records and were, in effect, obtained by the Trust from the doctor.

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

16. 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?*

17. 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.
18. In this case the information provided by the doctor to the Trust included financial and medical information. The Trust stated that this is sensitive information and is not accessible elsewhere.
19. The Commissioner accepts that the information is not publicly available and cannot be said to be trivial as it relates to personal matters. The

Commissioner is therefore satisfied that the requested information does have the necessary quality of confidence.

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

20. An obligation of confidence may be explicit (for example, the terms of a contract) or implicit (for example, where information is provided in the context of the relationship between a client and lawyer). The Commissioner's guidance covers the employer/employee relationship:

'employers clearly have obligations of confidence towards their employees, although these are not all encompassing. Whilst it is fairly obvious that information contained in staff appraisals should not be disclosed, other information, such as names and job titles, is unlikely to be confidential.' (<https://ico.org.uk/media/1432163/information-provided-in-confidence-section-41.pdf>)

21. The Trust stated that it has a clear duty of confidentiality to not disclose the personal and financial information contained in the personnel and pay records of the deceased doctor. *'Disclosure would be contrary to Dr (name redacted)'s expectation of maintaining confidentiality in respect of her private information.'*
22. The Commissioner considers that the duty of confidence will continue to apply after the death of the person concerned. This position was confirmed by the Tribunal in *Pauline Bluck v Information Commissioner and Epsom & St Helier University Hospitals NHS Trust* (EA/2006/0090) in which the Tribunal found that even though the person to whom the information relates has died, action for breach of confidence could still be taken by the personal representative of that person.
23. The Commissioner does not consider it necessary to consider who that personal representative would be. It is sufficient that the principle has been established that a duty of confidence can survive death and that an actionable breach of that confidence could be initiated by a personal representative. The duty of confidence serves to protect the privacy and interests of the person from whom the information was obtained.
24. Therefore, the Commissioner is satisfied that the individual's records are of a confidential nature and that there is an obligation of confidence on the Trust which continues after the individual's death.

*Would disclosure be of detriment to the confider?*

25. The Commissioner has considered this question in the context and timing of the requested information.

26. The loss of privacy can be a detriment in its own right. The Trust has stated that unauthorised disclosure of the medical, financial and identifiable personal information could constitute a detriment. The complainant is not related to the doctor and if the requested information is disclosed then fraudulent activity could result.
27. However, it is not necessary for there to be any detriment to the confider (the doctor) in terms of tangible loss, for this private information to be protected by the law of confidence. Therefore the Commissioner accepts that disclosure would be of detriment to the confider.

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

28. 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 Trust could successfully rely on such a public interest defence to an action for breach of confidence in this case.
29. The Commissioner recognises that the courts have taken the view that very significant public interest factors must be present in order to override the strong public interest in maintaining confidentiality.
30. The Commissioner has not been presented with any evidence to suggest that the public interest in disclosing this information is of such significance that it outweighs the considerable interest in maintaining the confidence of the personnel and pay records in question.
31. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA. As the Commissioner finds that the exemption at section 41 does apply, she will not go on to consider the exemption at section 31 (the prevention or detection of crime).

## Right of appeal

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32. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

33. 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.
34. 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**