

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 29 July 2014

**Public Authority:** NHS Litigation Authority  
**Address:** 2<sup>nd</sup> Floor, 151 Buckingham Palace Road  
London, SW1W 9SZ

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to claims paid by the NHS Litigation Authority (NHSLA) in excess of £1 million.
2. The Commissioner's decision is that NHSLA has correctly applied section 41 to the withheld information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

#### Request and response

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4. On 3 October 2013, the complainant wrote to NHSLA and requested information in the following terms:

*"In 2008 a Parliamentary Written Answer was provided (I attach a copy) which showed a table relating to all claims paid by the NHSLA under the CNST scheme where the compensation was or would be more than £500,000.*

*Please could you provide me with a similarly tabulated table with exactly the same column headings but which is restricted to only those where the payment has been or will be in excess of £1million. When you provide this table could you please state up to what date the data covers, and please use the most convenient but recent date available."*

5. NHSLA responded on 22 November 2013. It provided some information within the scope of the request but refused to provide the remainder. It stated that where there were fewer than five claims in any one specialty at any one trust, the information had been withheld to avoid the possibility of patient/claimant identification. The recorded injury in almost all of these claims is Brain Damage or Cerebral Palsy.
6. Following an internal review NHSLA wrote to the complainant on 20 December 2013. It apologised that its response did not address the request. It also apologised for failing to confirm or deny if the information was held and not having issued an appropriate refusal notice.
7. It went on to confirm that the requested information was held, however, it considered that it was exempt from disclosure under section 40(2) by virtue of section 40(3)(a)(i) and/or section 41.

## Background

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8. The written answer in question was recorded in Daily Hansard as follows:

### ***NHS: Negligence***

***Mr Lansley:*** To ask the Secretary of State for Health what the claims are for which total damages are worth more than £500,000 that have been settled under the Clinical Negligence Scheme for Trusts; and in each case (a) which trust was involved, (b) what damages have been paid to date, (c) what total damages are expected to be, (d) what the speciality was which the claim occurred and (e) what injury to the patient occurred.

***Ann Keen:*** The information requested was provided by the NHS Litigation Authority and is in the document "CNST claims with damages over £500k". A copy has been placed in the Library.

#### ***Note:***

*Total damages indicate the exact amount paid if the case is closed, or the estimated amount to be paid where some damages are outstanding, for example under periodic payments.*

9. One of the functions of the NHSLA is to manage clinical claims on behalf of its members (NHS Trusts and other healthcare organisations). The Clinical Negligence Scheme for Trusts (CNST) handles all clinical negligence claims against members where the incident in question took

place on or after 1 April 1995 (or from the date on which the member joined the scheme where that is later).

## Scope of the case

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10. The complainant contacted the Commissioner on 13 February 2014 to complain about the way his request for information had been handled.
11. The Commissioner considers the scope of this case to be to determine if NHSLA has correctly applied the exemptions it has cited. The withheld information relates to Trusts where less than five claims were made within a speciality.

## Reasons for decision

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### Section 41 – information provided in confidence

12. Section 41(1) 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.’*

13. Therefore for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party **and** the disclosure of that information has to constitute an actionable breach of confidence.
14. With regard to section 41(1)(b), in most cases the approach adopted by the Commissioner in assessing whether disclosure would constitute an actionable breach of confidence is to follow the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:
  - Whether the information had the necessary quality of confidence;
  - Whether the information was imparted in circumstances importing an obligation of confidence; and

- Whether an unauthorised use of the information would result in detriment to the confider.

15. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure. 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.

*Was the information obtained from a third party?*

16. In its submissions to the Commissioner, the NHSLA confirmed that the data had been provided to it by either the patient, the claimant or the relevant healthcare organisation. The Commissioner accepts that the information has been obtained by NHSLA from third parties. Therefore, the requirement of section 41(1)(a) is satisfied.

*Does the information have the necessary quality of confidence?*

17. NHSLA has provided the Commissioner with the withheld information, which he has examined. In this case, the requested information consists of a table which contains the following headings:

Claim ID, Trust Name, Outstanding Damages, Damages Paid, Total Damages, Injury, and Speciality.

18. The withheld information relates to those Trusts where less than five claims have been made. Given the nature of the information i.e. the amount paid in damages, the trust concerned, the speciality and the injury, the Commissioner is satisfied that the information is not trivial.

19. No evidence has been put before the Commissioner that the specifically withheld information in question has been put into the public domain. The Commissioner would not generally expect such information to be put into the public domain, since access to the withheld information is restricted to health and social care professionals and those who, within their professional capacity and remit access the information. He is therefore satisfied that the information is not accessible by other means.

20. The Commissioner has considered whether individuals (living or deceased) are likely to be identifiable from the requested information. The information does not contain any direct identifiers but the Commissioner accepts that the information contained in the withheld information contains small numbers, linked to other information, such as details of injury and geographic location of the NHS Trust. Given the sums of money involved the Commissioner accepts that there is significant risk that a motivated intruder would be able to use other

information in the public domain e.g. press reporting about certain cases to deduce the identity of individuals

21. The Commissioner is therefore satisfied that the withheld information has the necessary quality of confidence.

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

22. NHSLA contends that the information contained in its records of clinical claims is of the same sensitivity and relevance to patients as their medical records and can, therefore, also engage section 41. The 'injury' field is a shorthand rendering of some of the health information held in relation to each clinical negligence claim.

