

Decision Notice

Decision 09/2020: Bermuda Health Council

Diagnostic imaging statistical records

Reference no: 09082017-02

Decision date: 27 August 2020

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Bermuda Health Council (**Health Council**) for statistical records on diagnostic imaging tests. The Health Council disclosed one anonymised statistical record that was responsive to the request, but withheld the identities of individual health service providers and the specific type of diagnostic imaging test ordered by those providers. The Health Council also denied access to statistical records on diagnostic imaging tests categorised by patient age and the number of tests per patient.

During the Information Commissioner's review, the Health Council disclosed an additional record and provided additional information to the Applicant. The Health Council also changed its position to rely on the exemptions in sections 25(1)(c) (adverse effect on commercial interests), 26(1)(a) (information received in confidence), 30(1)(a) (operations of public authorities) and 37(1) (disclosure prohibited by other legislation) of the PATI Act.

The Information Commissioner has found that the Health Council was justified in relying on section 37(1) of the PATI Act because disclosure of the identities of the health service providers and the details of the type of diagnostic imaging tests they ordered is prohibited under section 18(1) of the Bermuda Health Council Act 2004.

Relevant statutory provisions

Public Access to Information Act 2010: section 37(1) (disclosure prohibited by other legislation).

Bermuda Health Council Act 2004: section 5 (functions of the Council); section 18 (confidentiality).

Health Insurance (Licensing of Insurers) Regulations 1971: Schedule, note 2(g) (documents to be submitted with application form).

The full text of each statutory provision cited above is reproduced in Appendix 1 to this Decision. The Appendix forms part of this Decision.

Background

1. In April 2017, the Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Bermuda Health Council (**Health Council**) asking for:

- [1] Records showing the number of diagnostic tests ordered annually by every registered physician in Bermuda – giving the physician’s name and the number of tests they ordered during 2015, 2016 and 2017 to date, as well as the type of test (MRI, CT, etc.); **(item 1)** and
- [2] Records showing how many tests were conducted for each patient in Bermuda (e.g., how many had one test, how many had two, etc.); and for those patients who received more than five tests in any given year, providing their age (or an age range) and the name of their physician, using the same timeframe as above. **(item 2)**
2. On 30 May 2017, the Health Council refused the PATI request in full under the exemption in section 37(1) because disclosure of the requested records is prohibited by the Bermuda Health Council Act 2004 (**Health Council Act**). The Health Council also refused the request under additional exemptions.
 3. On 7 June 2017, the Applicant sought an internal review by the head of the Health Council.
 4. In response, the Health Council’s internal review decision provided access to an anonymised statistical record that included the number of diagnostic imaging tests ordered by each health service provider for financial years 2015/2016 and 2016/2017. This record was responsive to item 1 of the PATI request. The internal review decision refused the remainder of the PATI request under section 37(1) of the PATI Act because disclosure is prohibited by the Health Council Act. The Health Council also relied upon the exemptions in sections 23 (personal information), 25(1)(c) (adverse effect to commercial interests), 26(1) (information received in confidence), 29(1) (deliberations of public authorities) and 30(1)(a) (operations of public authorities) of the PATI Act.
 5. The Applicant submitted a request for an independent review by the Information Commissioner, challenging the Health Council’s internal review decision refusing the remainder of the PATI request.

Investigation

6. The application was accepted as valid. The Information Commissioner confirmed that the Applicant made a valid request to a public authority and asked the public authority for an internal review before asking her for an independent review. Additionally, the Information Commissioner confirmed the issues the Applicant wanted her to review.

7. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the Health Council to determine whether its reliance on the exemptions was justified.
8. On 14 September 2017, the Information Commissioner's Office (ICO) notified the Health Council of the Applicant's valid application and sought copies of the requested records. Due to personnel changes, the Health Council was only able to provide the ICO with access to the withheld record responsive to item 1 of the PATI request in November 2017. The Health Council also provided the ICO with access to the database which contained various information relating to diagnostic imaging tests ordered and conducted in Bermuda.
9. During the course of the Information Commissioner's review, the Health Council published its report, Lab Diagnostic Imaging Order Rates (2018 Report), which provided an analysis of diagnostic imaging tests ordered by local physicians from April 2013 to March 2017 and was relevant to the Applicant's PATI request.¹ This report provided an analysis of the diagnostic imaging order rates by area of speciality, and not by individual health service providers in Bermuda. The ICO sought the Applicant's views on this publication. Although the Applicant did not find this report to fully satisfy the PATI request, the parties agreed to attempt facilitated resolution to resolve at least some of the issues in the review.
10. Throughout the facilitated resolution, the ICO met with and engaged both the Health Council and the Applicant. As a result of this process, the Health Council provided the Applicant with additional information and disclosed a Patient Encounters Table that provided the number of patients who had taken diagnostic imaging test in the financial years 2014/2015, 2015/2016 and 2016/2017.² During the facilitated resolution, the Health Council maintained its position to withhold the identities of the health service providers and the type of diagnostic imaging tests ordered by individual health service providers.
11. The ICO Investigation Officer informed the Applicant of her preliminary view that the identities of the health service providers were exempt. The Applicant disagreed with

¹ Available at <http://www.bhec.bm/wp-content/uploads/2018/09/Lab-Diagnostic-Imaging-Order-Rates-2018-Report.pdf>.

