

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 May 2017

Public Authority: Oxford University Hospitals NHS Trust
Address: John Radcliffe Hospital
Headley Way
Oxford
OX3 9DU

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the Oxford University Hospitals NHS Trust ("the Trust") for the results of tests conducted on brain samples of a deceased person. The Trust refused the request under the exemptions in section 41 (information provided in confidence), section 44 (prohibitions on disclosure) and section 36(2)(c) (prejudice to the effective conduct of public affairs). The complainant also made a supplementary request and was not satisfied that the Trust had disclosed all of the information he asked for.
2. The Commissioner's decision is that the test results are exempt from disclosure under section 41 and that as regards the supplementary request the Trust holds no further information beyond what has already been communicated to the complainant. The Commissioner requires no steps to be taken.

Request and response

3. On 31 December 2015 the complainant made a freedom of information request to the Trust which asked a number of questions regarding tests carried out on brain samples of a named individual.
4. The Trust responded to the request on 7 March when it explained that it could not disclose the information because it had a duty of confidentiality for patient information even when patients were deceased.
5. The complainant subsequently asked the Trust to carry out an internal review of its handling of the request and it presented its findings on 13 June 2016. The Trust now responded to each of the complainant's questions with the exception of part 6 of his request which is the only element which remains in dispute. Part 6 of the request asked "what tests have been conducted on the brain and what are the results?"
6. In response the Trust maintained that the information fell outside of the scope of FOIA because of the confidentiality owed to the patient and the body commissioning its services. No exemption from FOIA was cited.
7. On 21 June 2016 the complainant made what was essentially a new request by asking 6 supplementary questions which read as follows:
 - i. *Whether the brain samples are still held at the John Radcliffe Hospital and, if not what has become of them;*
 - ii. *What test are commissioned to be carried out on the samples and, in particular, whether the tests or any of them were for the purposes of diagnosing the cause of death and, if not, what was the purpose of them;*
 - iii. *According to your information, at whose request and by virtue of what authority Wexham Park Hospital commissioned the John Radcliffe Hospital to carry out the tests;*
 - iv. *To what persons, authorities and otherwise the John Radcliffe Hospital published the results of the tests;*
 - v. *According to the information, in what way was the Home Office and/or Broadmoor Hospital involved in the removal of the brain, the commissioning of the tests carried out by the John Radcliffe Hospital and the use of the report of the John Radcliffe Hospital on the sample tests carried out.*

- vi. *According to your information where the brain (less the samples referred to) is now located and how it came to be there.*
8. The Trust did not respond to this request until prompted by the Commissioner during the course of her investigation.

Scope of the case

9. On 24 May 2016 the complainant contacted the Commissioner to complain about the decision to refuse his request.
10. The Commissioner considers the scope of her investigation to be to decide whether the Trust was correct to refuse to disclose the results of the tests on the brain sample of the patient named in the complainant's request. During the course of the Commissioner's investigation the Trust said that it was relying on the exemptions in section 41 (information provided in confidence), section 44 (prohibitions on disclosure) and section 36 (prejudice the effective conduct of public affairs). The Commissioner will go on to consider whether any of these exemptions can be applied to the withheld information.
11. During the course of the Commissioner's investigation the Trust responded to each of the complainant's 6 supplementary questions. However, the complainant has said that he is not satisfied with its response to questions 4 and 5. The Commissioner agreed that she would consider the Trust's response as part of this decision notice.

Reasons for decision

Section 41 – information provided in confidence

12. The withheld information comprises a copy of a report of post mortem tests that were carried out on samples of brain tissue of an individual who had been a patient at Wexham Park Hospital. The Trust has sought to withhold this information in the first instance under the section 41 exemption. Section 41 provides that information is exempt if it was obtained from another person and disclosure would give rise to a breach of confidence, actionable by that or any other person.
13. In this case the Trust has said that the requested information was obtained from another person because it was obtained from the patient

and also the Hospital that commissioned the Trust to carry out the tests on the brain sample.

14. The Trust explained that it received a referral from Wexham Park Hospital in March 1996 to provide a post-mortem neuropathological opinion on the deceased which it said was apparent from the relevant booking in form held by the Trust, which contained a Wexham Park Hospital reference. Wexham Park Hospital is part of Frimley Health NHS Foundation Trust, which is a separate organisation to the Trust. At the time of the referral Wexham Park Hospital was not part of Frimley Health NHS Foundation Trust but was one of its predecessor organisations. It has always been separate to the Trust.
15. The Trust said that it did not hold a copy of the referral itself due to passage of time but based on its understanding of working practices at the time, the referral would have come from a pathologist at Wexham Park and have included information about the tests sought. However, it said that as it no longer had a copy of the referral it could only say that a pathologist sought a "specialist neuropathological opinion". The booking in form states that the Trust was provided with a sample of brain tissue by Wexham Park Hospital (and not the body of the deceased).
16. During the course of her investigation the Commissioner had questioned whether the information could be said to have been 'obtained' from the deceased, as the Trust had originally suggested, because the samples and the report recording the tests results were only obtained after death. In response the Trust contended that if it was not accepted that the samples were provided by the deceased, they were nevertheless provided to the Trust by a third party: the predecessor organisation to Frimley Health NHS Foundation Trust and/or the pathologist at Wexham Park Hospital.
17. It went on to say that in its view it was artificial to draw a distinction between the samples and the report that records the test results. It referred to the Commissioner's guidance on the section 41 exemption, which reads (at page 6):

"An individual makes an FOI request to a psychiatric hospital for a copy of his daughter's medical records from her time at the institution. The material caught by the request includes a psychiatrist's observations of his daughter's behaviour and his diagnosis of her condition, based on those observations.

