

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 March 2022

Public Authority: Barking Havering & Redbridge University
Hospitals NHS Trust

Address: Queen's Hospital
Rom Valley Way
Romford
Essex
RM7 0AG

Decision (including any steps ordered)

1. The complainant requested information from Barking Havering & Redbridge University Hospitals Trust ("the Trust") regarding child deaths and illnesses related to pollution in the area. The Trust initially refused the request on the basis that the information was personal data under section 40(2) of FOIA and later sought to rely on the exemption at section 41(1) of FOIA (information provided in confidence).
2. The Commissioner's decision is that the Trust was entitled to rely on section 41(1) of FOIA to the withheld information. However, the Commissioner finds that the Trust has breached section 10(1) of FOIA regarding the request, as it did not provide the complainant, within 20 working days, the information it held within the scope of the request.
3. The Commissioner does not require any steps to be taken as a result of this decision notice.

Request and response

4. On 20 April 2021, the complainant wrote to the Trust and requested information in the following terms:

"It is welcome that BHRUT have supplied stats relating to asthma and eye disease which will form part of a submission to Redbridge Council. This request seeks further information about child cancer and other illnesses as follows.

1) The full postcodes of patients, both in patients and out patients aged under 18 who have been are/receiving treatment for the following conditions

a) Cancer with a breakdown of types, for example

Leukemia

Brain and spinal cord tumour

Neuroblastoma

Wilms tumour

Lymphoma (including both Hodgkin and non-Hodgkin)

Rhabdomyosarcoma

Retinoblastoma

Bone cancer

b) Otitis media

c) All Acute lower respiratory infections, such as pneumonia and bronchiolitis.

d) Meningitis

For the following periods:

23rd March 2020 to 22nd March 2021

23rd March 2019 to 22nd March 2020

These dates tie in with the lockdown period.

2) Children who have died in your care either in hospital or at home as out-patients aged under 18 for the same time periods and same conditions with the full postcodes set out in 1 above. It is accepted there are confidentiality issues here, but when Councils are planning substantial housing developments close to roads it must be right to discover if there is a health risk to building homes in these locations.

This information may be over the usual cost limits, but it is the public interest for the it to be published. Information relating to the slight risk of blood clots from the astrazeneca vaccine has led to changes in the use of the vaccine."

5. On 20 May 2021, the complainant chased up a response to their request. The Trust responded on 24 May 2021 to apologise for the delay in their response. After a further chaser from the complainant, the Trust responded on 14 July 2021 refusing the requested information citing section 40(2) – personal information, of FOIA to do so.
6. On 12 August 2021 the Trust changed its stance at internal review, and cited section 41(1) – information provided in confidence, of FOIA to withhold the requested information, as it related to patient information given in confidence, and some of the information related to deceased individuals.

Scope of the case

7. The complainant contacted the Commissioner on 12 August 2021 to complain about the way their request for information had been handled.
8. The Commissioner considers the scope of this case to be to determine if the Trust has correctly applied section 41(1) of FOIA to the withheld information.

Reasons for decision

Section 41 – information provided in confidence

9. Section 41(1) of 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 than 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?

10. The Trust has explained that the information that has been requested contains specific identifiers which when combined with the locality, and publicly available information, are small enough to be able to identify individuals and their families.

11. The Trust advised that the information it holds has been extracted from the healthcare records of both living and deceased patients and the Commissioner is therefore satisfied that the information was obtained from another person(s). The Commissioner considers that information contained within medical records is considered to be provided by the patient, whether it is information given to medical staff during consultations or other information recorded by health professionals concerning the medical care and treatment of patients.

Would disclosure constitute an actionable breach of confidence?

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 to the detriment of the confider.

Does the information have the necessary quality of confidence?

13. 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.
14. In this case the information is extracted from medical records – this information is not otherwise accessible and is not trivial. The numbers involved in the request are small numbers and these numbers relate to location, medical health, and age. The Trust has argued that a motivated individual could use the criteria specified in the request to identify the individuals to whom the information relates if the exact postcode is known. The Commissioner is not considering here whether the information is personal data, but he does accept that if this argument has some logical basis, then it shows the information is not trivial.
15. The Commissioner has considered a previous First Tier Tribunal decision (EA/2019/0285P) in which the Tribunal found that a request asking for numbers relating to location, medical health and age could be used to identify individuals. The request in this case also contains some identifiers so it is not unreasonable to think that the numbers could

identity individuals in this case if they are small enough. As such the information cannot be viewed as trivial.

16. The Commissioner is satisfied that the requested information does have the necessary quality of confidence as there is clearly an explicit duty of confidence attached to information that forms part of a medical record and it is not trivial.

