

## Freedom of Information Act 2000 (FOIA) Decision notice

**Date:** 15 February 2012

**Public Authority:** Western Health and Social Care Trust  
**Address:** Bridgeview House  
Gransha Park  
Clooney Road,  
Londonderry  
BT47 6TG

### Decision (including any steps ordered)

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1. The complainant requested information relating to the 15 occurrences in the past year of the Western Health and Social Care Trust's ("the Trust") responding to urgent calls by taxi as no ambulances were available.
2. The Commissioner's decision is that the Trust has not handled the complainant's request in accordance with the provisions of FOIA as it has incorrectly applied sections 40(2) (by virtue of section 40(3)(i)(a)) and 41 to the withheld information. It has also breached sections 1(1)(b), 10(1) and 17(1)(b) of FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - To disclose the withheld information to the complainant within 35 calendar days of the date of this notice.
4. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

### Request and response

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5. On 14 January 2011, the complainant wrote to the Trust and requested information in the following terms:

*"Of the 15 occurrences in the Western Trust in the past twelve months of a taxi being used by cardiac units to respond to an urgent call because an ambulance was not available:*

1. *How many of the cardiac patients had suffered a heart attack?*
  2. *How many of the patients died?*
  3. *Why were no ambulances available?*
  4. *How many patients were admitted to hospital when clinicians attended in a taxi?*
  5. *What was the cost to the Trust and public purse of the taxis?*
  6. *How many of the occurrences were in the Derry area?*
  7. *How many of the occurrences were in the Limavady area?*
  8. *How many of the occurrences were in the Strabane area?*
  9. *How many of the occurrences were in the Omagh area?*
  10. *How many of the occurrences were in the Fermanagh area?"*
6. The Trust responded on 11 February 2011. It withheld the information requested in part 1, citing the exemption under section 40(2) of the FOIA (personal data of third parties) and partially disclosed the information requested in parts 2 and 6-10. It said it did not hold the information requested in parts 3 and 5 and disclosed the information requested in part 4.
  7. The complainant requested an internal review of the Trust's decision not to disclose the information in part 1 of his request and not to disclose exact numbers in relation to part 2 of his request ("the withheld information").
  8. Following an internal review the Trust wrote to the complainant on 18 March 2011. It stated that the reviewer was upholding the original decision in relation to the information in parts 1 and 2 of the complainant's request.
  9. Following correspondence from the Commissioner, the Trust decided that section 41 of the FOIA applied to the entirety of the withheld information and provided the Commissioner with its detailed submissions to that effect.

## Scope of the case

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10. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He was specifically concerned about the Trust's refusal to disclose the information he requested at part 1 and its refusal to disclose the exact number he requested at part 2 of his request.
11. The Commissioner has investigated the Trust's use of the exemption under section 41 of the FOIA (information provided in confidence) in relation to the withheld information. He has also considered whether the information in part 1 of the request constitutes personal data for the purposes of section 40(2) of the FOIA.

## Reasons for decision

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### Section 40(2) of the FOIA

12. Section 40(2) of the FOIA provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied.
13. One of the conditions, listed in section 40(3)(a)(i), is where disclosure of the information to any member of the public would contravene any of the data protection principles as set out in schedule 1 to the Data Protection Act 1998 ("the DPA".)
14. In its letter to the complainant dated 11 February 2011 the Trust stated that the withheld information was exempt from disclosure under section 40(2) as the numbers were small and there was a real risk that patients could be identified from them. Therefore the Trust was of the view that the information was personal data, and that its disclosure would breach the first data protection principle.
15. The first data protection principle requires the processing of personal data to be fair and lawful and that,
  - at least one of the conditions in schedule 2 is met, and
  - in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.
16. In order to reach a view on whether this exemption could be applied, the Commissioner initially considered whether or not the information in question was in fact personal data.

## Is the withheld information personal data?

17. Section 1 of the DPA defines personal data as data which relates to a living individual who can be identified:
  - from those data, or
  - from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
18. It is the Commissioner's view that, generally, statistical information relating to people has the potential to constitute personal data. This is because some such statistical information can identify individuals, depending on the nature of the information in question. However, the Commissioner believes that statistics of this nature which have been truly anonymised do not constitute personal data and will not therefore engage section 40 of the FOIA.
19. The Commissioner considers statistical information to be truly anonymised if the data controller (in this case the Trust) takes steps to remove any linkage between the statistic and information which could identify an individual.
20. The Commissioner does not accept that, where a data controller holds information which could potentially be used to identify living individuals from the anonymised data, this turns the anonymised data into personal data. The Commissioner considers that even where the data controller holds that additional 'identifying' information, this does not prevent it from anonymising that information to the extent that it would not be possible to identify any living individual from that information alone, and thus it would no longer be personal data.
21. The Commissioner draws support for this approach from the House of Lords' judgment in the case of the *Common Services Agency v Scottish Information Commissioner*.<sup>1</sup>
22. However if a member of the general public could identify individuals by cross-referencing the anonymised data with information already in the public domain, then the information will be personal data. Whether it is possible to identify individuals from the anonymised data is a question of fact based on the circumstances of the specific case.
23. The Trust has argued that the withheld information in this case is personal data as it constitutes "small figure statistics", disclosure of

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<sup>1</sup> [2008] UKHL 47.

which could lead to the identification of cardiac patients who suffered a heart attack, when combined with other information which may be publicly available.

