

Decision Notice 064/2020

Meeting minutes – Cryptococcus incident at Queen Elizabeth University Hospital

Applicant: The Applicant

Public authority: NHS Greater Glasgow and Clyde

Case Ref: 201901812



Scottish Information
Commissioner

Summary

NHSGGC was asked for the minutes of incident management meetings regarding a Cryptococcus outbreak at the Queen Elizabeth University Hospital.

NHSGGC withheld the minutes on the basis that they were internal communications and the public interest favoured withholding them.

The Commissioner investigated and found that, while there were good reasons why it was in the public interest to disclose the minutes, on balance the public interest lay in withholding them.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a), (b), (c) and (f) of “environmental information”) (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2), (4)(e) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 11 March 2019, the Applicant made a request for information to NHS Greater Glasgow and Clyde (NHSGGC). She asked for the minutes from any incident management report meetings regarding the Cryptococcus outbreak at the Queen Elizabeth University Hospital (QEUH) campus between 1 December 2018 and the date of her request.
2. NHSGGC responded on 7 June 2019. It withheld the minutes under regulation 10(4)(e) (internal communications) of the EIRs.
3. The following day, the Applicant wrote to NHSGGC and asked it to review its decision. She considered the exception had not been applied correctly and asked NHSGGC to look again at its reasons for refusing to disclose the minutes.
4. NHSGGC notified the Applicant of the outcome of its review on 29 August 2019. It explained, in more detail, why it believed the exception applied and upheld its initial response without modification.
5. On 1 October 2019, the Applicant applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications.
6. The Applicant stated she was dissatisfied with the outcome of NHSGGC’s review. She considered the public had the right to know what had been discussed at the meetings and noted that it had been reported that two patients had died as a result of having been infected with the Cryptococcus fungus.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
8. On 8 October 2019, NHSGGC was notified in writing that the Applicant had made a valid application. NHSGGC was asked to send the Commissioner the information withheld from the Applicant. NHSGGC provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. NHSGGC was invited to comment on this application and to answer specific questions. These questions focussed on its reasons for applying the exception and on the public interest in disclosure of (and in withholding) the information. NHSGGC responded on 14 January 2020.
10. Aspects of NHSGGC's submissions were clarified during the investigation.
11. The Applicant was asked for, and provided, submissions as to why she considered it was in the public interest for the information to be disclosed.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and NHSGGC. He is satisfied that no matter of relevance has been overlooked.

The subject of the request

13. NHSGGC has been operating the QEUH and the Royal Hospital for Children (RHC) since June 2015.
14. In December 2018, NHSGGC revealed that two patients died after contracting Cryptococcus, a fungal infection¹. NHSGGC stated that incident management team meetings were convened² in line with the NHS Scotland National Infection Prevention and Control Manual.

Application of the EIRs

15. NHSGGC considered that the information in the minutes was environmental information for the purposes of regulation 2(1) of the EIRs. This appears to have been accepted by the Applicant.
16. Having viewed the minutes, the Commissioner is satisfied that they comprise environmental information, as defined in regulation 2(1) of the EIRs. The information relates to the state of human health and safety (including the conditions of built structures) inasmuch as they are or may be affected by the state of the elements of the environment (such as air and atmosphere) or, through those elements, by factors (such as substances or waste) affecting or likely to affect the elements of the environment or by measures (such as policies, plans and activities) affecting or likely to affect the elements of the environment. (See paragraphs (b), (c) and (f) of the definition of environmental information in Appendix 1.)

¹ <https://www.bbc.co.uk/news/uk-scotland-glasgow-west-50488044>

² <https://www.nhs.gov.uk/about-us/media-centre/news/2019/01/cryptococcus-2/>

17. The Commissioner will therefore consider the information solely in terms of the EIRs.

Regulation 5(1) of the EIRs

18. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.

19. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply.

Regulation 10(4)(e) of the EIRs (internal communications)

20. NHSGGC withheld the minutes of the meetings of the Incident Management Team (IMT) set up to respond to issues arising from Cryptococcus (from 20 December 2018 to February 2019) under regulation 10(4)(e) of the EIRs.

21. Under regulation 10(4)(e) of the EIRs, a public authority may refuse to make environmental information available to the extent that it involves making available internal communications. In order for information to fall within the scope of this exception, it need only be established that the information is an internal communication.

22. As with all of the exceptions in regulation 10, regulation 10(4)(e) must be interpreted in a restrictive way (regulation 10(2)(a)) and a presumption in favour of disclosure must be applied (regulation 10(2)(b)). The exception is subject to the public interest test in regulation 10(1)(b) of the EIRs.

