

Decision Notice



Decision 178/2010 Mrs L and Lothian Health Board

Statistical information on complications and injuries associated with forceps delivery

Reference No: 201000575
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Scottish Information Commissioner

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Summary

Mrs L requested from Lothian Health Board (NHS Lothian) statistical evidence on specific complications and injuries associated with forceps delivery to newborns and mothers at the Simpson Centre for Reproductive Health (SCRH). NHS Lothian responded by explaining that the information requested was not recorded outwith individual medical files, that it could not be disclosed without breaching the data protection principles and that consequently it was exempt under section 38 of FOISA. Additionally, NHS Lothian claimed that to provide the information would involve a level of work which would exceed the £600 limit set for the purposes of section 12(1) of FOISA. Following a review, Mrs L remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that NHS Lothian had dealt with Mrs L's request for information in accordance with Part 1 of FOISA, as the Commissioner accepted that the cost of complying with the request would exceed the specified cost limit and that NHS Lothian was therefore not obliged to comply with the request.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 12(1) (Excessive cost of compliance) and 15(1) (Duty to provide advice and assistance)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs) and 5 (Excessive cost – prescribed amount)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 21 October 2009, Mrs L wrote to NHS Lothian requesting statistical evidence on specific complications and injuries associated with forceps delivery, to newborns as well as mothers, at the Simpson Centre for Reproductive Health (the SCRH). She listed the complications and injuries, and stated that if these differed from statistics collected at the SCRH, she wished to be informed of the differences and be given suggestions on alternative ways of obtaining the information.



2. NHS Lothian responded on 11 December 2009. It explained the arrangements for recording the complications and injuries referred to in Mrs L's request, providing a report prepared on the incidence of a limited category of neonatal admissions over the last 2 years and 7 months. It also provided a link to the website of the Information Services Division of NHS National Services Scotland (the ISD) for reporting on still births and neonatal deaths.
3. NHS Lothian concluded by stating that the information requested was not recorded outwith individual medical files and, since it did not have consent to release the requested data from these records, the information was exempt under section 38 of FOISA. Additionally, NHS Lothian submitted that to extract the detail required would involve a level of work which would exceed the £600 cost limit set for the purposes of section 12(1) of FOISA.
4. On 28 December 2009, Mrs L wrote to NHS Lothian requesting a review of its decision. In particular, she found it difficult to believe that NHS Lothian did not routinely collect statistical information falling within the scope of her request, since this would mean doctors were performing an operative delivery procedure without any understanding of its outcome. Mrs L expressed concern as to whether doctors could be said to perform evidence-based patient care if they could not check their performance of such high-risk operative procedure.
5. NHS Lothian notified Mrs L of the outcome of its review on 29 January 2010. The review advised that all the information presently available had been provided. NHS Lothian stated that information in relation to statistical evidence had not been withheld, as it did not currently collect this data or report it to the ISD. The review upheld NHS Lothian's initial decision on both of sections 38 and 12(1) of FOISA. However, NHS Lothian also stated that it had commissioned an audit process to look into forceps deliveries within its area, and this information would be shared with Mrs L upon completion.
6. On 15 March 2010, Mrs L wrote to the Commissioner, stating that she was dissatisfied with the outcome of NHS Lothian's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mrs L had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

8. The investigating officer contacted NHS Lothian, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, NHS Lothian was asked (with particular reference to its earlier submissions on the cost of compliance) to justify its reliance on any provisions of FOISA it considered applicable to the information requested.



9. In her submissions, Mrs L has emphasised the value statistical information of the kind she has requested would have to doctors performing such procedures and to members of the public. It should be noted, however, that it is not the remit of the Commissioner to decide whether a public authority should collect particular statistical data or whether such data should be collated in a certain way: he can only consider whether the public authority was correct in its application of FOISA in respect to the information it held at the time the request was received.
10. Towards the end of the investigation, NHS Lothian confirmed that the audit referred to in paragraph 5 above was approaching completion and that the report on this would be shared with Mrs L as soon as possible.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all the submissions made to him by Mrs L and NHS Lothian and is satisfied that no matter of relevance has been overlooked.