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

17. 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 patient and doctor).
18. The Trust argues that disclosing this information without the explicit consent of the patient or their representative would be a breach of confidence in respect of those patients.
19. The Trust has explained that when providing information about their health to the medical staff involved in their care, patients receive assurances that the information they provide to the Trust will be treated in strict confidence and in accordance with their Article 8 right to respect for their private and family life, home, and correspondence. This is supported by the oath of confidentiality taken by doctors in respect of the protection of doctor/patient confidentiality.
20. The Trust further argues that patients would not expect their healthcare information to be disclosed to third parties without consent. The Trust therefore believes that disclosure of the actual full postcodes in response to this request would represent an infringement of patients' confidentiality and privacy rights which would be likely to result in action for breach of privacy and confidentiality being taken by the individual, or in the case of a deceased patient, by their Personal Representative.
21. In view of the above arguments, the Commissioner is satisfied that disclosure of the requested information would compromise the duty of confidentiality between medical professionals and patients.
22. The Commissioner is therefore satisfied that the patients and/or representatives originally imparted information concerning their health to the Trust in circumstances importing an implied obligation of confidence (in the context of a relationship between doctor and patient).

Would disclosure be of detriment to the confider?

23. Where the information relates to a personal or private matter, the Commissioner (in accordance with current case law) considers that it should be protected by the law of confidence, even if disclosure would not result in any tangible loss to the confider. The loss of privacy can be viewed as a form of detriment in its own right.
24. It is therefore not necessary for there to be any detriment to the original confiders (the patients) in terms of tangible loss, for this private information to be protected by the law of confidence.
25. The Commissioner considers the Trust clearly has a duty of confidence to its patients. It is relevant that the duty of confidence continues 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)*¹. In this case the Tribunal found that even though the person to whom the information related had died, action for breach of confidence could still be taken by the personal representative of that person.
26. 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.
27. The Commissioner is satisfied that the disclosure of the requested information under FOIA in this case would be an unauthorised use of that information, as the patients would not have consented to this use.
28. The Trust has also argued, as discussed earlier, that once small numbers (such as those requested here) are made available to the public, this information could be recognisable to the families or motivated individuals.
29. The Commissioner also accepts that should information patients and/or representatives expect to be kept confidential, is then disclosed, it could have a detrimental effect on the reputation of the Trust in relation to its ability to protect patient information.
30. The Commissioner is satisfied that disclosure of the information may lead to identification by the families of the individuals concerned (and

¹ [Information Tribunal Appeal Number: EA/2006/0010 \(tribunals.gov.uk\)](https://www.tribunals.gov.uk/decisions/decision.aspx?ref=EA/2006/0010)

possibly to identification by others), thereby confirming that the individuals had specific medical issues. The Commissioner accepts that this loss of privacy to the patient can be viewed as a detriment in its own right. He also accepts that disclosure of the data would be detrimental to the reputation of the Trust. He therefore accepts that this limb of the test for confidence is met.

31. In view of the above, the Commissioner is satisfied that the three tests for breach of confidence have been met. He is therefore satisfied that disclosing the requested information would be a breach of confidence where action could be taken by the families of the individuals in question.

Is there a public interest defence for disclosure?

32. 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.
33. The Commissioner recognises that the courts have taken the view that significant public interest factors must be present in order to override the strong public interest in maintaining confidentiality.
34. The Trust acknowledges that disclosure of actual numbers could assist members of the public to understand any relationship between childhood illnesses and the built environment, however it is of the view that this does not outweigh the public interest in maintaining patient confidentiality, including after death. Overriding the duties of privacy and confidentiality could cause the breakdown of the confidential doctor patient relationship.
35. The complainant accepts there may be confidentiality issues with the information being disclosed, but the information was needed to help demonstrate if there was a link between the built environment and instances of childhood illnesses.
36. The Commissioner has accorded some weight to the argument that there is some public interest in knowing whether there may be a causal link between the built environment, and childhood illnesses the Trust have documented, as well as concerns for any future development and the knock-on effect that may have in the area. He appreciates the need for openness and transparency.

37. However, the Commissioner also considers that there is a weighty public interest in maintaining the confidentiality of patient information so that patients are not put off from seeking medical treatment for fear of their details being made public. Whilst the information in this case on face value appears to be solely statistical there is, in the wording of the request, *"it is accepted there are confidentiality issues here"*, and therefore a possibility of identifying individuals should the numbers be low.
38. The Commissioner therefore considers that the public interest in disclosing this information is not of such significance that it outweighs the considerable interest in maintaining the confidentiality of the information in question.
39. In conclusion, the Commissioner is satisfied that the requested information was provided in confidence to the Trust. He is satisfied that disclosing the requested information would be a breach of confidence where action could be taken by the families of the individuals in question. Furthermore, in such circumstances, the Commissioner does not consider that a public interest defence could be relied upon.

The Commissioner's view

40. Therefore, the Commissioner finds that in this case, the information was correctly withheld under section 41 of FOIA.
41. Because the Commissioner has found that section 41 is engaged, he has not gone on to consider the application of section 40 in this case.

Section 10(1)

42. Section 10(1) of FOIA states that

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."
43. The complainant sent their request for information to the Trust on 20 April 2021.
44. The Trust issued its response to the complainant on 4 July 2021.
45. This falls outside of the period of 20 working days required by section 10(1) of FOIA.

46. Therefore, the Commissioner's decision is that the Trust did not comply with the requirements of section 10(1) of FOIA.

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@justice.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

**Phillip Angell
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**