

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 March 2023

Public Authority: Lewisham & Greenwich NHS Trust
Address: Lewisham High Street
London
SE13 6LH

Decision (including any steps ordered)

1. The complainant has requested specified information relating to patients admitted between 15/12/2021 and 15/01/2022 categorised by those who have not received a COVID-19 vaccination and those who have received one or more doses of vaccine.
2. The Trust provided most of the information, but not broken down by vaccination status (as it said that this was not held). It did not provide the number of patients admitted to intensive care with COVID-19 that had underlying health conditions (part 3 of the request) as it said it would exceed the cost limit under section 12 FOIA to do so.
3. The Commissioner's decision is that section 12 FOIA was incorrectly applied to part 3 of the request.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide a fresh response under FOIA to part 3 of the request that does not rely upon section 12 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 FOIA and may be dealt with as a contempt of court.

Request and response

6. On 21 July 2022 the complainant requested the following information:

"Please provide the following information for patients admitted between 15/12/2021 and 15/01/2022 categorised by those who have not received a COVID-19 vaccination and those who have received one or more doses of vaccine.

- 1) Total number of patients admitted with COVID-19 as the reason for admission.
 - 2) Number of patients admitted to intensive care with COVID-19.
 - 3) Number of patients admitted to intensive care with COVID-19 that had underlying health conditions.
 - 4) Number of patients in intensive care that died with COVID-19 as the underlying cause of death.
 - 5) The minimum, maximum, median and average ages of patients with COVID-19 admitted to intensive care."
7. After some attempts to clarify the request as the Trust does not hold vaccination status for all patients, it responded on 31 October 2022 providing the required information (apart from part 3 of the request) but not categorised by vaccination status, applying section 12 FOIA cost limit to refuse to comply with part 3 of the request.
8. On the same date the complainant requested an internal review and asked the Trust to review its response to part 3 of the request:

"Regarding the response to question 3:

3) Number of patients admitted to intensive care with COVID-19 that had underlying health conditions.

"We don't have accurate data for this as this would lie with a patients GP records mostly"

This implies that the Trust does hold some data of relevance. Please provide the data that is available."

9. On 10 November 2022 the Trust provided the internal review, it said:

"The only way we could get more accurate data would be to send a list of the deaths to our Medical Records department, and they would have to physically look through each individual medical record paper book for the notes. This would take over 18 hours and s.12 of the Freedom of Information Act 2000 would then be applied.

It may be worth to see if the information you require could be recorded online nationally? Possible on the Gov websites could help. Have you also sent your request onto CSU's that would manage GP's?"

Scope of the case

10. The complainant contacted the Commissioner on 26 January 2023 to complain about the way that their request for information had been handled.
11. As the complainant expressed dissatisfaction with the Trust's response to part 3 in the internal review request, the Commissioner considered the scope of his investigation to be to determine whether it would exceed the cost limit to comply with part 3 of the request under section 12 FOIA.

Reasons for decision

Section 12

12. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the "appropriate limit" as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations").
13. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 at £600 for central government, legislative bodies and the armed forces and at £450 for all other public authorities. The appropriate limit for the Trust is £450.
14. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 18 hours for the Trust.
15. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;
 - 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.
16. 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 Information Commissioner & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be "sensible, realistic and supported by cogent evidence". The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.

17. Section 12 is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under FOIA to consider whether there is a public interest in the disclosure of the information.
18. In its submissions to the Commissioner, the Trust explained that to obtain a figure for the number of patients who were admitted to intensive care with COVID-19 that had underlying health conditions it would need to obtain and physically look this up on individual medical records (which in many cases it said would likely be held at GP Practice level). This rationale was confirmed by the Trust's former Chief Medical Officer and was subsequently reconfirmed by Trust's Interim Chief Medical Officer.
19. However in its internal review the Trust said that it would need to send a list of the deaths to the Trust's Medical Records department, and they would have to physically look through each individual medical record paper book for the notes. It said that this would exceed the cost limit to comply.
20. Upon reviewing the Trust's response to part 2 of this request, it confirmed that only 18 patients had been admitted to intensive care with COVID-19. Therefore it would only be required to review a maximum of 18 patients' records to determine whether or not it holds any information on an underlying health condition. The Commissioner considers it would be unlikely to exceed the cost limit under section 12 FOIA to review 18 patients' records to determine whether the Trust holds any information on underlying health conditions within those records. This is because the appropriate limit applicable to the Trust is £450 which equates to 18 hours work. So even allowing an hour per record to review, this would not exceed the cost threshold.
21. On this basis the Commissioner considers that the Trust was incorrect to apply section 12 FOIA to part 3 of the request.

Right of appeal

22. 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

23. 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.
24. 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.....

**Gemma Garvey
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**