Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 October 2018

Public Authority: King's College London
Address: James Clerk Maxwell Building
57 Waterloo Road
London SE1 8WA

Decision (including any steps ordered)

1. The complainant has requested patient level data associated with the PACE trial. The position of King's College London (KCL) is that it does not hold the requested information.

2. The Commissioner's decision is as follows:

    - KCL cannot be said to hold the information the complainant has requested under section 1(1)(a) of the FOIA.

3. The Commissioner does not require KCL to take any steps to ensure compliance with the legislation.

Request and response

4. On 23 February 2018 the complainant wrote to KCL and requested information in the following terms:

    "…Please provide the following patient-level data for baseline, 12-week, 24-week and 52-week assessments, where available.

1. EuroQOL (EQ-5D) scores.
2. Hospital Anxiety and Depression Scale scores in both anxiety and depression sub-scales.
3. Work and Social Adjustment scale scores.
4. Borg Scale scores
5. Physical Health Questionnaire 15 items (PHQ15) scores.
6. Self-paced step test of physical fitness results
7. Client Service Receipt Inventory scores. (Please also include the 6-months-prior assessment.)
8. Jenkins Sleep Scale scores.
9. Self-efficacy Scale scores.

I am happy to receive this information in electronic format."

5. KCL responded on 23 February 2018. It denied holding the requested information. KCL said it considered this to be the case because, even though it employs one of the named investigators of the PACE trial, that person had informed KCL that they do not perform data analysis and, as such, do not have intimate knowledge of the data requested.

6. KCL said that to be able to conduct the necessary data analysis, in order to provide the complainant with the requested information, would require it to employ someone specifically to do this. KCL said it has no current staff member employed with the technical expertise required to carry out analysis of this data. KCL referred the complainant to the Commissioner's decisions in FS50673373 and FS50557646.

7. The complainant requested an internal review on 26 February 2018. He argued that KCL employs staff/teaches students who have the technical knowledge/ability to be able to retrieve the information he has requested.

8. KCL provided an internal review on 26 March 2018. It advised that one staff member has not been employed to work on the trial in question for a number of years and that another had never worked on the trial. KCL maintained its position that it does not hold the information the complainant has requested.

Scope of the case

9. The complainant contacted the Commissioner on 3 April 2018 to complain about the way his request for information had been handled. He has told the Commissioner that he considers that KCL employs statisticians with the relevant knowledge of the trial and the statistical ability to extract the information he has requested.

10. KCL's primary position is that it cannot be said to hold the requested information. In the event that the Commissioner finds that it does hold the information, KCL says it would be exempt under section 40(2)(third person personal data) and section 22A (research).

11. The Commissioner's investigation has first focussed on whether KCL can be said to hold the requested information. If she finds the information is held she will then consider whether the information is exempt from release under section 40(2) or section 22A.

Reasons for decision

Section 1 – right of access to information held by public authorities

12. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled a) to be told if the authority holds the information and b) to have the information communicated to him or her if it is held, and is not exempt information.

13. In its submission to the Commissioner, KCL has confirmed that it is of the view that it does not hold the requested information. It says that this view is line with the Commissioner's 2018 decision in FS50721768[1], which also concerned data associated with the PACE trial.

14. In FS50721768 Queen Mary University of London (QMUL) had explained that there was no longer anyone at QMUL with the ability to produce data from this trial. QMUL had stated that data analysis was done by statisticians rather than the Principal Investigators (of the trial). This suggested that while the Co-Principal Investigator might have had knowledge about the data set in question, that person did not have the expertise necessary to extract the requested information. A statistician would have to be recruited to undertake that work.

15. The Commissioner found that no public authority could be expected to recruit staff – such as a technical expert - to provide a response to a FOIA request (or to refer to other public authorities for help). She

[1] https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2259075/fs50721768.pdf

therefore decided that QMUL did not hold the requested information under section 1(1)(a).

16. In its submission in the current case, KCL has noted that in his internal review request the complainant had stated that there were two other staff members beyond the Co-Principal Investigator who would have the expertise to be able to extract the requested information. Of these two staff members, according to the complainant, one was employed on the PACE trial while the other was an author on a PACE trial paper. With regard to the author on the paper, KCL says that the Co-Principal Investigator has confirmed that that staff member was never employed on the PACE trial and would not have the expertise necessary to be able to extract the requested information.

17. The Commissioner has disregarded the individual who was the author on the paper that the complainant has referred to. KCL has confirmed that that person was never involved in the PACE trial and would not have the necessary expertise with regard to analysing the trial's raw data.

18. In the case of the staff member who was employed on the PACE trial, the Co-Principal Investigator and the staff member themselves have confirmed that they have not been employed on the trial for a number of years. KCL says it is of the view that requiring this staff resource to be utilised to analyse and extract the requested information would be the same as if any other statistician employed by KCL was utilised in this fashion. KCL says that the Commissioner has previously taken the view that this is not a reasonable expectation.

19. In its submission, KCL has also referred to the Commissioner's 2015 decision in FS50557646[2], which again concerned QMUL and data sets associated with the PACE trial and in which, again, the Commissioner found that QMUL did not hold the requested information. In that case the Commissioner found that to provide a response would involve creating new information, which the FOIA does not require public authorities to do. However, KCL has referred to the Commissioner's point in that decision that "*it could be assumed that a statistician capable of analysing the datasets could be found within QMUL…*" The Commissioner went on to find that since this assumption could not equally be applied to other public authorities, the assumption was not appropriate.

[2] https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1043578/fs_50557646.pdf

20. KCL has told the Commissioner that it considers that there is no difference between an internal and external recruitment exercise in regard to the current situation. It argues that regardless of whether the person with the necessary expertise was recruited internally or externally, such a person would need to be recruited in order for KCL to be said to hold the requested information. The staff member in question, referred to above, has now been employed on another trial for a number of years, so their recruitment back to the PACE trial would prejudice the current study on which they are employed. In this way, KCL says, recruiting this member of staff for the particular purpose of analysing the raw data would be no different than if they were recruited externally, and would conflict with the Commissioner's previous decisions. KCL has confirmed that it does not employ staff with the necessary expertise and skill set to analyse the raw data in order to provide information falling within the scope of the complainant's request. KCL's position is that, while it may hold the raw data, it is not able to provide the requested information and therefore, it cannot be said to hold the requested information.

21. The Commissioner discussed with KCL the terms under which its researchers are employed. She understands that although technically employed by KCL, researchers identify specific sources of funding that facilitate their working on specific trials and projects. In effect, researchers have to generate their own work and their own sources of funding. The member of staff that the complainant has referred to – who may (or may not) have the necessary expertise to analyse the raw data concerned – has not been employed on the PACE trial for a number of years and is currently employed on a separate trial. That is, they are being funded to work specifically on this quite separate trial; effectively they are employed by that trial.

22. The Commissioner considers that bringing that person back to work on the PACE trail data would, effectively, be employing that person to work on the PACE trial specifically for the purpose of providing a response to the complainant's FOI request. In previous decisions, the Commissioner has decided that no public authority could be expected to recruit staff in order to provide a response to a FOIA request. The same applies in this case – the researcher in question would have to be recruited internally - and therefore, under section 1(1)(a), the Commissioner finds that KCL does not hold the requested information.

23. Since the Commissioner has decided that KCL does not hold the information the complainant has requested it has not been necessary to consider whether this information engages either the section 40(2) or section 22A exemptions.

Right of appeal

24. 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

25. 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.

26. 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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