*In this case, both the psychiatrist's observations **and** the diagnosis would be caught by the scope of Section 41(1)(a), because disclosing*

*the psychiatrist's diagnosis would inevitably reveal confidential information obtained from the patient.*¹

18. It said that it considered the situation in this case is analogous: the test results are equivalent to the diagnosis in the above example and would reveal detail about the confidential information provided by Wexham Park/ the Wexham Park pathologist (the samples).
19. The first thing to consider is whether the information was obtained from a third party. On the basis of what the Trust has said the Commissioner would accept that the information was obtained from Wexham Park Hospital and that therefore this part of the test is met.
20. As to whether disclosure would give rise to an actionable breach of confidence, the Commissioner's view is that a breach will be actionable if the following test is met:
 - i. The information has the necessary quality of confidence. (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.)
 - ii. The information was communicated in circumstances importing an obligation of confidence. (An obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend upon the nature of the information itself, and/or the relationship between the parties.)
 - iii. Unauthorised disclosure would cause a specific detriment to either the party which provided it or any other party.
21. The Trust has suggested that a duty of confidence is owed to the deceased individual and/or Wexham Park Hospital or its successor organisations. Due to the obvious complexities surrounding the issue of whether a duty of confidence might be owed to a patient in respect of information which was created after their death, the Commissioner has started from the more obvious point of considering whether a duty of confidence is owed to Wexham Park Hospital and its successor organisations.

¹ <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

22. The first part of the test requires that information has the necessary quality of confidence and in this case the Commissioner is satisfied that it does. Clearly information on post mortem tests of this nature cannot be dismissed as trivial and neither is the Commissioner aware that the information has previously been disclosed.
23. The Commissioner must now consider whether the information was passed to the Trust in circumstances importing an obligation of confidence. On this point the Trust has sought to argue that a duty of confidence applies to all patient information throughout the NHS even if the patient was never under the care of the medical practitioner or organisation holding the information. It referred to the case *WXYZ vs Secretary of State for Health* where the Court of Appeal had considered the issue of a duty of confidentiality within the NHS.² At paragraph 26 the Court summarised the test for a claim for breach of confidence:

"It is common ground that the test as to whether the disclosure of the Information to the Secretary of State and then to the Home Office breaches the claimants' common law rights to privacy and confidentiality involves two questions. The first is whether the claimants have a reasonable expectation of privacy in relation to the Information. This question is judged objectively by reference to the reasonable person of ordinary sensibilities. If they do have a reasonable expectation of privacy, the second question is whether there has been a breach of their rights to privacy and confidentiality. This requires a balancing exercise of weighing the public benefit that would be attained by the transmission of the Information against the harm that would result from the interference with the rights."

24. The Court addressed the first question of whether there was a reasonable expectation of privacy at paragraph 35:

"We accept...that the Information is inherently private information, particularly because it reveals information of substance about the health of the data subjects, namely that they were unwell to the extent that they had to seek medical care at a particular point in time from one or more NHS bodies. In our view...we consider that there would be a reasonable expectation of privacy in respect of such information on the part of the patient."

² [2015] EWCA Civ 1034

25. The Court went on to review the various policy statements on confidentiality at paragraph 38. At paragraph 39 it concluded:

"In our view, all of these documents articulate the same approach to the issue of confidentiality: all identifiable patient data held by a doctor or a hospital must be treated as confidential. The documents have been drafted in expansive terms so as to reflect the reasonable expectations of patients that all of their data will be treated as private and confidential. These publicly available documents inform the expectations of patients being treated in the NHS."

26. In light of this the Trust has argued that in the NHS the duty of confidentiality applies to all organisations and health care professionals that have control of patient information, even if they have never had a direct contact with the patient e.g. organisations and health and social care professionals that carry out diagnostic tests or store records. Therefore, it said that a duty of confidentiality can arise regarding the test results even though the Trust did not treat the deceased (he was never a patient in their care).

27. The Trust also referred to the case of *Ashworth Hospital Authority v MGN Ltd* the House of Lords considered the question of whether a duty was owed to a hospital responsible for holding a patient's records, as well as to the patient themselves. This was in the context of the disclosure of medical information about the moors murderer, Ian Brady, to a newspaper. Ashworth Hospital Authority ran the hospital at which Mr Brady was being treated, where the information originated. Lord Woolf concluded:

"I also accept the conclusion of Lord Phillips of Worth Matravers MR in the Court of Appeal [2001] 1 WLR 515, paras 50-54 that, while Ian Brady's conduct in putting similar information into the public domain could well mean that he would not be in a position to complain about the publication, this did not destroy the authority's independent interest in retaining the confidentiality of the medical records contained in Ashworth's files."

