

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 August 2021

Public Authority: Nottingham University Hospitals NHS Trust
Address: Trust Headquarters
City Hospital Campus
Hucknall Road
Nottingham
NG5 1PB

Decision (including any steps ordered)

1. The complainant has requested information on children diagnosed with paediatric tumours within specific time periods. Nottingham University Hospitals NHS Trust ("the Trust") initially refused the request on the basis that the information was personal data under section 40(2) of the FOIA and later also sought to rely on the exemption at section 41 of the FOIA for information provided in confidence.
2. The Commissioner's decision is that the information does engage the section 41 exemption and there is no public interest defence for breaching the duty of confidence. As such the Trust has correctly withheld the information.

Request and response

3. On 19 May 2020 the complainant made a request to the Trust in the following terms:

"Please could I request the following information. I have put two variations to each question, just so there's no possibility of avoiding answering the question:

-During the period 1st Jan 2018- 31st Dec 2019, how many children (Under 18 years old) were incorrectly diagnosed of a paediatric tumour?

-During the period 1st Jan 2018- 31st Dec 2019, how many children (Under 18 years old) received a change in diagnosis of a paediatric tumour?

-During the period 1st Jan 2018- 31st Dec 2019, how many children (Under 18 years old) received a change in diagnosis of a paediatric brain tumour?

-During the period 1st Jan 2018- 31st Dec 2019, how many children (Under 18 years old) were incorrectly diagnosed of a paediatric brain tumour?

-During the period 1st Jan 2018- 31st Dec 2019, how many children (Under 18 years old), who were incorrectly diagnosed of a paediatric tumour, died?

-During the period 1st Jan 2018- 31st Dec 2019, how many children (Under 18 years old), who received a change in diagnosis of a paediatric tumour, died?

-During the period 1st Jan 2018- 31st Dec 2019, how many children (Under 18 years old), who were incorrectly diagnosed of a paediatric brain tumour, died?

-During the period 1st Jan 2018- 31st Dec 2019, how many children (Under 18 years old), who received a change in diagnosis of a paediatric brain tumour, died?"

4. The Trust responded on 11 June 2020 and asked the complainant to provide some further definitions of terms used in the request to help it identify and locate relevant information. The complainant responded on the same date to confirm that "diagnosis" was intended to refer to imaging diagnosis, "change in diagnosis" referred to those with a tumour only confirmed with imaging diagnosis, and "incorrectly diagnosed" referred to any child with a tumour diagnosed with imaging that later changed.
5. The Trust responded on 2 July 2020. It provided an approximate number of five to protect individual data rights as the Trust considered a more specific number, given the low numbers, might identify individuals.
6. The complainant asked for an internal review of this decision on 2 July 2020 arguing that individuals could not be identified from the actual number given.
7. The Trust conducted an internal review and communicated the outcome on 21 August 2020. The internal review upheld the decision to refuse to provide the specific numbers by virtue of section 40(2) of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 25 August 2020 to complain about the way their request for information had been handled.
9. During the course of the Commissioner's investigation the Trust advised it was also now seeking to rely on section 41 to withhold the requested information as some of the questions related to deceased individuals and all of the information was patient information.
10. The Commissioner considers the scope of her investigation to be to determine if the Trust has correctly withheld the information in the scope of the request on the basis of either section 41 or section 40(2) of the FOIA.

Reasons for decision

Section 41 – information provided in confidence

11. 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 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?

12. The Trust has explained that the information that has been requested contains multiple identifiers which when combined, describe various characteristics about the individuals including age, medical health and location.
13. The Trust advises 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?

14. 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?

15. 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.
16. 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 numbers are known. The Commissioner is not considering here whether the information is personal data but she does accept that if this argument has some logical basis then it shows the information is not trivial.
17. 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 identify individuals in this case if they are small enough. As such the information cannot be viewed as trivial.
18. 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?

19. 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).
20. 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.
21. 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.
22. 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 numbers 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.
23. 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.
24. 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?

25. 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.
26. 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.
27. 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)*. 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.

28. 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.
29. The Commissioner is satisfied that the disclosure of the requested information under the FOIA in this case would be an unauthorised use of that information, as the patients would not have consented to this use.
30. 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.
31. The Commissioner also accepts that information patients and/or representatives would expect to be kept confidential being disclosed could have a detrimental effect on the reputation of the Trust in relation to its ability to protect patient information.
32. The Commissioner is satisfied that disclosure of the information may lead to identification by the families of the individuals concerned (and 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. She also accepts that disclosure of the data would be detrimental to the reputation of the Trust. She therefore accepts that this limb of the test for confidence is met.
33. In view of the above, the Commissioner is satisfied that the three tests for breach of confidence have been met. She 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?

34. 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.

35. 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.
36. The Trust acknowledges that disclosure of actual numbers could assist members of the public to understand current issues relating to the care of children with tumours or brain tumours, 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, resulting in patients being reluctant to divulge sensitive information about themselves to their healthcare team, thereby impacting on the quality of care they receive.
37. The complainant had suggested that the information being disclosed would not be a data protection issue and that the information was needed to demonstrate if there was bad practice taking place in the Trust.
38. The Commissioner has accorded some weight to the argument that there is some public interest in knowing whether the Trust is correctly diagnosing and appropriately treating patients. She appreciates the need for openness and transparency
39. 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 the details of their medical history 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, more information that can be gleaned and a possibility of identifying individuals should the numbers be very low or one.
40. 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.
41. In conclusion, the Commissioner is satisfied that the requested information was provided in confidence to the Trust. She 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

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

Right of appeal

44. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. 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.
46. 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

Jill Hulley
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