

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 February 2023

Public Authority: Birmingham's Women and Children's NHS Foundation Trust

Address: Steelhouse Lane
Birmingham
B4 6NH

Decision (including any steps ordered)

1. The complainant has requested information obtained from a hysteroscopy patient satisfaction survey.
2. Birmingham's Women and Children's NHS Foundation Trust ('the Trust') refused to provide the requested information, citing section 22a (research).
3. The Commissioner's decision is that:
 - In failing to respond to the request within twenty working days, the Trust breached section 10 (time for compliance with request).
 - Section 22a is engaged but the public interest lies in disclosure.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information.
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 8 April 2021, the complainant wrote to the Trust and requested the following information:

"Benchmarking services in outpatient hysteroscopy: A quality improvement project" – [Authors]

1. Please would you send me the full data-set of pain-scores obtained from this National Hysteroscopy Patient Satisfaction Survey.
 2. I need to see the bell-curve/normal distribution of pain-scores from 0 - 10, not just the mean pain scores plus standard deviations.
 3. The purpose of this FOIA is to determine the % of patients who experience pain scores of 0, 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10.
 4. This information is not included in the write-up in the European Journal of Obstetrics & Gynaecology."
7. On 7 May 2021 the Trust wrote to the complainant and explained that it 'required an extension of time to collate the data.'
8. The Trust responded on 15 June 2021 and refused to provide the information, citing section 22a.
9. On 26 June 2021 the complainant requested an internal review. The complainant expressed concern that 'This research project has been concluded and published in the EJOG¹ and presented to the BSGE² ASM ('Annual Scientific Meeting).'
10. The complainant chased this matter with the Trust on 23 September 2021 and 15 September 2022.
11. On 30 November 2022 the Trust provided its internal review outcome. It upheld its original response.

¹ [Home Page: European Journal of Obstetrics and Gynaecology and Reproductive Biology \(ejog.org\)](http://ejog.org)

² [The British Society for Gynaecological Endoscopy \(bsge.org.uk\)](http://bsge.org.uk)

Reasons for decision

Section 22a – Research

12. Section 22a of FOIA states:

“(1) Information obtained in the course of, or derived from, a programme of research is exempt information if—

a) the programme is continuing with a view to the publication, by a public authority or any other person, of a report of the research (whether or not including a statement of that information), and

(b) disclosure of the information under this Act before the date of publication would, or would be likely to, prejudice—

(i) the programme,

(ii) the interests of any individual participating in the programme,

(iii) the interests of the authority which holds the information, or

(iv) the interests of the authority mentioned in paragraph (a) (if it is a different authority from that which holds the information).”

13. The complainant is concerned that ‘This research project has been concluded and published in the European Journal of Obstetrics & Gynaecology (‘EJOG’) and presented to the BSGE ASM³ (‘British Society for Gynaecological Endoscopy Annual Scientific Meeting).’

14. The complainant is also concerned that, at the time that their request was made, the information with which they were concerned had not been published as part of the aforementioned article, ‘Benchmarking services in outpatient hysteroscopy (OPH): A quality improvement project’ within the EJOG.⁴

15. The Trust has confirmed to the Commissioner that ‘The dataset was collected with the intention of multiple phases of analysis leading to multiple publications.’ Therefore, the article to which the complainant refers is ‘one of an intended series of publications... publications in

³ [The British Society for Gynaecological Endoscopy \(bsge.org.uk\)](http://bsge.org.uk)

⁴ [Benchmarking services in outpatient hysteroscopy \(OPH\): A quality improvement project - European Journal of Obstetrics and Gynaecology and Reproductive Biology \(ejog.org\)](http://ejog.org)

such peer reviewed journals are subject to stringent scrutiny which may take some time before they are finally published.'

16. The Commissioner's guidance⁵ on section 22a states 'The exemption requires that the research programme must be 'continuing with a view to the publication... of a report of the research (whether or not including a statement of that information)''.
17. What this means is, so long as the research programme continues, and the Trust has suggested it is due to the 'multiple phases of analysis', the exemption may apply to the information if there is an intention for a 'report of the outcome to be published at some point in the future.'
18. This remains the case even if a report, such as the EJOG article above, has already been published about a particular aspect of the same research. Ultimately, as long as one or more reports remain to be published and the research continues, the exemption can still apply to information 'obtained in the course of, or derived from' the research programme.
19. In order for section 22a to be engaged, the public authority must demonstrate that disclosure before the envisaged publication date would prejudice: the research programme, the interests of an individual participating in the programme; the interests of the public authority holding the information or the interests of a different authority that is going to publish a research report. The complainant is concerned that no such link has been made and the Trust's refusal to disclose the requested information is 'based on embarrassment'.
20. The Commissioner notes that the Trust's explanation regarding the prejudice test is lacking. The Trust hasn't indicated what threshold of prejudice it is relying upon. In its internal review outcome, it explained (as part of its public interest analysis) that premature disclosure, which would bypass the stringent scrutiny and peer review process, would result in a lower standard of research and lower quality reports.
21. Since the Trust hasn't put forward any arguments as to how disclosure would prejudice any of the interests discussed in paragraph 19 and has only stated that disclosure would prejudice the research programme itself, the Commissioner must consider to what extent this is the case.

