

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 December 2020

Public Authority: Manchester University NHS Foundation Trust
Address: First floor
Stiltz Building
Ledson Road
Wythenshawe Hospital
M23 9GP

Decision (including any steps ordered)

1. The complainant has requested Manchester University NHS Foundation Trust (the trust) to disclose information relating to the gynaecological procedures/operations carried out by a particular consultant. Initially the trust advised that the requested information was not held and some was exempt under section 40 of the FOIA. At the internal review stage it maintained this position but also claimed a late reliance on section 12 of the FOIA for some elements of the request.
2. With regards to the information that is not held, the Commissioner is satisfied that on the balance of probabilities the recorded information is not held. In terms of the trust's application of section 12 and 40 of the FOIA, the Commissioner is satisfied that these sections apply to the respective elements of the complainant's request.
3. However, the Commissioner has found the trust in breach of sections 1, 10 and 16 of the FOIA.
4. For section 16 of the FOIA, the Commissioner requires the trust to take the following steps to ensure compliance with the legislation.
 - The trust is required to provide the complainant with advice and assistance so far as it is reasonable to do so in accordance with section 16 of the FOIA.

5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 29 September 2019, the complainant wrote to the trust and requested information in the following terms:

"Further to a formal complaint raised over [name redacted] on 24th July 2019 reference PL/BC:F19/0538. [Name redacted] Since my last correspondence I have received instructions from the Royal College of obstetricians and gynaecologist (hereafter RCOG). The RCOG recommend that I obtain success rate record on all procedures for [name redacted] for each hospital that he works in. Thus, I am making a request under the Freedom of Information Act (FOI).as such effect."

7. The PA responded on 3 October 2019. It asked the complainant to clarify what she meant in terms of success rates and what would be the measure of success.
8. The complainant responded on 4 October 2019 and stated that she required the following information:

"1 Prolapse surgery:

What is [name redacted] individual success rate of prolapse surgery?

How many repeat operations does [name redacted] perform? How is this different to the general success rate?

How many prolapse surgeries does [name redacted] perform? Please provide a breakdown of which type.

2. Endometriosis surgery:

What is [name redacted] individual success rate of endometriosis removal surgery?

How many repeat operations does [name redacted] perform for endometriosis removal ?

How is this different to the general success rate?

3 Pessaries

How many and how often does [name redacted] fit pessaries and how many repeats are required?

How successful are pessaries in [name redacted]'s patients post hysterectomy, compared with patients who have not had previous surgeries?

4 General:

How many readmissions are required after surgery by [name redacted]?

[Name redacted] Infection rates."

9. The complainant chased up the matter on 14 and 19 November 2019.
10. As the complainant received no response, she referred the matter to the Commissioner on 19 December 2019.
11. The Commissioner wrote to the trust on 11 January 2020 and requested it to respond to the request within 10 working days.
12. The trust responded on 13 January 2020 and confirmed that it issued a response to the complainant on 19 December 2019. For the majority of the request the trust stated that the level of detail requested is not recorded by the trust. For the number of prolapse surgeries performed broken down by type, the trust refused to disclose the information citing section 40 of the FOIA.
13. The complainant requested an internal review on 14 January 2020.
14. The trust acknowledged receipt on 16 January 2020.
15. As the complainant received no response she referred the matter back to the Commissioner on 8 February 2020.
16. The Commissioner wrote to the trust on 28 February 2020 to notify it that she would proceed to full investigation without an internal review.

Scope of the case

17. As stated above, the complainant has contacted the Commissioner at various intervals to complain about the way her request for information has been handled. The Commissioner decided to exercise her discretion and accept the complaint for full investigation without an internal review on 28 February 2020.

18. The Commissioner wrote to the trust on 28 February 2020 to request further information. The case was however paused in late March as a result of Covid-19. The trust did not then have capacity to progress the complaint until July.
19. On 20 July 2020 the trust decided to issue a further response to the complainant addressing the internal review that was requested in January 2020. It disclosed some information to the complainant. For some elements of the request (those relating to success rates) it confirmed that the information is not held. It continued to rely on section 40 of the FOIA for one element of the request and cited section 12 of the FOIA (cost limit) for the remainder.
20. The Commissioner's investigation has focussed on whether the trust does hold information on success rates and the trust's application of section 12 and 40 of the FOIA.

