

Decision Notice 013/2022

Treatment of low Pregnancy Associated Plasma Protein-A

Applicant: The Applicant

Public authority: Lothian Health Board

Case Ref: 202100120



Scottish Information
Commissioner

Summary

NHS Lothian was asked for information relating to the recommended treatment of women who are found to have low Pregnancy Associated Plasma Protein-A (PAPP-A) in pregnancy and any information which recommended the treatment of low PAPP-A with aspirin, along with the date on which development of such documents commenced and a full timeline of development through to implementation. NHS Lothian provided some information, but claimed that it held no information of the type the Applicant wished for in respect of guidelines about aspirin.

The Commissioner investigated and found that NHS Lothian did not hold the type of timeline requested by the Applicant.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Notice that information is not held); 73 (definition of “information”) (Interpretation)

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 24 August 2020, the Applicant made a request for information to Lothian Health Board (NHS Lothian). The Applicant requested the following information for 1 January 2015 to 24 August 2020:
 - A copy of any documents (including but not restricted to - clinical guidelines, policy documents, guidelines for staff, care pathways, NHS Lothian development procedures, working groups) relating to the recommended treatment of women who are found to have low Pregnancy Associated Plasma Protein-A (PAPP-A) in pregnancy [Part 1]; and
 - A copy of any documents (including but not restricted to - clinical guidelines, policy documents, guidelines for staff, care pathways, NHS Lothian development procedures, working groups) which recommend the treatment of low Pregnancy Associated Plasma Protein-A (PAPP-A) with aspirin, along with the date on which development of such documents commenced and a full timeline of development through to implementation [Part 2].
2. NHS Lothian responded¹ on 24 September 2020. NHS Lothian provided information and explained that the SGA [Small for Gestational Age] guideline was in development for some years with several amendments and it took time to get agreement between St John’s Hospital, Royal Infirmary of Edinburgh, Sonographers, and Midwives. Before this time, there was an informal recommendation for growth scans at 28 and 34 weeks, in line with previous growth guideline for such risk factors. NHS Lothian stated that the aspirin guideline had been in discussion “over the last nine months and was finalised at the last guideline group”, and there was no specific guideline for aspirin prior to this. NHS Lothian provided a copy of *Aspirin – Antenatal Prophylaxis* (Maternity Services Lothian Guidelines).

¹ <https://org.nhslothian.scot/FOI/RequestAndResponseRegister/FOIs/4636.pdf>

3. Later the same day, the Applicant wrote to NHS Lothian requesting a review of its decision on the basis that NHS Lothian's response had not fully answered Part 2 of her request. The Applicant commented that, while NHS Lothian had stated that the 'Aspirin - Antenatal Prophylaxis' guideline had been in discussion over the last nine months and was finalised at the last guideline group, NHS Lothian's response did not provide the information requested i.e. it did not provide documents relating to the Guideline Group which developed these guidelines, nor did it provide a full timeline of development of these guidelines through to implementation.
4. NHS Lothian notified the Applicant of the outcome of its review on 17 November 2020. NHS Lothian stated that there were no minutes taken for any of the guideline meetings and accordingly section 17 of FOISA applied as NHS Lothian did not hold the information. NHS Lothian explained that there were no timelines developed for any guideline in relation to this and "until a guideline is launched it is not followed, so the length of time a draft guideline is in development has no bearing on the care a woman received and this data is not recorded".
5. On 26 January 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of NHS Lothian's review of Part 2 of her request as she believed information was held by NHS Lothian. She suggested that the information requested around a timeline of development, which would include dates of meetings where the NHS Lothian Guideline Group discussed the development of this guidance and review points or meetings where the development was considered further as it was being developed. She believed that NHS Lothian did hold a record of dates when this guideline development was discussed and documents relating to the audit trail of this.

Investigation

6. 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.
7. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. NHS Lothian was invited to comment on this application and to answer specific questions. These related to how NHS Lothian had established the information it held that fell within Part 2 of the Applicant's request.

Commissioner's analysis and findings

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

Section 17 - Notice that information is not held

9. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received, subject to certain qualifications which are not applicable in this case. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give an applicant notice in writing to that effect.