Section 12(1) – excessive cost of compliance

12. Section 12(1) provides that a Scottish public authority is not obliged to comply with a request for information where the cost of doing so (on a reasonable estimate) would exceed the relevant amount prescribed in the Fees Regulations. In terms of regulation 5 of the Fees Regulations, this is £600. Consequently, the Commissioner has no power to require the release of information should he find that the cost of responding to a request for information exceeds this amount.
13. The projected costs a Scottish public authority can take into account in relation to a request for information are, according to regulation 3 of the Fees Regulations, the total costs, whether direct or indirect, which the authority reasonably estimates it is likely to incur in locating, retrieving and providing the information requested in accordance with Part 1 of FOISA. The authority may not charge for the cost of determining (i) whether it actually holds the information requested or (ii) whether or not it should provide the information. The maximum rate a Scottish public authority can charge for staff time is set at £15 per hour.
14. In her submissions to the Commissioner, Mrs L said that she did not believe that the SCRH, the largest maternity school in Scotland, would not have information on the outcome of each and every forceps delivery. In particular, she did not believe that injury rates to newborns and mother were not collected routinely and were only held in individual medical notes.



15. Mrs L noted that forceps deliveries were classed as operative procedures and she did not believe that doctors at NHS Lothian would be allowed to perform an operative procedure without any idea of the likely outcome. If this were the case, she asked, how could doctors at NHS Lothian be said to practice evidence-based medicine, or decide whether a surgical procedure was valid and reliable? She also suggested that there should be circumstances in which the excessive cost provisions should not apply.
16. NHS Lothian advised that it was able (and had been able at the time it initially dealt with Mrs L's request) to provide numbers of all injuries/conditions for all births in Lothian over a set period of time; however, its information systems were unable to link injuries/conditions with method of birth. In relation to the injuries listed in the request, it was only possible to link injuries to associations (in this case forceps delivery) through a manual audit of the baby and mothers' individual case notes. Such an audit would require a specialist opinion on whether the injury/condition was linked to the method of delivery.
17. NHS Lothian detailed to the Commissioner the national data returns which it supplied to the ISD.
18. The Commissioner has found no evidence to suggest that NHS Lothian held, or holds, the information Mrs L requested in the statistical form she wished. Having considered all relevant submissions, he accepts that this information would require to be extracted from individual case files.
19. NHS Lothian explained that in Lothian there were 1,313 forceps deliveries in 2009/10, 1,437 in 2008/09, and 1,351 in 2007/08. Taking the average of the last three years, a case note review of 1,367 notes would be required.
20. However, NHS Lothian also submitted that to set these results in context, an audit of injuries/conditions would also need to be considered in relation to normal births, caesareans and vacuum births in a set period. Therefore, all baby and mother case notes would need to be audited. Across Lothian, this would amount to approximately 2,370 births per quarter (1,650 a quarter at the SCRH specifically) or 29,224 births over the 3 year period.
21. For calculations, NHS Lothian submitted that to facilitate the audit a pro-forma would have to be developed to capture the necessary data. It estimated that it would take one hour to design such a pro forma.
22. Given the need to assess association with method of delivery, the cost of the audit was based on a junior doctor and a clinical nurse specialist undertaking the review (at £13.98 and the maximum £15 per hour each respectively). The cost of designing the pro forma would therefore be £28.98.
23. Each case note would require to be studied and the information extracted, and NHS Lothian assumed that each case note would take 30 minutes to review given the large number of injuries/ conditions to be cross-referenced (19 in total). Again, this would involve both a junior doctor and a clinical nurse specialist.