Reasons for decision

Section 1 – right of access

21. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b), to have the information communicated to him or her if it is held and is not exempt information.
22. With regards to the elements of the complainant's request where she asks for success rates, the trust stated that the information is not held. The complainant is dissatisfied with the trust's response and believes the information should be held and should be provided. She provided a letter she received from the Royal College of Obstetricians and Gynaecologists dated 27 September 2019 to support this.
23. The trust explained that both endometriosis surgery and urogynaecological disorders are long term conditions which may be ameliorated by surgery, but which frequently occur. They are re-emerging conditions which means that whilst operations/procedures for these conditions may be successful at the time, these conditions may re-occur in the future. Success is also very subjective, as what one woman may consider a success would not be considered a success by another woman. Similar between patient and consultant. Many individual factors affect the outcome of surgery, for example, age, weight, smoking, case mix. It stated that it is therefore very difficult to compare data from individual patients or individual surgeons.

24. It stated that there is a drive across the NHS to publish metrics to measure the performance of individual consultants. But as the letter the complainant received from the Royal College of Obstetricians and Gynaecologists dated 27 September 2019 advised, this information is still not published in many specialities. The trust confirmed that whilst this has been achieved for some medical conditions such as cardiac surgery and cancer, it has not been achieved within Gynaecology. There are no nationally recognised measures for gynaecological conditions.
25. The Commissioner is satisfied that the trust has explained in sufficient detail why success rates for the specific conditions mentioned in the request are not held. She has no reason to doubt this. She is therefore satisfied that on the balance of probabilities the requested information is not held.

Section 12 – cost limit

26. Section 12(1) of the FOIA states that:

“(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

27. The appropriate limit is set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations'). The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour. This means that in practical terms there is a time limit of 18 hours in respect of the trust. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) of the Fees Regulations states that an authority can only take into account the costs it reasonably expects to incur during the following processes:
 - determining whether it holds the information;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
28. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be 'sensible, realistic and supported by cogent evidence'.

29. The trust applied section 12 of the FOIA to certain elements of the complainant's request (repeat operations and infection rates). It identified that over the last five years 214 procedures/operations were recorded against the named consultant (96 prolapse surgery operations, 81 endometriosis surgery operations and 37 procedures relating to the insertion of pessaries unrelated to obstetrics or terminations). Although these are recorded against the consultant's name it does not necessarily mean that the actual operation or procedure was carried out by him personally. It could be a member of his team. These figures will also include repeat operations.
30. The trust explained that it is not able to easily identify repeat operations electronically because, electronically, initial operations are not identified separately to repeat operations. It confirmed that the trust holds readmissions rates for the department as a whole. But these figures cannot be drilled down further to give the specific reason for the readmission such as repeat operation. Additionally, the trust advised that infection rates are held by individual consultant electronically.
31. In order to comply with the request the trust would therefore have to request from the Health Records Library the relevant paper-base casenotes for all 214 procedures and manually review each one to first identify if it was the named consultant that undertook the procedure, then if he did whether it was a repeat procedure or not and then establish if there is any information about infections. It explained that the size of the paper-based casenotes will vary from one patient to another depending on their medical history. Some paper-based casenotes will include numerous volumes. It stated that given the number of patients involved and what would be required in order to retrieve and extract the relevant information, this would be a lengthy exercise which would take it over the cost limit prescribed by the FOIA.
32. The Commissioner is satisfied that the requested information cannot be retrieved and extracted more easily. The trust has explained how it is not able to provide the requested information from electronic records and how it would need to retrieve and review the paper-based casenotes for all operations/procedures recorded against the consultant's name. It would first need to identify if the named consultant carried out the procedure and then if he did, whether it was a repeat operation or not and whether there is any record of infection. The trust has advised how voluminous casenotes can be and how this is not unusual. It would take the trust 17.8 hours at a rate of five minutes per procedure to locate, retrieve and then extract the requested information. The Commissioner considers in reality it would take longer and certainly considerably longer for those casenotes that are extensive, which takes the request comfortably over the cost limit.