⁵ [information-intended-for-future-publication-and-research-information-sections-22-and-22a-foi.pdf \(ico.org.uk\)](https://ico.org.uk/foi/information-intended-for-future-publication-and-research-information-sections-22-and-22a-foi.pdf)

22. The Commissioner is mindful that some of the data from the study has already been published, albeit it has been manipulated in a different way than the raw data that the complainant is requesting. The Trust has failed to explain how disclosure of the detailed breakdown of the pain scores could prejudice the research programme, considering the mean scores and standard deviation have already been published in the EJOG article.
23. The Trust has regurgitated the generic arguments presented in the Commissioner's section 22a guidance, without highlighting any causal link between the requested information and any prejudice to the research programme. However, the Commissioner does accept that disclosure of the pain scores requested, without conducting the accompanying analysis and peer reviewing any scientific commentary, could present an incomplete picture, bearing in mind that the research programme is still ongoing.
24. Without any evidence to suggest that this prejudice is more likely than not to occur, the Commissioner considers section 22a is engaged on the lower threshold of prejudice, disclosure 'would be likely to' prejudice the research programme. As a qualified exemption, the Commissioner must now go onto consider where the balance of the public interest lies.

Public interest test

Public interest in maintaining the exemption

25. The Trust has highlighted that 'it is in the public interest to allow researchers to complete their programme of research and finalise their findings before the research programme is subjected to external scrutiny. This allows the time and space for research findings to be thoroughly examined and tested by peer review and should ultimately add to the quality of the final research report and standards of research.'
26. The Trust has also explained 'It also prevents an incomplete picture arising from the publication of research that is still ongoing, or from information being published without relevant context or explanation.'

Public interest in disclosure

27. There is always a public interest in public authorities being transparent and accountable.
28. The complainant is concerned that 'THOUSANDS (complainant's emphasis) of women undergoing NHS endoscopy of the womb have reported excruciating pain during the procedure in outpatients...Making this information public - and including it in revised RCOG ('Royal

College of Obstetrics and Gynaecologists') guidance - would enable future patients to avoid acute suffering and enable them to make a truly informed choice of outpatient vs. general anaesthetic hysteroscopy.'

The balance of the public interest test

29. The Commissioner has accepted that the lower bar of prejudice is engaged and there will always be some inherent public interest in protecting the research process and the research programme itself. However, the Commissioner only just considers the exemption engaged and therefore, the public interest in maintaining the exemption is weak.
30. The Commissioner also considers that the Trust has failed to identify the specific public interest⁶ in the information that is being requested. The NHS⁷ website indicates that the pain felt during a hysteroscopy 'seems to vary considerably between women.'
31. The aforementioned EJOG article concludes that 'Overall, the information provided to women and their subsequent experience of OPH is good, but pain is common.' Whilst the Commissioner is mindful that he hasn't been able to access the whole EJOG article, he notes that disclosure of the requested information would help contextualise pain during hysteroscopy within a relatively high population (5,151 women). Combined with the fact that the Commissioner considers the exemption only just engaged, and the Trust has failed consider that it could mitigate the prejudice that would be likely to occur with the publication of a supplementary statement, he considers the public interest lies in disclosure.

Procedural matters

32. In failing to respond to the request within twenty working days, the Trust breached section 10 (time for compliance with request) of FOIA.

⁶ [Hysteroscopy Action – Campaign Against Painful Hysteroscopy](#)

⁷ [Hysteroscopy - NHS \(www.nhs.uk\)](http://www.nhs.uk)

Other matters

33. The complainant requested an internal review on 26 June 2021 and this internal review outcome was not provided until 16 September 2021. This is outside of the timeframe recommended by the Commissioner; internal reviews should take no longer than 20 working days to complete, and even in exceptional circumstances the total time taken should not exceed 40 working days.

Right of appeal

34. 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

35. 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.
36. 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

Alice Gradwell
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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SK9 5AF