23. IMT meetings are convened in accordance with the processes set out in the NHS Scotland National Infection and Control Manual. An IMT may be chaired by either the Infection Control Doctor or by a Consultant in Public Health Medicine. Other members of IMTs are from the Infection Prevention and Control Team and include clinical teams, Facilities, Occupational health, pharmacy, etc. as determined by the nature of the incident.

24. The circulation of the minutes is restricted to those within the IMT. They are not circulated or published outwith NHSGGC. As noted below, there is no requirement to circulate copies of the minutes of the IMT meetings externally, for example to Health Protection Scotland (HPS).

25. The Commissioner is satisfied that the minutes comprise internal communication and that the exception in regulation 10(4)(e) applies.

26. He must, therefore, go on to consider whether, in all of the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

The public interest test

NHSGGC's submissions

27. NHSGGC agreed that there were factors that favoured disclosure in the public interest: disclosing the minutes would demonstrate that measures were put in place to contain the outbreak and to identify the potential source of infection. Disclosure would therefore reassure the public that all possible steps were being considered and taken.

28. NHSGGC also recognised that there is a significant public interest in ensuring that the public is adequately informed of any danger to public health or safety, or to the environment:

patients, visitors and staff in hospitals need to be reassured that they are in a safe environment.

29. However, NHSGGC considered that there were many reasons why it was not in the public interest for the information to be disclosed.
30. NHSGGC commented that the IMT meeting minutes included hypotheses, and the discussions around them, which needed to take place in an environment where staff were confident that all options and issues could be properly considered. To disclose this type of information, when assessments were at an early stage and theories still being explored, would create the risk that matters would be taken out of context. This would undermine the purpose of the IMT and any relevant decision making processes.
31. NHSGGC noted that it had disclosed information about the action it had been taking to identify and contain what was perceived to be the likely source of the infection (pigeons). Information about the action taken included media statements,³ communications to the public via the NHSGGC public-facing website and through Core Briefs circulated to all staff⁴. Therefore, the public were being informed of the incident in real time.
32. Withholding the information did not mean that matters were not being investigated or reported appropriately to, for example, HPS. NHSGGC noted that there are different levels of reporting in relation to Infection Prevention and Control. Following detection or recognition of an incident, the NHSGGC's Infection Prevention and Control Team undertake an initial assessment, using the mandatory Healthcare Infection Incident Assessment Tool (HIIAT). If the HIIAT is assessed as RED or AMBER then a Healthcare Infection, Incident and Outbreak Reporting Template (HIIORT) is completed and forwarded to HPS. At each IMT meeting, the HIIAT status is re-assessed and this then determines whether a HIIORT is forwarded to HPS. (NHSGGC noted that it had disclosed a redacted version of the HIIORT report to the Applicant in response to a separate information request.)
33. In addition, regular public reporting of infection control is made through NHSGCC's consideration of the Healthcare Associated Infection Reporting Template papers taken to each meeting of the NHSGGC Board. The formal reporting route to HPS ensures that regulatory bodies receive the required information on such issues.
34. NHSGCC considered that a number of other mechanisms and processes would provide a much wider and in-depth scrutiny of its practices and workings than disclosing the IMT minutes. These included the:
 - internal review announced on 19 February 2019⁵;
 - external review of QEUH and Royal Hospital for Children and Young People (RHCYP) set up on 26 February 2019⁶; and
 - public Inquiry into the QEUH and RHCYP sites⁷ announced on 17 September 2019.
35. NHSGGC said it was clear from the nature and terms of reference of these reviews and of the inquiry that the outcomes will be far-ranging and will have a significant impact on the

³ <https://www.nhsggc.org.uk/about-us/media-centre/news/news-search/>

⁴ <https://www.nhsggc.org.uk/working-with-us/staff-communications/core-brief/>

⁵ https://www.nhsggc.org.uk/media/252955/item-9-paper-19_03-board-paper-qeuhrhc-evsg.pdf

⁶ <https://www.queenelizabethhospitalreview.scot/faqs/>

⁷ <https://news.gov.scot/news/public-inquiry-into-hospital-sites>

provision of healthcare within NHSGGC. (It noted, for example, that the external review is looking at the QEUH/RHCYP buildings' design, commissioning and construction, handover and ongoing maintenance and how these matters contribute to effective infection control.)

36. Finally, NHSGGC also argued that disclosing the minutes would be distressful and upsetting to the families of the patients concerned.