33. The Commissioner also notes that there is no timeframe specified in the complainant's request. The trust has selected the last five years to demonstrate that compliance would exceed the cost limit. As no timeframe has been specified, the trust would be required to provide the same information for each year of the consultant's employment so far as that information is held. Again, increasing the time that would be required in order to fully comply with the request.
34. For the above reasons, the Commissioner is satisfied that section 12 of the FOIA applies.

Section 40 – personal data

35. In relation to the number of prolapse procedures broken down by type, the trust disclosed the total number of procedures and the individual numbers for two types but withheld the individual numbers for three types, as the numbers are so small and disclosure could lead to identification.
36. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
37. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
38. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
39. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

40. Section 3(2) of the DPA defines personal data as:

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

"any information relating to an identified or identifiable living individual".

41. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
42. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
43. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
44. The trust stated that the numbers are so low, disclosure of the withheld information and any other information otherwise available could be used to identify the data subjects. For these reasons, it considers the information is personal data.
45. The Commissioner has been provided with the withheld information and she is satisfied that due to the small numbers of each of the three remaining types that disclosure could lead to potential identification of the data subjects. In the information that has already been disclosed it is known that the procedures were carried out between July 2018 and July 2019. It is also known from the name of the trust where the procedures were carried out. Disclosure of the specific prolapse procedure against the very small number could allow someone to piece this information together and potentially identify the data subjects. For these reasons, she is satisfied that the withheld information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
46. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
47. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

48. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

49. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
50. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
51. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

Is the information special category data?

52. Information relating to special category data is given special status in the GDPR.
53. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
54. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include special category data. She has reached this conclusion on the basis that the request is relating to medical procedures carried out by a named doctor and as she has reached the view that the data subjects could be identified it directly relates to the health of those data subjects.
55. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
56. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
57. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
58. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

Procedural matters

Sections 1 and 10 – general right of access and time for compliance

59. The trust requested the complainant to provide clarification on 3 October 2019. The complainant responded on 4 October 2019. As the trust failed to respond to the complainant's request within 20 working days of the receipt of her clarification it breached section 10 of the FOIA.
60. The trust completed the internal review on 20 July 2020 and released some information to the complainant. The Commissioner finds the trust in breach of section 1 and 10 of the FOIA. This is because it failed to disclose information to which the complainant was entitled within 20 working days of the receipt of her clarification.

Section 16 – advice and assistance

61. The application of section 12 triggers the duty to provide the applicant with advice and assistance so far as it is reasonable to do so to enable them, if possible, to make a fresh request on refined terms which could be processed within the cost limit.
62. In this case the trust claimed a later reliance on section 12 of the FOIA in July 2020. Although it issued a fresh response to the complainant at this point advising her of this, it did not provide any advice and assistance in accordance with the requirements of section 16.
63. The Commissioner therefore finds the trust in breach of section 16 of the FOIA. It is now required to offer the complainant advice and assistance so far as it is reasonable to do so to enable her to potentially make a refined request that could be processed within the cost limit. Even if a public authority considers there is no advice and assistance that can be provided in a given case, it is still good practice to inform the complainant accordingly.

Other matters

64. The Commissioner notes that the complainant requested an internal review on 14 January 2020. However, the trust failed to complete this until 20 July 2020 and once the Commissioner's investigation had already commenced.
65. The section 45 code of practice advises public authorities to carry out internal reviews within 20 working days of receipt. It acknowledges that particularly complex or voluminous requests may take longer but states

that any additional time should not exceed 40 working days. The Commissioner would like to remind the trust of the importance of the section 45 code of practice and completing internal reviews on time with a view to improving its performance for future requests.

Right of appeal

66. 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

67. 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.
68. 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

Samantha Coward
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