² The Patient Encounters Table provided information on the number of patients who had one to ten diagnostic imaging tests (as single categories) as well as those who had more than ten tests in each financial year. The age range of patients who had more than five tests each financial year is also provided. Although the Patient Encounters Table did not reveal the identities of the health service providers, it noted that all patients with more than five diagnostic imaging tests had multiple health service providers.

the preliminary view, and the facilitated resolution was ended with only part of the issues being resolved. The remaining contentious issues progressed through the investigation, and the Applicant exercised the right to a decision by the Information Commissioner.

12. The issues remaining in this review concern whether the Health Council was justified in denying access to (a) the identities of the health service providers as requested in items 1 and 2 and (b) the details on the type of diagnostic imaging tests ordered by the health service providers as requested in item 1.
13. Throughout the review, the Health Council revised and narrowed the grounds of its refusal of the PATI request on a number of occasions. The Health Council's final position in this review was to rely on the exemption in section 37(1) of the PATI Act because disclosure of the identities of the health service providers and the details on the type of diagnostic imaging test ordered by the health service providers were prohibited by section 18(1) of the Health Council Act. The Health Council further relied upon the exemptions in sections 25(1)(c) (adverse effect to commercial interests), 26(1)(a) (information received in confidence) and 30(1)(a) (operations of public authorities) of the PATI Act.
14. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority and the applicant a reasonable opportunity to make representations. The ICO invited the Health Council and the Applicant to comment on this application and to make submissions to the Information Commissioner for consideration in this review. The Health Council was further asked specific questions to justify its reliance on the exemptions. Both the Health Council and the Applicant made submissions.

Information Commissioner's analysis and findings

15. In coming to a decision on this matter, the Information Commissioner considered all of the relevant submissions, or parts of submissions, made by the Health Council and the Applicant. She is satisfied that no matter of relevance has been overlooked.

Disclosure prohibited by other legislation – section 37(1)

16. Section 37(1) of the PATI Act allows public authorities to refuse public access to a record if disclosure of the requested record is prohibited by any statutory provision other than the PATI Act.

17. If the exemption in section 37(1) of the PATI Act applies to a record, the public authority need not consider the public interest test.
18. To rely on section 37(1) of the PATI Act, a public authority must ask the following questions³:
 - [1] What is the statutory provision creating the mandatory prohibition on disclosure?
 - [2] Does the record fall within this statutory provision?
 - [3] Does the record fall within any exception or gateway to public disclosure that is contained in the statutory provision?
19. The burden is on the public authority to show that, on the balance of probabilities, it has provided sufficient support to justify applying section 37(1) of the PATI Act.

Public authority's submissions

20. The Health Council submitted that disclosure of the identities of the health service providers and information on the types of diagnostic imaging procedures that the providers ordered is prohibited by section 18(1) of the Health Council Act.
21. The Health Council explained that this information came to the Health Council's knowledge in the course of its duty to license health insurers in accordance with section 5(e) of the Health Council Act.
22. The health insurers had provided the Health Council with the identities of the health service providers and information on the types of diagnostic imaging procedures which those providers had ordered, in raw data format as part of its claims data, in support of the insurers' renewal of license applications, in accordance with paragraph 2(g) of the Schedule to the Health Insurance (Licensing of Insurers) Regulations 1971. The Health Council explained that this information is used to assist in system planning that is done by the Ministry of Health.

Applicant's submissions

23. The Applicant submitted that disclosure of the identities of the health service providers and the type of diagnostic imaging tests that those providers ordered is in the public interest.

³ See Decision 05/2017, Bermuda Monetary Authority.

Discussion

[1] *What is the statutory provision creating the mandatory prohibition on disclosure?*

24. In Decision 27/2019, Bermuda Health Council, paragraphs 46-50, the Information Commissioner recognised that section 18(1) of the Health Council Act is a statutory prohibition on disclosure within the meaning of section 37(1) of the PATI Act.

[2] *Does the record fall within this statutory provision?*

25. Section 18(1) of the Health Council Act reads:

Except in so far as may be necessary for the due performance of a person's functions under this Act or any other statute and subject to subsections (3), (4) and (5), any person who is a member of the Council or who is acting as an officer, a servant, an agent or an adviser of the Council shall preserve and aid in preserving confidentiality with regard to all matters relating to the affairs of the Council or of any person, that may come to his knowledge in the course of his duties.

