

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 26 October 2018

**Public Authority:** West Midlands Ambulance Service  
NHS Foundation Trust

**Address:** Millenium Port  
Waterfront Business Park  
Waterfront Way  
Brierley Hill  
West Midlands DY5 1LX

### **Decision (including any steps ordered)**

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1. The complainant has requested information concerning ambulance journeys taken by the complainant and her mother and a particular report concerning the complainant's mother. West Midlands Ambulance Service NHS Foundation Trust ('WMAS') withheld the requested information under section 40(2) of the FOIA as it considered it to be the personal data of third persons.
2. The Commissioner's decision is as follows:
  - WMAS cannot rely on the provisions under section 40 of the FOIA to withhold the requested information, if held, or to neither confirm nor deny the information is held. This is because the information cannot be categorised as personal data.

- However, WMAS can rely on section 41(2) to neither confirm nor deny the information is held. This is because confirmation or denial would constitute an actionable breach of confidence.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

## **Request and response**

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4. On 17 December 2017 the complainant wrote to WMAS and requested information in the following terms:

*"I wish to apply for some records under the Freedom of Information Act.*

*They are as follows:*

*Journeys booked for [Named Individual] and Carer who is me, her daughter, July 2013. Plus, the information on why the Ambulance did not turn up, until the fourth occasion. What happened with the bookings? The appointments were for the DVT Clinic also a scan. I would also request the St John Ambulance report on my mother."*

5. WMAS responded on 15 January 2018. It said that the information the complainant has requested is exempt under section 40 of the FOIA. WMAS did not state what sub-section(s) of section 40 it was relying on.
6. WMAS provided a review on 19 February 2018. It confirmed that it was withholding the requested information under section 40(2) of the FOIA.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 12 March 2018 to complain about the way her request for information had been handled.
8. Having considered the submissions that WMAS provided to her, and the circumstances of this case, the Commissioner's investigation has first focussed on whether the WMAS can rely on section 40(5) of the FOIA to neither confirm nor deny that it holds the requested information.
9. Since she is the upholder and regulator of information rights, if necessary the Commissioner has been prepared to proactively consider whether WMAS can rely on section 41(2) to neither confirm nor deny it holds the requested information.

## Reasons for decision

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### Section 40 – personal data

10. In its initial submission to the Commissioner dated 5 September 2018, WMAS advised that the complainant has requested information relating to her mother's health records, which is sensitive personal data under the Data Protection Act 1998 (DPA). The DPA was still in force at the time of WMAS' response to the complainant. WMAS said that releasing the information would breach Principle 6 of the DPA: "*...personal data shall be processed in accordance with the rights of data subjects under this Act.*" WMAS told the Commissioner that it had stressed to the complainant that disclosure under the FOIA is disclosure to the public and that responses to all the FOIA requests it receives are published on its website.
11. In the above submission, WMAS goes on to say that it is aware that the complainant had already asked for this information separately, as part of a complaint she had raised about the service her mother received from WMAS. WMAS says it had advised the complainant that it does not hold the information she has requested due to the time elapsed since the incident involving her mother. It therefore advised the complainant that it was more appropriate for its Patient Advice Liaison (PAL) team to deal with the request. The PAL team contacted the complainant and provided her with a copy of a patient report form that she had requested, for the incident in question that had occurred in 2013. In response, the complainant acknowledged receipt of the patient report form and asked that the FOI team review its response to her FOIA request. WMAS had provided the review of 19 February 2018.
12. In relation to its application of section 40, WMAS said in its initial submission above that the information relates to the complainant's mother who it understands is deceased, and that the expectations are to ensure that personal data is processed lawfully.
13. However WMAS closes this submission by stating that section 40 is an absolute exemption and that it therefore "*does not need to confirm or deny it holds the information, as this had already been communicated to the complainant we did not feel it was a requirement to confirm this to her for this request.*"
14. This position appeared muddled to the Commissioner. An absolute exemption is one that is not subject to the public interest test and that is not relevant in the circumstances of this case. Section 40 has different sub-sections: section 40(1) relates to information that is the applicant's

own personal data and section 40(2) relates to information that is the personal data of a third person.

15. Section 40(5) meanwhile removes the obligation on an authority to confirm or deny that it holds information if to do so would, in itself, release an individual's personal data. Section 40(5) is not relevant to situations where the public authority has already provided information through a different route ie in this case WMAS cannot apply section 40(5) simply because it had already handled the complainant's request as a service complaint and dealt with it that way. It can only apply section 40(5) if it considers that if it was to confirm or deny that it holds information within the scope of the complainant's request this would release an individual's personal data. In this case confirmation or denial would indicate whether or not the complainant's mother had needed the ambulance service and whether she had a health condition.
16. The Commissioner asked WMAS to clarify its position. In a second submission dated 22 October 2018, WMAS told the Commissioner that when it first responded to the complainant's request it was unaware at that point that the complainant's mother was deceased. However it has told the Commissioner that it considers that it applied section 40 to the request appropriately as the complainant was requesting a copy of a patient report form which contained sensitive personal data. In this second submission, WMAS did not indicate which sub-section of section 40 it was relying on.
17. Although WMAS's submissions remain unclear with regard to its application of section 40, because it had indicated that it was not obliged to either confirm or deny it holds the requested information the Commissioner has first considered whether WMAS can rely on section 40(5).
18. For section 40(5) to apply, confirmation or denial that the information is held would have disclose an individual's personal data. The Commissioner has first considered whether the information that would be disclosed (ie that the complainant's mother had a health condition and needed the ambulance service), if held, is the personal data of a third person.
19. The DPA says that for data to constitute personal data it must relate to a living individual and that individual must be identifiable.
20. In this case, WMAS told the Commissioner in its submission of 5 September 2018 that it now understands that, at the time of the request, the complainant's mother was deceased. Since information must relate to a living individual in order to be categorised as personal data, the information in this case (that the complainant's mother had a

