

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 May 2017

Public Authority: The University of Bristol
Address: Senate House
Tyndall Avenue
Bristol
BS8 1TH

Decision (including any steps ordered)

1. The complainant has requested information from the University of Bristol ("the University") about the cost of a study into using a technique known as The Lightning Process in children with chronic fatigue syndrome.
2. The Commissioner's decision is that section 22 is not engaged.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - issue a fresh response to the request which does not rely on section 22 of the FOIA.
4. The Council 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 the Act and may be dealt with as a contempt of court.

Request and response

5. On 9 September 2016, the complainant wrote to the University and requested information in the following terms:

"This request concerns this study:

The feasibility and acceptability of conducting a trial of specialist medical care and the Lightning Process in children with chronic fatigue syndrome: feasibility randomized controlled trial (SMILE study)

<http://trialsjournal.biomedcentral.com/articles/10.1186/1745-6215-14-415>

...

1. Please give the total cost of the study.

2. In the trial protocol (1), it is stated: 'Families currently pay approximately £620 to attend the Lightning Process course.' Please say how much was paid for children in the study to attend 'Lightning Process' courses. If possible, please give the cost per child attending and the overall cost.

3. Please say if any discount or special deal was arranged with the providers of 'Lightning Process' courses. If there was a discount or special deal negotiated, please say what it was.

4. It is said that Phil Parker, the creator of this intervention, receives commission on each course undertaken. Please state whether you are aware of any commission paid for any of the courses provided as part of the study. If you are aware, please say what commission was paid. Please also state if there was any discount or special deal done with Phil Parker regarding his commission, and if so what it was."

6. The University responded on 3 October 2016. It explained that information was not held with regard to request 4. With regard to requests 1-3, it confirmed that information was held, but it refused to provide the requested information, citing the following exemption as its basis for doing so: section 22 of the FOIA (Information intended for future publication).
7. Following an internal review into its handling of requests 1, 2 and 3, the University wrote to the complainant on 18 November 2016. It stated that it had revised its position regarding requests 1 and 3 and that it did not hold information falling within their scope, although it did provide some information relevant to request 1. With regard to request 2, it

maintained its position that the information was exempt from disclosure under section 22 of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 25 November 2016 to complain about the way his request for information had been handled. Specifically, he wished the Commissioner to consider whether information should now be disclosed in response to request 2.
9. The Commissioner considers that the scope of the case has been to investigate whether the University has correctly applied section 22 of the FOIA to the complainant's request 2, and, if so, whether the public interest favours maintaining the exemption.

Reasons for decision

Section 22 - Information intended for future publication

10. Section 22(1) of the FOIA states that:

Information is exempt information if –

- a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
 - b) the information was already held with a view to such publication at the time when the request for information was made, and
 - c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).
11. In order to determine whether section 22 is engaged the Commissioner has therefore considered the following questions:
 - When the complainant submitted the request, did the University intend the information to be published at some date in the future?
 - If so, in all the circumstances of the case, was it 'reasonable' that the University should withhold the information from disclosure until some future date (whether determined or not)?

Was the information held at the time of the request with a view to its publication at a future date?

12. The University has explained that the information requested concerns a study which took place into the possibility of treating children with chronic fatigue syndrome using a technique known as the Lightning Process. The study was known as the SMILE study.
13. A paper has been prepared by a named professor at the University, reporting the outcome of the study ("the Paper").
14. The University has explained in detail to the Commissioner how the Paper is expected to include the costs information requested by the complainant.
15. Specifically, the Paper refers to the cost of the Lightning Process charged to the trial and specifies the mean cost per patient. Since the number of children taking part in the trial is also specified, the University has explained that it is possible to calculate "*how much was paid for children in the study to attend the 'Lightning Process'.*"
16. The University is of the view that the information requested by the complainant is integral to the Paper, since one of the Paper's stated aims is to investigate the cost-effectiveness of the treatment.
17. The University has explained that cost-effectiveness has been analysed in a number of ways in the Paper, including reference to the cost of the Lightning Process to the trial as well as reference to the cost of accessing the treatment privately and the estimated cost to the NHS were it to be offered.
18. Specifically, the University has stated that the Paper as submitted for publication includes: "*three paragraphs... dedicated to the discussion of cost-effectiveness with one paragraph dedicated to the discussion of costs of [Lightning Process], potential future costs, trial costs and private costs.*"
19. The Paper also includes the information requested by the complainant in table form.
20. The University has explained that, by the date of the complainant's request for information on 9 September 2016, the Paper had already been submitted by the University to the medical journal *The Lancet Psychiatry*. A copy of an email from *The Lancet Psychiatry* dated 24 August 2016, acknowledging receipt of the Paper, has been provided to the Commissioner.

21. The Commissioner accepts that in this case, at the date of the request, the University had a settled intention to publish the Paper and that it will include the information sought by the complainant; indeed, it had submitted a draft for consideration. This intention to publish remains in place. Accordingly, she has gone on to consider whether it was reasonable for the University to withhold the information under this exemption.

Was it reasonable to withhold the information?