26. The identities of the health service providers and information on the type of diagnostic imaging tests that they have ordered relates to the affairs of the health service providers. Because the Health Council obtained the information from the health insurers, the information also relates to the affairs of the health insurers.
27. The Information Commissioner agrees with the Health Council that the identities of the health service providers and details on the types of diagnostic imaging tests they ordered came to the knowledge of the Health Council in the course of fulfilling its duties under section 5(e) of the Health Council Act to license health insurers. As part of the license applications or license renewal applications, health insurers are required under the Schedule to the Health Insurance (License of Insurers) Regulations 1971 to submit various information to the Health Council. This would include "such other information as the [Health] Council may reasonably require to determine the suitability of the applicant to undertake insurance business" as well as "such statistical data as the [Health] Council may require" and "any other relevant information required by the [Health] Council for the purposes of health system analysis, planning and management".

28. Given the breadth of categories of information that the Health Council might require health insurers to provide under the relevant legislation, the Information Commissioner accepts that the identities of the health service providers as well as information about the type of diagnostic imaging tests ordered by those providers fall within section 18(1) of the Health Council Act.

[3] *Does the record fall within any exception or gateway to public disclosure that is contained in the statutory provision?*

29. Subsections (3) and (4) allow disclosure of records coming within section 18(1) of the Health Council Act in certain circumstances, which are not present in this case. Specifically, although the Health Council has made publicly available some statistical information regarding diagnostic imaging in Bermuda, the identities of the health service providers and information on the types of diagnostic imaging they have ordered is not, and has not, been made available to the public either through the Health Council or another source.
30. Although the Applicant has emphasised the public interest in disclosure, the public interest test is not applicable to the exemption in section 37(1).

Conclusion

31. The Information Commissioner is satisfied that the Health Council was justified in relying on section 37(1) of the PATI Act to deny access to the identities of the health service providers requested in items 1 and 2 of the PATI request and to the types of diagnostic imaging tests ordered by those providers requested in item 1 of the PATI request, because their disclosure is prohibited by section 18(1) of the Health Council Act. It is unnecessary to consider the remaining exemptions invoked by the Health Council.

Decision

The Information Commissioner finds that the Bermuda Health Council (**Health Council**) justified its reliance on the exemption in section 37(1) of the Public Access to Information (**PATI**) Act 2010 to refuse part of the PATI request because disclosure of the identities of health service providers and the type of diagnostic imaging tests they ordered is prohibited under section 18(1) of the Bermuda Health Council Act 2004.

In accordance with section 48(1) of the PATI Act, the Information Commissioner affirms the Health Council's reliance on section 37(1) of the PATI Act.

Judicial Review

The Applicant, the Bermuda Health Council or any person aggrieved by this Decision has the right to seek and apply for judicial review to the Supreme Court in accordance with section 49 of the PATI Act. Any such application must be made within six months of this Decision.



Gitanjali S. Gutierrez
Information Commissioner
27 August 2020

Appendix 1: Relevant statutory provisions

Public Access to Information Act 2010

Disclosure prohibited by other legislation

37 (1) Subject to subsection (6), a record is exempt if its disclosure is prohibited by any statutory provision, other than this Act.

...

Bermuda Health Council Act 2004

Functions of the Council

5 The functions of the Council are—

...

(e) to licence health insurers;

...

Confidentiality

18 (1) Except in so far as may be necessary for the due performance of a person's functions under this Act or any other statute and subject to subsections (3), (4) and (5), any person who is a member of the Council or who is acting as an officer, a servant, an agent or an adviser of the Council shall preserve and aid in preserving confidentiality with regard to all matters relating to the affairs of the Council or of any person, that may come to his knowledge in the course of his duties.

(2) Any member, officer or servant of the Council who—

(a) communicates any matter relating to the affairs of the Council or of any person, that may come to his knowledge in the course of his duties to any person other than—

(i) the Minister;

(ii) a member of the Council; or

(iii) an officer of the Council authorized in that behalf by the Chief Executive Officer; or

(b) permits any unauthorized person to have access to any books, papers or other records relating to the Council,

commits an offence and is liable on summary conviction, to a fine of \$10,000.00 or to imprisonment for a term of six months or to both such fine and imprisonment and on conviction on indictment to a fine of \$25,000.00 or to imprisonment for a term of two years or to both such fine and imprisonment.

(3) Subsection (1) does not preclude the disclosure of information—

...

(b) if the information is or has been available to the public from other sources.

Health Insurance (Licensing of Insurers) Regulations 1971

Schedule

Notes:

...

2 If the application is for the renewal of a license, this form must be submitted to the Council together with—

...

(g) any other relevant information required by the Council for the purposes of the health system analysis, planning and management.

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