



Decision Notice 199/2024

Use of specific medications at Border General Hospital in October 2022

Authority: Borders Health Board

Case Ref: 202400104

Decision Number: 199/2024

Summary

The Applicant requested information about medication dosages given to patients on specific dates. The Authority told the Applicant that it would cost more than £600 to provide the information requested and therefore it was not obliged to provide a response. The Commissioner investigated and agreed with the Authority.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 15(1) (Duty to provide advice and assistance); 47(1) and (2) (Application for decision by Commissioner)

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

Background

1. On 26 November 2023, the Applicant made a request for information to the Authority. They asked for:
 - a) The number of dosages of Morphine and Midazolam given together to patients within Borders General Hospital on 4 and 5 October 2022 to manage breathlessness or any other injury or disease.
 - b) The number of dosages of Levomepromazine given to patients within Borders General Hospital on the 2, 3, 4 and 5 October 2022 to manage breathlessness or any other injury or disease.
 - c) The number of dosages of Haloperidol given to patients within Borders General Hospital on the 2, 3, 4 and 5 October 2022 to manage breathlessness or any other injury or disease.

- d) The number of dosages of Levomepromazine and Haloperidol given together within Borders General Hospital on the 2, 3, 4 and 5 October 2022.
- e) The number of and description of any dosage of an Opioid and Benzodiazepine given together within Borders General Hospital on the 2, 3, 4 and 5 October 2022.
- f) Any NICE (National Institute for Health and Care Excellence) organisation recommended interventions given to NHS Borders recommending any of the above for patients on 2, 3, 4 and 5 October 2022.
- g) Any NICE organisation instruction(s) of any other type given to NHS Borders recommending any of the above for patients on 4 and 5 October 2022.

2. The Authority responded on 21 December 2023. It said there were similarities in several of the Applicant's recent Freedom of Information (FOI) requests but reiterated that under Section 15 of the Freedom of Information (Scotland) Act 2002 (FOISA), Duty to Provide Advice and Assistance, it would like to help. It asked for more concision and detail.
3. In its response, the Authority explained it does not have an electronic prescribing and medicines administration system and therefore does not have means to report on medications/combinations of medications supplied to wards for specific patients. It said a manual trawl of all patient records would be needed for the mentioned dates. The Authority stated that the cost of carrying out this work would exceed the limit set in the Fees Regulations, and therefore under section 12 of FOISA it was not required to provide the information for parts a) to e) of the request.
4. The Applicant asked for details of NICE recommendations/directions, but NICE's remit only applies to England. Therefore, the Authority informed the Applicant that as it is not required to comply with NICE interventions/instructions, in line with section 17, the guidelines requested were not held by it.
5. In line with its duty under section 15, the Authority did however provide the Applicant with links to appropriate websites to facilitate them in accessing guidelines used by its clinical staff, which included prescribing information.
6. On 5 January 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that they found it hard to believe that the Authority did not have a readily available registry for the medications if they were held or indeed administered on the dates given. The Applicant requested that the Authority carry out a review to ascertain if there is indeed any such registry of any type or not. If such a registry did exist, the Applicant requested that the information disclosing the details sought should be provided. Where no registry exists, the Applicant asked that the Authority obtain the information from medical records for specific dates as they considered this to be in both the national and public interest.
7. On 24 January 2024, the Authority notified the Applicant of the outcome of its review. It upheld its previous decision and supplied further details giving its cost analysis.
8. On 25 January, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated they were dissatisfied with the outcome of the Authority's review because they did not agree that the request would be too costly to answer.

Investigation

9. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
10. On 16 April 2024, the Authority was notified in writing that the Applicant had made a valid application, and the case was subsequently allocated to an investigating officer.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions about its cost calculations, together with any steps taken to fulfil its duty to provide advice and assistance in line with section 15.

Commissioner's analysis and findings

12. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Section 12(1) – Excessive Cost of compliance

13. Under section 12(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the amount prescribed for that purpose in the Fees Regulations. This amount is currently set at £600 (regulation 5). Consequently, the Commissioner has no power to require the disclosure of information should he find that the cost of responding to a request for information would exceed that sum.
14. The projected costs an authority can consider 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.
15. An authority may not charge for the cost of determining whether it:
 - (i) actually holds the information requested or
 - (ii) should provide the information.
16. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.

Submissions from the Authority

17. The Authority explained that it does not have an electronic system to track what medications were given to specific patients. This information may be held in the patient's medical records, but checking these records manually would take too long.
18. In his information request, the Applicant asked for the number of dosages of specified medications given on specific dates.
19. The Authority identified that the minimum number of patient records it would have to review to extract information to fulfil the Applicant's request would be 243. Reviewing this number of records alone, would, the Authority argued, take about 81 hours, thereby exceeding the 40 hour maximum per request.