The Applicant's submissions

37. The Applicant considered that the public have a right to know what experts have said about the Cryptococcus infection and what was discussed, and whether any concerns were raised at this time about subsequent or past infections at the hospital and how these were handled.
38. She considered it was in the public interest to allow scrutiny of decision-making processes, thereby improving accountability. Disclosure would, in her view, help the public scrutinise the practices and workings of NHSGGC and allow the public to be fully informed regarding a clear danger to public health.
39. In the Applicant's view, disclosure would have no impact on national security and would have no General Data Protection Regulation related effects (provided it was properly redacted), and would not impact the administration of justice or law enforcement given there are no criminal cases outstanding with regards this incident.
40. Disclosure would, in the Applicant's view, allow the information previously released by NHSGGC to be scrutinised, to determine the reliability of the information and statements made with what is contained within the IMT minutes.
41. Finally, disclosure would contribute to the current public debate surrounding the running of the QEUH and management of serious incidents and outbreaks, many of which, in the Applicant's view, have yet to be fully understood or scrutinised.

The Commissioner's findings

42. The Commissioner has carefully considered the submissions made by both NHSGGC and the Applicant.
43. The Commissioner recognises the significant public interest in information about a Cryptococcus outbreak in a hospital environment, how it started, what can be done to prevent further transmission and whether further individuals will be affected. There is a clear public interest in transparency and accountability in the decision making process of public authorities and in understanding how matters are investigated and whether all relevant options have been explored.
44. The Commissioner also accepts that there is a public interest in ensuring that NHSGGC and the clinicians who were part of the IMT have a private space within which they can discuss and consider all issues and options in detail. As noted by NHSGGC, the minutes of the meetings include hypotheses, and the discussions around them, which took place in an environment where staff were confident that all options and issues could be properly considered. (The Commissioner notes that the first item at each meeting reminded everyone present at the meeting of "the confidentiality surrounding IMTs" which clearly raised the expectation that the discussions taking place would be kept private.)
45. The Commissioner accepts that good decision making relies on the free and frank discussions of all hypotheses and scenarios to ensure that well informed decisions are made. To disclose information, when assessments were at an early stage and theories were still being explored, would, in the Commissioner's view, create the risk that individuals would

be inhibited from suggesting concerns, solutions, etc. in future in the event that they may subsequently be discovered to be wrong or simply unfounded.

46. The environment in which these meetings took place is clearly relevant – the meetings took place when NHSGCC was dealing with the early stages of the Cryptococcus outbreak and where nothing was off the table. Meetings took place within days, often within hours, of each other as theories evolved or in response to changing circumstances in relation to patients.
47. While recognising the public interest in knowing how NHSGCC reacted to the early stages of the outbreak, the Commissioner is concerned that disclosing the minutes would mean that, in future, those taking part in similar meetings in similar circumstances would not be so free and frank with their views or opinions. This could lead to novel ideas or solutions not being expressed or tested. This would not be in the public interest.
48. The Commissioner notes the amount of information which NHSGCC made public about the situation and also notes the announcement of the internal and external reviews and inquiry mentioned above.
49. The Commissioner also notes that NHSGGC provided the Applicant in response to the request with a redacted copy of the HIIORT which summarises the key issues of the Cryptococcus outbreak and includes a summary of the actions and updates of the IMT meetings held. This report contains significant details as to how the incident was managed.
50. While there is a clear public interest in understanding the reasons for the outbreak, disclosing the IMT minutes will not provide a definitive answer to the issues experienced at the hospital. While the meetings discussed the possible causes of the outbreak and the possible resolutions, an Expert Advisory Group has been set up to report to the Incident Management Team to establish whether a definitive source of the Cryptococcus can be found. At the time of writing, this work is ongoing.
51. The Commissioner considers that the disclosure of the above information, together with the media updates and other published briefings fulfils the public interest in the causes of the Cryptococcus outbreak and that the actions taken by NHSGGC fulfils the public interest and ensures that the public have been appropriately informed of the situation.
52. In the particular circumstances of this case, the Commissioner concludes, on balance, that the public interest in making this information available is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs. Therefore, he considers that NHSGGC was justified in withholding the information under the exception.

Decision

The Commissioner finds that NHS Greater Glasgow and Clyde complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or NHSGGC 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.

Margaret Keyse
Head of Enforcement

11 June 2020

Appendix 1: Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

-

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;...
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;
- ...
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c).

...

5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...

10 Exceptions from duty to make environmental information available–

- (1) A Scottish public authority may refuse a request to make environmental information available if-
 - (a) there is an exception to disclosure under paragraphs (4) or (5); and
 - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that

....

- (e) the request involves making available internal communications.

....

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info