22. For the exemption to be relied upon, section 22(1)(c) requires that its application should be reasonable in all the circumstances of the request.
23. The University has argued that it would be unreasonable to provide the information to the complainant at this stage since there is a settled intention to publish. It has explained that, since the information will be made public in the context of a peer-reviewed paper in a 'learned journal', it would be unreasonable to release some facts relating to the study out of context.
24. The University has also argued that releasing the information requested by the complainant could prejudice the likelihood of the Paper being published. It is concerned that advance disclosure of information about a clinical trial has been used by journals as a reason to refuse publication.
25. In addition, the University is of the view that releasing information about costs to the trial, out of the context of its overall analyses of cost-effectiveness, would undermine the recommendations it has prepared for the NHS in the Paper regarding whether it should offer the Lightning Process as a treatment.
26. The complainant, conversely, considers that the cost to the trial of participating in Lightning Process is a self-contained piece of information, and disclosing it would not detract from the outcome of the study itself. He points out that knowing the cost does not make it possible to pre-judge the findings of the study in terms of the treatment's effectiveness, and that the information requested is not a product of the researchers' work in the study nor could it be used by any other researchers.
27. Accordingly, he doubts that releasing the information he has asked for would have an impact on the paper being published, since it does not relate to its academic content.
28. He therefore considers that it would be reasonable to release the information.

29. In addition to considering the arguments from the University and the complainant, the Commissioner considered whether the information requested is integral enough to the overall content of the Paper that there is no significant risk of it being edited out prior to publication. In her view, this would lend weight to the view that withholding the information at this stage would be unreasonable.
30. The Commissioner is satisfied that the University has demonstrated that the stated aim of the Paper is to establish whether the Lightning Process is both effective and cost-effective. The information requested forms part of the paper's analyses of cost-effectiveness, which is integrated throughout the Paper.
31. The Commissioner has gone on to consider the likely timetable for publication of the information.
32. The Commissioner's guidance¹ states that although a public authority must hold the information at the time of the request with a view to its publication, the exemption does not require a set publication date in place. A public authority may still be able to apply section 22 if:
 - there is a publication deadline, but publication could be any date before then;
 - publication will take place once other actions have been completed;
 - publication will take place by reference to other related events; or
 - there is a draft publication scheme that has not been finalised.
33. In addition, however, for the exemption under section 22 to be engaged, the proposed timetable for publication should be reasonable in all the circumstances.
34. The Commissioner notes that at the date of the request the Paper had not, at that stage, been accepted for publication and is, as at the date of this notice, going through a process of journalistic review. This is a process by which comments are made on a submitted piece and it is passed back to its author for editing and resubmission.
35. The complainant has argued that the journalistic review process is open-ended, as a paper can be passed back and forth a number of times, and

¹ <https://ico.org.uk/media/for-organisations/documents/1172/information-intended-for-future-publication-and-research-information-sections-22-and-22a-foi.pdf>

indeed the process carries no guarantee that the research will ultimately be published.

36. He has also commented that there has been "*an unusual delay*" in publishing the Paper, since the study was completed over three years ago.
37. Furthermore, the Commissioner notes that the University has stated that the lead researcher of the Paper has been considering how to make data from the study available to other researchers, within the ethical framework of the trial, delaying the resubmission of the Paper for publication.
38. The application of the exemption at section 22 of the FOIA was considered by the First-tier Tribunal in the case *Queen Mary University of London v Information Commissioner & Mr Robert Courtney [EA/2012/0229]*², which also concerned the early release of information from a medical trial. The Tribunal found that the exemption under section 22 of the FOIA could be said to be engaged if there is "*a clear and settled intention to publish*" while, however, noting: "*in light of the... clear evidence of a structure and timetable to the... publication of the [information], we are satisfied that the timescale is reasonable.*"
39. In this case, the Commissioner is not satisfied that there is clear evidence of a structure and timetable for the publication of the information.
40. The Commissioner's guidance, referenced previously, states that in considering reasonableness, the public authority must consider whether withholding the information is sensible, in line with accepted practices, and fair to all concerned.
41. In her view, although the University is following accepted practices in submitting the paper for publication to a 'learned journal,' the fairness test is not met since there is no way of knowing if and when the Paper will be published.
42. In addition, in this case, the Commissioner accepts that the information requested, although integral to the report, is a specific costs figure which will not be changed or explored further during the journalistic

2

<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1020/20130522%20Decision%20EA20120229.pdf>

review process. To this extent this request differs, for example, from that in the Courtney case, above, where the University was concerned to prevent the premature publication of provisional research results.

43. In view of this, and in view of the length of time that has elapsed since the completion of the trial, the fact that the Paper is currently yet to be resubmitted for publication, and that it will then be subject to an unspecified period of further peer reviewing, the Commissioner does not find that it is reasonable to withhold the information in all the circumstances of the case.
44. For this reason, the exemption at section 22 of the FOIA has not been engaged and the Commissioner has not been required to go on to consider the public interest test.

Other matters

45. The Commissioner is aware that the University presented public interest arguments in favour of withholding the information, which broadly concerned the 'volatile' climate surrounding research into chronic fatigue syndrome, a poorly-understood condition causing great distress to its sufferers. For this reason, this decision notice requires the University to issue a fresh response under the FOIA rather than ordering the disclosure of the information.

Right of appeal

46. 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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

47. 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.
48. 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

Pamela Clements
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