20. During the specified period (02.10.22 - 05.10.22) of the Applicant's request, the Authority explained that 944 inpatients were identified at Borders General Hospital. Therefore, the Authority considered it essential to determine the unique CHI numbers of each patient to account for admissions and discharges within this time period to identify the actual number of patient files which would have to be reviewed. Once the actual number of patients was known, the Authority submitted that the process of finding, collecting, and collating records and relevant data could be carried out.
21. The Authority provided the Commissioner with a breakdown of the steps that would have to be taken to review each patient paper file to locate, retrieve and provide the relevant information.
22. The process to retrieve the requested information begins with identifying the relevant patients whose records would have to be reviewed. This task is carried out by the service or the Authority's Business Intelligence team, who determine the number of patients related to the request and check their unique patient numbers. Next, each patient's CHI Number is entered into Trakcare to locate their paper Medical Records. The records are then collected and delivered to the relevant team. Each Medical Record is thoroughly reviewed to ensure no documents are missed. A thorough review of the whole patient record needs to be carried out because information in patient records is not held in date order and there are multiple areas within a patient file where details of prescribed medications is recorded. After the review, all relevant data is gathered and prepared for submission, including the identification of any errors or issues.. The data is then checked for accuracy by a Line Manager or equivalent member of staff.

Any necessary redactions are applied, a step that can take anywhere from one to thirty minutes.

23. The Authority explained that based on a sample exercise carried out in 2018, it takes about twenty minutes per file to carry out this work. With a cost of £15 per hour and a maximum of £600 per request, the maximum number of Medical Records that can be checked is 120. As such, the Authority submitted that section 12 of FOISA applied and it would not be required to comply with the request.

Submissions from the Applicant

24. The Applicant raised concerns about the response from the Authority, suggesting it was questionable. They pointed out that the Authority appears to admit that there is no automatic way for the public, or even itself, to know exactly when and how certain medications were used, either alone or together, on specific dates.
25. The Applicant argued that it is important for the public to know how these medications were used, especially after the pandemic, due to serious concerns about their usage during that time.

The Commissioner's view

26. Paragraph 7 of the Commissioner's guidance on section 12(1) of FOISA states; "A public authority is entitled to charge for the direct and indirect costs incurred in locating, retrieving and providing information. However, an authority is not entitled to charge for any costs incurred in determining whether it actually holds the information. This means authorities cannot charge for searching for the information if it turns out they don't hold it."

27. Having considered all of the relevant submissions and the terms of the Applicant's request, the Commissioner accepts that the Authority's interpretation of the scope of the request was reasonable.
28. The Commissioner acknowledges that the Applicant believes the Authority should be capable of providing the information he requested without exceeding the £600 cost limit under FOISA.
29. However, the Commissioner must determine if section 12(1) of FOISA is applicable in this case, focusing on the Authority's current recording systems rather than the potential capabilities desired by an Applicant.
30. The Commissioner accepts from the submissions received that, a single central electronic file system does not exist for patient records. The Commissioner considers the analysis provided by the Authority of the cost to it of locating, retrieving and providing the information to be reasonable, taking account of the work that would have to be undertaken and the minimum number of patient files which would have to be reviewed.
31. Considering all the circumstances, the Commissioner is satisfied that the Authority could not have complied with the Applicant's request within the £600 cost limit. Consequently, he finds that the Authority was entitled to rely on section 12(1) of FOISA and was under no obligation to comply with the request.

Section 15 - Duty to advise and assist

32. Section 15(1) requires a Scottish public authority, so far as reasonable to expect it to do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it.
33. Section 15(2) states that a Scottish public authority which, in relation to the provision of advice and assistance in any case, conforms to the <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>ⁱ (the Section 60 Code), is taken to comply with the duty to provide reasonable advice and assistance in section 15(1).
34. The Section 60 Code provides guidance to Scottish public authorities on the practice which Scottish Ministers consider desirable for authorities to follow in connection with the discharge of their functions under FOISA. The Section 60 Code provides (at 9.4.3):

"When refusing a request on cost grounds, it is good practice for the authority's response to provide clear advice on how the applicant could submit a new, narrower request within the cost limit. In giving advice [the authority] may wish to take account of how much the cost limit has been exceeded. Any narrower request would be a separate new request and should be responded to accordingly."
35. The Authority emailed the Applicant on 21 December 2023 to offer assistance in identifying the information they sought, but it did not receive a response to this offer. In its response to the Applicant's requirement for review, the Authority reiterated its willingness to help under Section 15, asking the Applicant to provide a clear breakdown of the information they needed so they could assist more effectively.
36. The Commissioner finds that the Authority did comply with its duties under Section 15 - Duty to advise and assist - of FOISA.

Decision

The Commissioner finds that the Authority complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to 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.

**Jill Walker,
Deputy Head of Enforcement.**

11 September 2024

ⁱ [FOI/EIR: section 60 code of practice - gov.scot \(www.gov.scot\)](https://www.gov.scot/foi/eir/section-60-code-of-practice)