23. It referred to the Commissioner's guidance regarding medical records and quoted the following:

*"The information contained in medical records will generally be confidential, whether it is held by the doctor or clinician treating the patient or has been provided by that person to another person (such as an NHS Trust, a court or the police in connection with a criminal investigation)"*

24. The information relates to the medical care of patients, and includes information provided to NHSLA when pursuing a claim of negligence. This information is provided with the expectation that it will not be disclosed to third parties without their consent. The Commissioner is satisfied that an obligation of confidence is created by the very nature of the relationship between the individuals and NHSLA, and that duty of confidence is therefore implicit.

*Would disclosure be of detriment to the confider?*

25. The Commissioner went on to consider whether disclosure of the information would be to the detriment of the confider. The loss of privacy can be a detriment in its own right. The Commissioner considers that, as medical records, constitute information of a highly sensitive personal nature, 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.

26. In this case, the Commissioner considers that disclosure would be contrary to the claimants' reasonable expectations of maintaining confidentiality in respect of their private information. He therefore considers the absence of detriment would not defeat a cause of action.

27. The Commissioner also considers that, while disclosure may not cause harm to the confider, he considers that the knowledge that confidential information has been passed to those to whom the confider would not willingly convey it, may be sufficient detriment.
28. The Commissioner then considered whether there is a public interest defence for a breach of confidence. Disclosure of confidential information will not constitute an actionable breach of confidence if there is a public interest in disclosing the information which outweighs the public interest in keeping the information confidential.
29. NHSLA stated that while there may be interest among the public in the requested information, it considered that its disclosure may deter some individuals from pursuing meritorious claims for clinical negligence, as they may be anxious about the possibility of their identification.
30. In considering whether the disclosure was in the greater public interest, the Commissioner was mindful that in some circumstances there may be a public interest in the disclosure of such information, although he considers such circumstances will be rare.
31. In reaching a view on this the Commissioner has had regard for the withheld information. Having considered this, the Commissioner has formed the view that in this case there is no overriding greater public interest, and that therefore the public interest does not override the duty of confidentiality.
32. One of the requirements for section 41 to apply is that the disclosure of the information would constitute an actionable breach of a duty of confidence. Given that the Commissioner accepts that in this case a duty of confidence exists, the questions to be addressed are whether such a disclosure would be actionable, and if so, who could bring the action?
33. With regard to whether this disclosure would be actionable, the Commissioner considers this to be the case, though it is unlikely that damages could be awarded for a breach of the duty of confidence as there is no obvious financial loss. Instead, any remedy would most likely be in the form of an injunction to prevent publication of the information requested.
34. After reaching this view, it is therefore necessary to establish who would be able to bring the action if the duty of confidence was breached.

35. In the case of *Bluck v Information Commissioner and Epsom & St Helier University Hospitals NHS Trust*<sup>1</sup> 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 and that in the circumstances of this case it does survive" (para 21).*

36. Although these issues did not come up in *Bluck* it is the Commissioner's view that this action would most likely be by way of an application to the court for an injunction seeking to prevent disclosure of the information. It should be noted that there is no relevant case law in support of this position.
37. Furthermore 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 be able to take action. This is because it should not be the case that a public authority should lay itself open to legal action because at the time of a request it is unable to determine whether or not a deceased person has a personal representative.
38. The Commissioner is satisfied that the breach of confidence which would arise from disclosure of the relevant reports would be actionable by the patients/claimants themselves or personal representatives, if any, of deceased individuals.
39. NHSLA explained that it does disclose claims data in response to FOI requests where it is confident that there is a low risk of re-identification, and it is aware that there can be no 'blanket exemption' of such information. It further explained that it is also working towards establishing a research governance policy to enable disclosures of 'higher-risk' data sets to 'properly constituted closed communities' where there are specific safeguards in place.

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<sup>1</sup> EA/2006/0090

40. In view of all the above, the Commissioner considers that disclosure of this information is exempt under section 41 of the Act, and that NHSLA was correct to apply this exemption in relation to the withheld information.
41. In reaching this conclusion the Commissioner has been mindful of the wider public interest in preserving the principle of confidentiality.
42. It is in the public interest that confidences should be respected. The encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence. The Commissioner is mindful of the need to protect the relationship of trust between confider and confidant; and the need not to discourage or otherwise hamper a degree of public certainty that such confidences will be respected by a public authority.
43. The Commissioner considers that the public interest in disclosing the information does not outweigh the public interest in maintaining trust between medical and social care professionals and the individuals they treat. He finds that the public interest in preserving that trust to be particularly strong.
44. The Commissioner considers that NHSLA would not have a public interest defence for breaching its duty of confidence. Therefore, he finds that the withheld information is exempt under section 41 and NHSLA applied this exemption appropriately.
45. As the Commissioner considers that all the withheld information is exempt by virtue of section 41 he has not gone on to consider the application of section 40(2).



## Right of appeal

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46. 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: 0116 249 4253

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)

47. 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.
48. 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 .....**

**Steve Wood**  
**Head of Policy Delivery**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**