24. In reaching a view as to whether the withheld information is personal data the Commissioner has been mindful of the wording of section 1 of the DPA and Article 2 of Directive 95/46/EC (the European directive enacted in the UK by the DPA). Article 2 states that the term personal data, "*shall mean any information relating to an identified or identifiable natural person*". Recital 26 of the Directive states that, "*to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or any other person.*"
25. The Trust has stated to the complainant that a small number of cardiac patients whom clinicians attended by taxi suffered a heart attack. The Trust believes that to provide further detail as to the exact number could lead to identification of patients and their medical condition, which they would expect to be kept private. It is the Trust's view that the information could not be sufficiently anonymised so as to prevent a member of the public from identifying the patients. Patients could also identify themselves from the first part of the withheld information and consider disclosure of this to be a breach by the Trust of their medical confidentiality.
26. The Commissioner believes that, given the already available information, a determined individual with a substantial amount of additional knowledge **may** be able to deduce the identity of a particular individual who suffered a heart attack. However, whilst the Commissioner cannot rule out the possibility of identifying an individual from the withheld information coupled with other information which may be in the public domain, he has no evidence that this may happen and therefore he is of the view that this possibility is remote and will not, in any case, be increased by the disclosure of the withheld information. Therefore the Commissioner is satisfied that the withheld information in part 1 of the request is not the personal data of the patient(s).
27. The Commissioner has taken all the Trust's arguments into consideration and has concluded that the withheld information in part 1 of the request does not constitute the personal data of the individual patient(s). Therefore, the section 40(2) and (3)(i)(a) exemptions are not engaged in relation to the withheld information and the Commissioner has not gone on to consider whether disclosure of the withheld information would breach any of the data protection principles.

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

28. Since the Commissioner does not consider that the section 40(2) and (3)(i)(a) exemptions are engaged in relation to the withheld information in part 1 of the request, he considered whether section 41 applies to the entirety of the withheld information.
29. Section 41(1) of the FOIA states that information is exempt if it was obtained by the public authority from any other person and if disclosure of the information would constitute a breach of confidence actionable by that or any other person. The exemption is absolute and therefore not subject to the public interest test.
30. The Trust has argued that the withheld information is exempt from disclosure on the basis of section 41 because it was provided to it in confidence by third parties, possesses the necessary quality of confidence, was imparted in circumstances giving rise to an obligation of confidence and disclosure of the withheld information would be actionable. The Commissioner has considered the application of this exemption to the withheld information.

## **Part 1 of the complainant's request**

31. The information in this part of the complainant's request relates to living individuals, however the Commissioner has already decided that that it is not personal data, as there is no realistic possibility of individual(s) being identified from it.
32. In cases where the subject of the information cannot be identified as a result of the withheld information being disclosed then there can be no expectation of confidence, no quality of confidence and no detriment by way of an invasion of privacy. As nobody can be identified it follows that there would be no breach of confidence to action. Therefore, section 41 cannot apply to the information in part 1 of the complainant's request.

## **Part 2 of the complainant's request**

33. The information in part 2 of the request relates to deceased individuals. In the case of *Bluck v Epsom & St Helier University NHS Trust*<sup>2</sup> the Tribunal confirmed the Commissioner'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

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<sup>2</sup> EA/2006/0090

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).*

34. The Trust has argued that such a duty of confidence exists in this case as disclosure of the information in part 2 of the request could reveal the circumstances of individuals' deaths and cause distress to the surviving family members. The Trust is of the view that disclosure of such information would constitute an actionable breach of confidence as the deceased's personal representatives could take such an action and would, on the balance of probabilities, succeed. However, as the Commissioner considers that the information in part 2 consists of anonymised statistics just as the information in part 1 does, he is also of the view that no individual could be identified from the information in that part of the request.
35. In order for section 41 to apply it is necessary for all of the relevant elements of the test of confidence to be satisfied. Therefore if one or more of the elements is not satisfied then section 41 will not apply. The Commissioner has explained why he does not consider it possible to reliably identify an individual as the subject of the withheld information from its contents or if it is linked with other material available to the general public. In such circumstances he does not consider that there can be an expectation of confidence or that disclosure would cause detriment by way of an invasion of privacy. Therefore it follows that there can be no breach of confidence to action and section 41 does not apply.

## **Procedural requirements**

### **Sections 1 and 10 of the FOIA**

36. In failing to disclose the withheld information within 20 working days of receipt of the request, the Trust did not comply with the requirements of sections 1(1)(b) and 10(1) of the FOIA.

### **Section 17(1) of the FOIA**

37. The Trust, in its initial refusal and internal review letters to the complainant, referred to a duty of confidentiality but did not specify that it was applying the section 41 exemption to the withheld information in part 2 of the complainant's request. Therefore, the Trust did not comply with the requirements of section 17(1)(b) of

Reference: FS50383013



FOIA, which states that any refusal notice must specify the exemption being applied.



## Right of appeal

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38. 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: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

39. 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.
40. 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** .....

**Faye Spencer**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
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