

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 October 2024

Public Authority: Public Health Wales NHS Trust
Address: 2 Capital Quarter
Tyndall Street
Cardiff
CF10 4BZ

Decision (including any steps ordered)

1. The complainant requested a copy of the final report following an investigation into the cluster of Endovirus causing Myocarditis in young babies. Public Health Wales NHS Trust (PHW) withheld the information requested under section 22 (information intended for future publication) of the FOIA .
2. The Commissioner's decision is that section 22 (information intended for future publication) of the FOIA is not engaged as, at the time of the request, the information requested was not held. In failing to confirm that the information requested was not held and for failing to confirm the information was not held within the statutory time period, the Commissioner finds that PHW breached sections 1 and 10 of the FOIA. The Commissioner does not require any steps to be taken.

Request and response

3. On 4 March 2024, the complainant wrote to PHW and requested information in the following terms:

"I would now be pleased to receive a copy of the final report following the investigation - initiated 3 May 2023 by PHW - into the cluster of Endovirus causing Myocarditis in very young babies.

4. PHW responded on 2 April 2024 and confirmed that it held the information requested but it considered it to be exempt under section 22 of the FOIA.
5. On 2 April 2024 the complainant requested an internal review of the refusal to provide the information requested.
6. PHW provided the outcome of its internal review on 26 April 2024 and upheld its decision that section 22 of the FOIA applied to the request.

Scope of the case

7. The complainant contacted the Commissioner on 26 April 2024 to complain about the way their request for information had been handled.
8. The scope of the Commissioner's investigation is to determine whether PHW correctly applied section 22 of the FOIA to the request.

Reasons for decision

Section 22 – information intended for future publication

9. Section 22 states that information is exempt from disclosure 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).
10. As stated in the Commissioner's guidance on section 22¹, for this exemption to apply, the public authority must, at the time of the request, hold the information and intend that it or 'any other person' will publish it in the future.
11. During the course of the Commissioner's investigation, it became apparent that, at the time of the request, PHW did not hold a final

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

version of the report in question. Furthermore, PHW did not even finish completing the first draft of the report until 25 June 2024, nearly three months after the request was submitted.

12. The Commissioner understands that now the report is drafted it needs to be reviewed and is subject to possible amendments. In addition, in its initial response to the request dated 2 April 2024, PHW stated that the "information you have requested in relation to this is still being collected as part of an ongoing investigation". In its internal review response dated 30 April 2024, PHW also stated that its Incident Management Team (IMT) who were undertaking the investigation were "awaiting the outcome of the in-depth research into the outbreak by the International Severe Acute Respiratory and Emerging Infection Consortium (ISARIC)".
13. The Commissioner acknowledges that, at the time of the request, PHW is likely to have held at least some of the building blocks/information which has now been incorporated into the first draft of the report. However, at the time the request was received it was not known exactly what information would be included in the report, particularly in light of the fact that PHW has confirmed that information was still being collected as part of the investigation that the report relates to.
14. The Commissioner notes that PHW has an intention to publish a copy of the final report, once it is available. However it is clear to the Commissioner that PHW did not hold a draft or final version of the report in question at the time the request was received. As the requested information was not held, the Commissioner finds that section 22 is not engaged in this case.
15. As the Commissioner has determined that the requested information was not held at the time of the request, the Commissioner is unable to order disclosure of the information. He would, however, suggest that if the complainant is still interested in the information, they consider submitting a new request for a copy of the report.

Procedural matters

Section 1 – general right of access **Section 10 – time for compliance**

16. Section 1 of the FOIA states that "any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request".

17. Section 10(1) provides that a public authority must comply with section 1 promptly and in any event no later than the twentieth working day following the date of receipt of a request for information.
18. In this case the request was submitted on 4 March 2024 and PHW issued a refusal notice on 2 April 2024 confirming the information requested was held but considered exempt under section 22 of the FOIA.
19. As the Commissioner has determined that the information requested was not held at the time of the request, he finds that PHW breached section 1(1)(a) of the FOIA in failing to confirm the information was not held by the completion of its internal review. In addition, in failing to advise the complainant that the requested information was not held within the statutory time limit the Commissioner also finds that PHW breached section 10(1) of the FOIA.

Right of appeal

20. 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

21. 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.
22. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Joanne Edwards
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