health condition and needed the ambulance service) cannot be categorised as the personal data of the complainant's mother.

21. WMAS cannot therefore rely on section 40(5) to neither confirm nor deny that it holds the information the complainant has requested.
22. For information, the requested information itself (that is information about ambulance bookings and a particular report) is not personal data either because the complainant's mother is deceased. WMAS could not have therefore relied on section 40(2) to withhold this information, if it is held.
23. WMAS may well have indicated to the complainant in response to her separate service complaint whether or not it holds information relevant to her request. This response was given to the complainant as an individual. However, as WMAS has pointed out to the complainant, a response under the FOIA is, in effect, a response to the wider world and, for the reasons given above, WMAS can appear to give a contradictory response under the FOIA.
24. In cases where information about the deceased requires protection, certain exemptions will apply. In certain circumstances, such as a request for medical records of the deceased, the exemption for confidential information is likely to apply. Although WMAS has not referred to it, given the sensitivity of the disputed information (if held) the Commissioner has proactively considered whether WMAS can rely on section 41(2) of the FOIA to neither confirm nor deny the information is held.

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

25. Section 41(1) of the FOIA says that information is exempt information if a) it was provided by any other person and b) disclosing it would constitute an actionable breach of confidence.
26. Section 41(2) removes the duty to confirm or deny the information is held if confirmation or denial would constitute an actionable breach of confidence.
27. If WMAS was to confirm or deny under the FOIA that it holds the requested information, it would indicate whether the complainant's mother had a health condition and whether she made use of the ambulance service. The Commissioner has considered whether such information was information provided in confidence.

*41(1)(a) - was the information obtained from a third person?*

28. The Commissioner is satisfied that, if held, the information in question – about ambulance journeys and a report associated with the complainant's deceased mother would have been obtained from a third party, as it would have originated from the deceased. The Commissioner is also satisfied that this information, if held, constitutes the deceased's medical records. In the Commissioner's view information contained within medical records will qualify as information obtained from a third party.

*41(1)(b) – would disclosure constitute an 'actionable' breach of confidence?*

29. When determining if disclosure would constitute a breach of confidence, a public authority will usually need to consider:
- whether the information has the quality of confidence
  - whether it 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?

30. 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. As previously stated, disclosure under the FOIA would be disclosure not just to the complainant but to the public as a whole. For this reason the Commissioner has considered whether the information is otherwise accessible to the public, rather than just to the individual complainant in this case. She has concluded that the information in this case, if held, is neither trivial nor otherwise accessible to the public. The Commissioner is therefore satisfied that the medical records requested in this case have the necessary quality of confidence required to sustain an action for breach of confidence.

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

31. The Commissioner considers that 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, she is satisfied that an obligation of confidence is created by the very nature of the doctor/patient relationship and the

duty is therefore implicit. The Commissioner therefore concludes that this information, if held, was obtained in circumstances importing an obligation of confidence.

Would disclosure be to the detriment of the confider?

32. The Commissioner considers that as medical records constitute information of a personal nature there is no need for there to be any detriment to the confider, in terms of any tangible loss, in order for it to be protected by the law of confidence. She has not therefore considered this issue any further.

*Would there be a defence to disclosure in the public interest?*

33. In the Commissioners 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.
34. Although WMAS did not provide any public interest arguments in this case as it had not considered section 41, the Commissioner would concur with the comments of the Information Tribunal in *Bluck v the Information Commissioner & Epsom St Helier University NHS Trust (EA/2006/0090)* that it is in the interest of *"patients to have confidence that medical staff will not disclose sensitive medical data before they 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."* The Commissioner has not been presented with any compelling argument as to a particular public interest in disclosure into the public domain in this case sufficient to outweigh the considerable public interest in maintaining the confidentiality of medical information. She therefore considers that WMAS would not have a public interest defence for breaching the confidence in this case.

Does the breach remain actionable after the death of the confider?

35. In *Bluck* 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"*

36. The Commissioner considers that in the circumstances of this case the duty of confidence is similarly capable of surviving the death of the confider. 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 take action.

37. In light of the above the Commissioner concludes that the requested information engages the exemption under section 41(2) of the FOIA and that WMAS is not obliged, under the FOIA, to confirm or deny it holds the requested information.
38. In certain circumstances an individual may have access to a deceased person's medical records through Access to Health Records legislation. This is something the complainant may want to consider, after reviewing all WMAS's correspondence to her.



## Right of appeal

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39. 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)

40. 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.
41. 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**  
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**Information Commissioner's Office**  
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