

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 February 2023

Public Authority: Swansea Bay University Health Board

Address: One Talbot Gateway
Baglan Energy Park
Baglan
Port Talbot
SA12 7BR

Decision (including any steps ordered)

1. The complainant requested information from Swansea Bay University Health Board ("the Health Board") about waiting lists and Covid deaths. The Health Board provided some information within the scope of the request, but maintains that it does not hold some of the requested information for the purposes of FOIA.
2. The Commissioner's decision is that:
 - the Health Board does hold the information requested in part 3 of the request for the purposes of FOIA; it was therefore not entitled to rely on section 3(2) of FOIA to refuse this part of the request.
 - the Health Board breached section 10(1) of FOIA in that it failed to provide a valid response to the request within the statutory time frame of 20 working days.
3. The Commissioner requires the Health Board to take the following steps to ensure compliance with the legislation.
 - Disclose the information it holds within the scope of part 3 of the request, or issue a valid refusal notice with does not rely on section 3(2) of FOIA.

4. The Health Board 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 7 April 2022, the complainant wrote to the Health Board and requested information in the following terms:
 - “1. How many names were removed from all waiting lists for all Departments for whatever reason by your Board in the 12-month period prior to The Assembly Elections (1st May 2020 to 30th April 2021)?
 2. Of these how many were removed because they were referred to treatment?
 3. In the period from the start of The Pandemic to 29th September 2021, how many people died from Covid in your Board's Area?
 4. Of these how many died as a result of probable or definite hospital acquired Covid infections?”
6. The Health Board responded on 6 July 2022. It provided some information within scope of parts 1 and 2 of the request. It stated that the Health Board did not hold information within scope of part 3 of the request, but advised the complainant that the Office for National Statistics (“ONS”) would hold this information. In relation to part 4 of the request, it stated that the information was held on its website, provided a link to a response to a previous FOI request on its FOI disclosure log and stated that it was applying the exemption under section 21 of FOIA, (information accessible to applicant by other means).
7. The complainant requested an internal review on 6 July 2022
8. Following an internal review the Health Board wrote to the complainant on 17 August 2022. It disclosed some additional information within the scope of the request. In relation to part 3 of the request, it maintained its position that the Health Board does not hold this information for the purposes of FOIA and that it is held by the ONS.

Scope of the case

9. The following analysis considers whether the Health Board is correct to say that it does not hold the information requested in part 3 of the request for the purposes of FOIA. It will also address the timeliness of the response to the request as required under section 10 of FOIA.

Reasons for decision

Section 3(2) - information held by a public authority

10. Section 3(2)(a) of FOIA states that information is "held" by a public authority if it is held "otherwise than on behalf of another person".
11. Therefore, if information is held only on behalf of another person, including a "legal person" such as an organisation, it is not "held" for the purposes of FOIA, and does not need to be considered for disclosure in response to a request made under FOIA. The Commissioner's guidance on information held for the purposes of FOIA¹ indicates that when considering whether information is held only on behalf of another person the question to consider is whether the information is held to any extent for the public authority's own purposes.
12. The Commissioner is satisfied that the ONS is a separate legal entity from the Health Board and is therefore a separate "person" within the meaning of FOIA.
13. His task, therefore, is to determine whether the Health Board, as it has asserted, holds the information requested in part 3 of the request, only on behalf of the ONS. If the information is held to any extent by the Health Board for its own purposes, then it will be held.
14. The Commissioner asked the Health Board to explain how and why the information was held, including whether it had any access to and control over the requested information.
15. The Health Board stated that its position is that it does not hold the information within the scope of part 3 of the request for the purposes of

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/information-you-hold-for-the-purposes-of-foia/#whoholdsthe>

FOIA. It stated that it, "physically holds this information on its IM&T systems for statistical purposes". With regards to whether this information is needed for its own functions it stated, "the Health Board accesses the data for information purposes, but it is not required for the Health Board to function." With regards to access and control and whether the information had been used for any of its own purposes, it stated, "the Health Board has access to the information, but does not have control over the information". It also confirmed that, "informatics/administrative/management staff have access for statistical analysis." and that the information "has been used in a dashboard report for information purposes".

16. The Health Board also added:

"Therefore, on reviewing, we acknowledge that the Health Board does hold this information on its systems for statistical purposes, however not for FOIA purposes. The Health Board does not have the knowledge to ascertain as to whether the data it extracts from the ONS is the most up to date and accurate. The numbers produced by ONS are slow to prepare, because they have to be certified by a doctor, registered and processed. It is acknowledged that sometimes registration can be delayed by many months, sometimes 6 months to 1 year. But once ready, they are the most accurate and complete information in relation to COVID deaths. The requester should therefore submit an FOIA request to ONS, for the most accurate record of deaths within the geographical area of the Health Board for the period they have requested. It is acknowledged that ONS are the source of the data and they hold the information for FOIA purposes, not the Health Board."

17. The argument made by the Health Board regarding uncertainty as to whether the data it extracts from the ONS is the most up to date and accurate is not a valid argument with regards to whether the information is held by the Health Board for the purposes of FOIA. Nor does the fact that the ONS produced the statistics mean that the Health Board holds the data it extracts from the ONS only on behalf of the ONS.
18. The Commissioner considers that the information is held by the Health Board for its own purposes, specifically for statistical analysis and information purposes.
19. While advising the complainant that the ONS may hold more up-to-date data may well be useful advice and assistance, this does not allow the Health Board to refuse this part of the request on the grounds that the information is not held for the purposes of FOIA.

20. The Commissioner is not satisfied that the information specified in part 3 of the request is held by the Health Board only on behalf of the ONS. Therefore his decision is that the information is held by the Health Board for the purposes of FOIA and that the Health Board was not entitled to rely on section 3(2) of FOIA to refuse the request.

Section 10 - Time for compliance with request

21. Section 10(1) of FOIA states that a public authority must respond to a request promptly and "not later than the twentieth working day following the date of receipt".
22. From the evidence provided to the Commissioner in this case, it is clear that the Health Board did not deal with the request for information in accordance with FOIA.
23. In this case the Health Board took 59 working days to respond to the request.
24. The Commissioner finds that the Health Board has breached section 10(1) by failing to provide a valid response to the request within the statutory time frame of 20 working days.

Right of appeal

25. 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

26. 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.
27. 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

Victoria James
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
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