28. In light of this, the Trust argued that the *Ashworth* case should be seen as authority that there can be a duty of confidentiality owed by a third party (there the newspaper, here the Trust) to a hospital with responsibility for handling confidential information, as well as to the patient who is the subject of the information. By analogy, it said that Wexham Park Hospital could take action against the Trust for any disclosure that breaches confidentiality.

29. The Commissioner has considered the sensitive nature of the withheld information and the circumstances in which it was passed to the Trust. In the Commissioner's view, it seems very likely that due to normal sensibilities as well as custom and practice, Wexham Park Hospital would have an expectation that the Trust would treat the sample/test results as confidential and that the Trust would recognise this implied duty of confidence.
30. The Commissioner is satisfied that a "reasonable person of ordinary sensibilities" would recognise the information as confidential due to its obvious sensitivity and the general expectation that medical information is treated as confidential. For these reasons the Commissioner is satisfied that an implied obligation of confidence was owed by the Trust to Wexham Park Hospital and its successor organisations.
31. The Commissioner has next gone on to consider whether disclosure would cause any detriment to the confider of the information, Wexham Park Hospital. The Trust has suggested that disclosure could discourage patients from providing consent for post mortem tests to be conducted in the future. The Commissioner is aware that under the Human Tissue Act 2004, "appropriate consent" is needed for various activities to be carried out after death, including post-mortem testing. Consent may be given by the patient while they are still living or by another person specified in the Act after a patient's death. The Trust has said that disclosure of post-mortem test results to the general public under FOIA is likely to deter some people from giving their consent, as for many people this would be an intrusion of privacy. The Commissioner has considered this point and agrees that many patients would be concerned about the potential disclosure of such sensitive information after their death and that therefore they would be more likely to withhold their consent. This would be detrimental to the successor organisations to Wexham Park Hospital because it is important that they are able to conduct post mortem tests so as to fully understand the causes of death.
32. Whilst the Commissioner is satisfied that the information is subject to a duty of confidence, in deciding whether the exemption is engaged it is necessary to consider whether an actionable breach of confidence would occur. Case law on the common law concept of confidence suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. The public interest test in deciding if a duty of confidence is actionable is the reverse of that normally applied under the FOIA, i.e. the test assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.

33. 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. Whilst the Commissioner would accept that there is a general public interest in transparency and accountability, she considers that there is no compelling case for the disclosure of test results of an individual who died 20 years ago. The case for disclosure amounts to little more than curiosity around the cause of this person's death and is easily outweighed by the public interest in protecting confidential information. The Commissioner has decided that the section 41 exemption is engaged.

Other exemptions

34. The Commissioner is satisfied that the test results are exempt under section 41 and therefore she has not gone on to consider whether any of the other exemptions relied on by the Trust might also apply.

Supplementary Questions

35. The complainant has said that he is not satisfied with the Trust's response to the following supplementary questions he asked in his request of 21 June 2016.

iv. To what persons, authorities and otherwise the John Radcliffe Hospital published the results of the tests;

v. According to the information, in what way was the Home Office and/or Broadmoor Hospital involved in the removal of the brain, the commissioning of the tests carried out by the John Radcliffe Hospital and the use of the report of the John Radcliffe Hospital on the sample tests carried out.

36. In response to part 4 of the complainant's second request the Trust explained that the results of the tests were sent to Wexham Park Hospital.
37. For part 5 the Trust said that it did not hold any information concerning the Home Office/Broadmoor's involvement in this case.
38. The complainant was not satisfied with the Trust's response and suggested further information may be held. In particular he said that as regards part 4 he required "particulars of the persons, authorities and otherwise (in addition to Wexham Park Hospital) to whom/which the results were published". For part 5 he said that the Trust's statement

that it does not hold any information concerning the Home Office/Broadmoor's involvement "in the case" was too loose and did not address the specific questions he had asked.

39. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
40. The Trust has explained that a search was conducted for any relevant information. Both paper records and electronic archives were searched and the only documentation found concerning this case was the results of the tests on the brain samples which it said were sent to the referrer at Wexham Park Hospital and a document of receipt for the samples. It confirmed that it held no further information regarding this matter.
41. The Commissioner has considered the nature of the requested information and the Trust's explanation about the extent of the information it holds. The Trust has taken reasonable steps to search for the information and given that the requests relate to events over 20 years ago, the Commissioner is satisfied on the balance of probabilities that no further information is held beyond what has already been communicated to the complainant. There is nothing to suggest any involvement of the Home Office or Broadmoor and without any evidence to the contrary the Commissioner must find that no further information is held.

Right of appeal

42. 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

43. 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.
44. 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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