10. "Information" is defined in section 73 of FOISA as "information recorded in any form". Given this definition, it is clear that FOISA does not require a public authority to create information in order to respond to a request, or to provide information which is not held in a recorded form (e.g. from a person's memory).
11. The Applicant was dissatisfied with the outcome of NHS Lothian's review: NHS Lothian's review stated that it did not hold the information around a timeline of development, but the Applicant believed a timeline "would include dates of meetings where the NHS Lothian Guideline Group discussed the development of this guidance and review points/meetings where the development was considered further as it was being developed."
12. The issue for the Commissioner to determine is whether, at the time of the Applicant's request, NHS Lothian held recorded information falling within Part 2 of that request. NHS Lothian was therefore asked how it had interpreted this part of the request, and how it had established that it did not hold any recorded information.
13. NHS Lothian replied that searches were carried out: it supplied details to the Commissioner of the staff who had conducted the searches. NHS Lothian also explained that it had contacted other staff to check and, again, NHS Lothian supplied the names and posts of these staff and the email trail to evidence this. The searches were carried out by those staff members "across their emails, communications and documents".
14. NHS Lothian was referred to the Applicant's application and invited to comment on whether it held dates of meetings where the NHS Lothian Guideline Group discussed the development of this guidance or review points/meetings where the development was considered further as it was being developed. NHS Lothian responded that the dates of the meetings were not specifically requested and NHS Lothian did not directly associate these with a development timeline.
15. NHS Lothian supplied the Commissioner with the agendas from the time where discussions on Aspirin took place and said that the Aspirin guideline "went live" on 3 August 2020 on the Intranet for staff use. There was no pre-existing Aspirin guidance relating to PAPP-A and its use was restricted to preventing hypertension. At the start of the COVID-19 pandemic, there were no formal guideline meetings as non-clinical gatherings were not permitted. There were no minutes taken for any of the guideline meetings. Similarly, there were no timelines developed for any guideline. NHS Lothian explained that it does not keep timelines or formal minutes of the guideline group, and a guideline is added to the intranet when it is signed off and the previous (if in existence) is archived. Finally, NHS Lothian said that drafts were not held.
16. The Applicant had commented that she was "perplexed that NHS Lothian maintain they hold no relevant information which sets out the timeline relating to the discussion, development and implementation of these guidelines." The Applicant believed that for NHS Lothian:

As a public body, I would expect as a minimum that they would have good governance around recording of dates, clinicians involved and decisions taken in relation to guideline development. As least as an audit trail if nothing else.
17. NHS Lothian was specifically asked if a timeline was possible from the dates of meetings where the aspirin guideline appears as an agenda item. NHS Lothian was asked if it held other agenda, additional to the two supplied to the Commissioner, that would indicate the length of time the Aspirin guidelines were discussed. The investigating officer also

highlighted that NHS Lothian had commented that it took nine months to develop the guidelines; and the following information was available from the recorded sources:

- Lothian Guideline group Agenda 13th August 2020 - Guideline uploaded.
- Maternity Guidelines Date created: 03/08/2020 Version: V1 Author1: Review date: 03/08/2023 -
- Lothian Guideline group agenda - 9th July 2020 - Draft to be discussed.

18. NHS Lothian replied to these points by confirming that no additional information was held. NHS Lothian said that:

The development stage was not minuted or noted in any discussions, prior to the implementation phase and the July August meetings when it went live.

19. The Commissioner must decide whether NHS Lothian complied with Part 1 of FOISA in refusing the request, i.e. whether NHS Lothian was correct to notify the Applicant that it held no recorded information falling within Part 2 of the request. In doing so, the Commissioner must assess whether NHS Lothian held recorded information when it received the Applicant's request.
20. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
21. Having considered all the relevant submissions, the Commissioner is satisfied that NHS Lothian took adequate and proportionate steps to establish whether it held recorded information falling within the scope of Part 2 of the Applicant's request. The NHS Lothian staff involved in assessing what information was held by the authority had experience and knowledge of the subject matter of the request, reducing the likelihood of error and misunderstanding in locating the information requested. NHS Lothian evidenced to the Commissioner its internal discussions that assessed whether information was held. Also, information falling within the request would be readily identifiable. Similarly, the searches did locate some relevant information and were therefore capable of locating and retrieving relevant information.
22. As stated in many previous decisions, the Commissioner's remit extends only to the consideration of whether a Scottish public authority actually holds the requested information and whether it has complied with Part 1 of FOISA in responding to a request: the Commissioner cannot comment on whether a public authority should have recorded any, or more, information about a particular event or process.
23. Having reviewed the submissions made, the Commissioner accepts that NHS Lothian did not, at the time of the request, hold recorded information that showed provide a full timeline of development of the named guidelines through to implementation. Recorded information is held that indicates dates relevant to the guidelines i.e. the dates of meetings or when finalised, but such dates cannot be regarded as part of a recorded timeline.
24. In all the circumstances, the Commissioner is satisfied, on the balance of probabilities, that NHS Lothian holds no further recorded information that falls within the terms of Part 2 of the Applicant's request.

25. Despite reaching this conclusion, the Commissioner is surprised that NHS Lothian failed to retain or create any documentation which reflects the decision-making process and specifically the reasoning and development behind a policy/practice change.

Decision

The Commissioner finds that Lothian Health Board complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or NHS Lothian 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

25 January 2022

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

17 Notice that information is not held

- (1) Where-

- (a) a Scottish public authority receives a request which would require it either-

- (i) to comply with section 1(1); or
(ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

73 Interpretation

In this Act, unless the context requires a different interpretation -

...

“information” (subject to sections 50(9) and 64(2)) means information recorded in any form;

...

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