

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 May 2018

Public Authority: Upton Road Surgery
Address: Ground Floor, Colne House
21 Upton Road
Watford WD18 0LP

Decision (including any steps ordered)

1. The complainant has requested information relating to the prescribing of Dexamethasone and Cyclophosphamide.
2. The Commissioner's decision is that Upton Road Surgery (the surgery) has incorrectly cited section 21 (information accessible by other means) of the FOIA.
3. The Commissioner also finds that the surgery was in breach of section 10 of the FOIA as it did not provide a response within the statutory 20 working days.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide a new response without reliance on section 21.
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 the Act and may be dealt with as a contempt of court.
6. The Commissioner notes that a medical practice itself is not for the purposes of FOIA a public authority. Rather, each GP who provides primary medical services is a public authority themselves and has a duty to reply to a request in accordance with section 1 of FOIA. However, the Commissioner acknowledges that when an applicant makes a freedom of information request to a medical practice it is reasonable to expect that the practice will act as the single point of contact and process the

request on the doctors' behalf. For the purposes of this decision notice all references to the medical practice should be regarded as referring to the public authority.

Request and response

7. On 9 August 2017, the complainant wrote to the surgery and requested information in the following terms:

Are you able to freely prescribe Dexamethasone and Cyclophosphamide medications?

What symptoms/indications have to be present in the patient before you freely prescribe Dexamethasone and Cyclophosphamide?

Are you able to tell me from what year/month you were able to freely prescribe Dexamethasone and Cyclophosphamide?

8. The surgery responded on 2 October. It stated that the information requested was available to the public and under Section 21 of the Freedom of Information Act (2000) it was not obliged to provide information that is already reasonably publically accessible.
9. It provided the details of the two websites to access the information requested.

NICE Clinical Knowledge Summaries - <https://cks.nice.org.uk/>

Electronic Medicines Compendium - <http://www.medicines.org.uk/emc/> .

10. There was no offer of an internal review. The Commissioner wrote to the surgery on 15 February 2018 asking if it wished to carry out an internal review and that it should advise accordingly by 2 March 2018. The Commissioner also advised that if she received no response by that date that she would assume they did not wish to carry out an internal review and maintain reliance on section 21.
11. At the time of this decision notice the Commissioner has not received any further communication from the surgery and therefore she has exercised her discretion to continue with the complaint.

Scope of the case

12. The complainant initially contacted the Commissioner on 25 September 2017 to complain that he had not received a response from the surgery.

The Commissioner contacted the surgery who subsequently provided a response on 2 October 2017. The complainant then advised the Commissioner that he was dissatisfied with the response.

13. The Commissioner considers the scope of this case to be to determine if the requested information is reasonably accessible to members of the public via the website links provided.

Background

14. The complainant made the same request to several GP surgeries in the area. The majority obtained advice from the Clinical Commissioning Group (CCG) and based the response on that advice. The Commissioner contacted each surgery and provided advice where appropriate. However, despite contact from the Commissioner Upton Road Surgery failed to engage with her.

Reasons for decision

Section 21 Information reasonably accessible to the applicant by other means

15. Section 21(1) of the FOIA provides that a public authority does not need to provide information under section 1 of the FOIA if that information is reasonably accessible to the applicant by other means.
16. Section 21 provides an absolute exemption. This means that if the requested information is held by the public authority, and it is reasonably accessible to the applicant by other means, it is not subject to the public interest test.
17. In order for section 21 to apply there should be another existing, clear mechanism by which the particular applicant can reasonably access the information outside of the FOIA. In addition, for section 21 to apply, it is necessary to consider whether the entirety of the information is reasonably accessible to the applicant.
18. Information is only reasonably accessible to the applicant if the public authority:
 - knows that the applicant has already found the information; or
 - is able to provide the applicant with precise directions to the information so that it can be found without difficulty.

19. The Commissioner's guidance¹ on the subject explains that, unlike consideration of most other exemptions in the FOIA, a public authority can take the individual circumstances of the applicant into account.

20. Her guidance also states:

"It is important to emphasise that a public authority must know that it holds the information in order to be able to apply the section 21 exemption. When a public authority receives a request for information it has a duty to establish whether it holds that specific information, as, under section 1(1)(a), the requester is entitled to be told whether the authority holds the information. In other words, it has a duty to confirm or deny whether it holds the requested information. Consequently, a public authority cannot claim the section 21 exemption on the basis that it probably holds the information or information of the same type. The authority must know whether it holds the information as specified in the request".

21. The complainant stated that he was unhappy with the response, although did not provide any specific reasons for this.

Is the information reasonably accessible to the applicant?

22. An assessment of whether the section 21 exemption can be successfully applied will be dependent on whether or not requested information is reasonably accessible to the particular applicant who requested it. Of particular relevance in this case is that a public authority wishing to rely on section 21 must make it clear how the applicant can access the specific information he or she requested.

23. The complainant made his complaint to the Commissioner via email and so clearly has access to a computer and knowledge of how to search the internet. Although the complainant may have access to these facilities the key here is whether the information itself is **reasonably accessible**.

Did the surgery precisely direct the applicant to the requested information?

24. In order for the surgery to be able to rely on the exemption it needed to be able to precisely direct the applicant to the requested information. The Commissioner therefore considered whether the surgery gave the

¹ <https://ico.org.uk/media/for-organisations/documents/1203/information-reasonably-accessible-to-the-applicant-by-other-means-sec21.pdf>

applicant sufficiently clear directions so that the requested information could be found without difficulty and not hidden within a mass of other information.

25. The Commissioner has followed the links provided:

<https://cks.nice.org.uk/>

This is the home page for National Institute of Health and Care Excellence CKS service which provides primary care practitioners with a readily accessible summary of the current evidence base and practical guidance on best practice in respect of over 330 common and/or significant primary care presentations.

Part 2 of the request - *What symptoms/indications have to be present in the patient before you freely prescribe Dexamethasone and Cyclophosphamide?*

26. The Commissioner then searched the website for Dexamethasone which produced 15 results. Some of the results appeared to describe the symptoms which could result in the prescription of Dexamethasone. However, other results referred to the ways it can be administered and diagnosed diseases where Dexamethasone may be used, rather than the symptoms as requested.
27. The Commissioner repeated the search for Cyclophosphamide, which produced 4 results similar to those described above. The Commissioner is not satisfied that the link itself made the requested information reasonably accessible to a member of the public as the website information referred to specific diagnosed conditions rather than symptoms/indications as requested.
28. The Commissioner then followed the link at: <http://www.medicines.org.uk/emc/> and carried out the same searches. The searches produced 30 results for Dexamethasone and 6 for Cyclophosphamide. The information on this website appeared to consist of patient information leaflets that would be contained with Dexamethasone medication when prescribed. With regard to Cyclophosphamide, the search results all appeared to be about the different forms it was available in, and the companies that make it.

Parts 1 and 3 of the request - *Are you able to freely prescribe Dexamethasone and Cyclophosphamide medications?*

Are you able to tell me from what year/month you were able to freely prescribe Dexamethasone and Cyclophosphamide?

29. The Commissioner was unable to find any information that answers these parts of the request on either website.

30. Taking into account all the circumstances of the case, the Commissioner has determined that section 21(1) is not engaged: the information given on the websites does not provide the complainant with the information requested.

Section 10 – time for compliance

31. Section 1(1) of the FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.
32. Section 10(1) of the FOIA provides that a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt. From the information provided to the Commissioner it is evident that the surgery did not respond to the complainant within the statutory timeframe in respect of this request and has therefore breached section 10 of the FOIA.

Right of appeal

33. 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

34. 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.
35. 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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