24. NHS Lothian supplied a figure of 338 case notes to be reviewed for one quarter, derived from the annual figure for 2007/2008 quoted in paragraph 19 above. Having taken account of the overall figures provided, the Commissioner accepts this as a reasonable basis for estimating the number of case notes that would require to be reviewed.
25. For one quarter, NHS Lothian estimated the requirement for amalgamation of the audit results and statistical analysis at 26 hours administrative and clerical time (12.66 per hour, using Band 4 administrative and clerical staff) to input the data (5 minutes per pro forma) and 5 hours analyst time (£15 per hour).
26. Therefore, NHS Lothian estimated that the total cost of the case note audit for one quarter would be:
- 1 (hour) x (1 x £13.98 + 1 x £15) = £28.98
- 338 (case notes) x (1 x £13.98 + 1 x £15) x 0.5 (hours) = £4,897.62
- 28 (hours) x £12.66 = £354.48
- 5 (hours) x £15 = £225
- Total = £5,506.08.
27. There are several points that the Commissioner would make in respect of NHS Lothian's submission on the cost of complying with Mrs L's request.
28. Firstly, Mrs L did not specify a time period in respect of the information requested, for a example a year or a number of years, as she believed that the information would be held and readily accessible. From NHS Lothian's cost estimate, it would appear to follow that the production of the required information for any time period would exceed the prescribed cost of £600.
29. Secondly, NHS Lothian submits that "to set these results [on forceps deliveries] in context, an audit of injuries/conditions would also need to be considered in relation to normal births, caesareans and vacuum births in a set period of time". That is, as the Commissioner understands, to have data with statistical value it would be necessary to compare data in respect of forceps delivery with data on other forms of delivery. Whether or not such a comparison would be strictly necessary to meet Mrs L's request, the Commissioner notes that calculations for this additional exercise have not been provided by NHS Lothian. In the circumstances, the Commissioner will go on to consider the figures he has been provided with.
30. The Commissioner has considered NHS Lothian's calculations and other submissions as presented to him. He is satisfied, as reasonable in the circumstances, with the processes and calculations described. Even if the audit could be by done by a single person (either a specialist nurse or junior doctor), the cost would still exceed the £600 limit considerably. Similarly, even if the time estimated for amalgamation of the results and statistical analysis – 26 hours administrative and clerical time and 5 hours analysis time, all at rates which appear to be reasonable – were to be reduced, again the estimate would still be well over the limit.



31. Having taken due account of the submissions made by Mrs L and NHS Lothian, therefore, along with the requirements of section 12(1) of FOISA and the Fees Regulations, the Commissioner is satisfied that the costs of complying with Mrs L's information request would exceed the £600 limit prescribed for the purposes of section 12(1). Therefore, the Commissioner concludes that NHS Lothian was correct in its application of section 12(1) of FOISA and was under no obligation to comply with the information request made by Mrs L.
32. While noting Mrs L's argument, on what might be described as public interest grounds, that the information is of such importance that section 12(1) should not apply, the Commissioner would emphasise again that it is simply not in his power to require the disclosure of information where he is satisfied that the cost of doing so would exceed the £600 limit.

Section 15 – duty to provide advice and assistance

33. Section 15 of FOISA requires a Scottish public authority, so far as it is reasonable to expect it do so, to provide advice and assistance to a person proposes to make, or has made, a request for information to it. Examples of such advice and assistance given in the Scottish Ministers' Code of Practice on the discharge of functions by public authorities under FOISA (commonly known as the "Section 60 Code") include, in cases where section 12(1) applies, "an indication of what information could be provided within the cost ceiling".
34. In this case, the Commissioner has noted that NHS Lothian did not advise Mrs L how it would be possible to bring the cost of complying with her information request within the £600 threshold. However, having considered both the cost submissions provided by NHS Lothian (which have been accepted by the Commissioner) and Mrs L's arguments as to why the information should be disclosed, it does not appear likely that NHS Lothian would have been able, within the cost limit, to provide Mrs L with detailed information meeting her requirements.
35. The Commissioner has noted the information and explanations provided to Mrs L in response to her information request, along with NHS Lothian's stated intention to commission an independent review of forceps-related injuries (which would include gathering the information described in the authority's section 12 submission). While fully understanding Mrs L's expectations on this matter, he is satisfied in the circumstances that NHS Lothian provided her with such advice and assistance as it was reasonable to expect it to provide in relation to her request: he cannot, of course, comment on the conduct of the audit – or require it to take any action in this case in relation to the information that audit exercise may produce.



DECISION

The Commissioner finds that Lothian Health Board complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mrs L.

Appeal

Should either Mrs L or Lothian Health Board wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Margaret Keyse
Head of Enforcement
12 October 2010



Appendix

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

...



Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

3 Projected costs

- (1) In these Regulations, "projected costs" in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.
- (2) In estimating projected costs-
 - (a) no account shall be taken of costs incurred in determining-
 - (i) whether the authority holds the information specified in the request; or
 - (ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and
 - (b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

5 Excessive cost - prescribed amount

The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.