



Decision Notice 046/2024

Processes relating to termination of pregnancy

Authority: Lothian Health Board

Case Ref: 202201275

Summary

The Applicant asked the Authority for processes regarding termination of pregnancy at a specific clinic. The Authority provided a small amount of information but the Applicant believed more information was held. The Authority stated that it held no further information. The Commissioner investigated and found that the Authority had failed to provide adequate submissions to justify its position. He required the Authority to carry out a fresh review and to provide the Applicant with a revised review outcome.

Background

1. On 13 July 2022, the Applicant made the following request for information to the Authority:

“I would like to see the processes followed by NHS Lothian staff at the Chalmers clinic, starting when a women [sic] makes either direct contact or is referred regarding termination of pregnancy (ToP).

I would like to see the process from 1st contact to exit which may or may not result in ToP. Please show or explain the exit points in the process. This information may be available in a single document or documents and comprise a procedure, flow chart, scripts, counselling or a pathway. In accordance with the spirit of the FOI Act I would ask you to consider the wording of the request in its broadest sense. Please do not hesitate to come back to me if you require any clarifications. I am happy to communicate by email.

For clarity, no personal information is sought.”

2. For context, “the Chalmers clinic” refers to Chalmers Sexual Health Centre, which hosts the Authority’s Sexual and Reproductive Health Service.
3. The Authority responded on 12 August 2022. The Authority provided a flowchart which it indicated outlines the full process.

4. On 4 September 2022, the Applicant wrote to the Authority, requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because the information appeared incomplete, including no clear references to termination of pregnancy, and, more broadly, it lacked the detail he had seen in similar processes from other health boards.
5. The Authority notified the Applicant of the outcome of its review on 4 November 2022. The Authority upheld its original decision, confirming that it holds no further process documents for referral for termination of pregnancy.
6. On 11 November 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review because he did not consider it credible that the Authority held no further information.
7. The Applicant also expressed concern that the Authority was interpreting his request too narrowly by focusing on referrals without acknowledging any other pathways that may lead to termination of pregnancy.

Investigation

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
9. On 16 December 2022, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice of the application in writing and invited its comments.
10. The case was subsequently allocated to an investigating officer.
11. The Authority provided comments. The Applicant also provided comments.

Commissioner's analysis and findings

12. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Section 1(1) – General entitlement

13. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section (6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in 1(6) are not applicable in this case.
14. The information to be given is that held by the authority at the time the request is received, as defined by section 1(4) of FOISA.
15. In its comments to the Commissioner, the Authority submitted that it does not hold any further information in addition to that already disclosed to the Applicant. The Authority did not describe what searches it had undertaken or how it had otherwise arrived at this

conclusion. The Authority also linked to [information available on its website](#) on the process from entry to exit for termination of pregnancy.¹

16. In his comments to the Commissioner, the Applicant explained that other health boards in Scotland held substantially more detailed documents.
17. In considering whether a Scottish public authority holds the requested information in any given case, the Commissioner must be satisfied that the authority has carried out adequate, proportionate searches in the circumstances, taking account of the terms of the request and all other relevant circumstances. He will consider the scope, quality, thoroughness and results of those searches, applying the civil standard of proof (the balance of probabilities). Where appropriate, he will also consider any reasons offered by the public authority to explain why it does not, or could not reasonably be expected to, hold the information.
18. In all cases, it falls to the public authority to persuade the Commissioner, with reference to adequate, relevant descriptions and evidence, that it holds no more information than it has identified and located in response to the request. In this case, notwithstanding the opportunity given to provide comments, the Commissioner is not satisfied that the Authority has achieved this. Specifically, the Commissioner finds that the Authority's submissions on searches fall short in the following key respects:
 - it failed to describe the searches it carried out or provide any detail or evidence of those searches
 - in its comments to the Commissioner, it highlighted material on its website which appears to match the information requested by the Applicant, which it did not provide to him in its initial response or at review stage.
19. When the Commissioner requested comments from the Authority, he asked it to read his guidance on what is needed from public authorities in order for him to come to a decision. In respect of "incomplete responses" (i.e. cases like this one, where an applicant considers more information is held than has been identified or provided), the Commissioner's guidance specifically states that he requires the following information:
 - Which searches were carried out, including:
 - search terms used and timeframe searched against; why these were considered likely to retrieve the information
 - who carried out the searches and why were they the people best placed to carry out the searches
 - which sets of records or data were searched (information may be held on WhatsApp, mobile phones, etc.)
 - If no searches were carried out, why did you consider no searches were needed?
20. In all the circumstances, therefore, the Commissioner cannot uphold the Authority's claim that it does not hold any further information. He requires the Authority to carry out fresh searches for the information and to issue the Applicant with a revised review response.

¹ <https://www.lothiansexualhealth.scot/pregnancy-pla>

21. In doing so, the Authority should consider whether the information within the website link it provided the Commissioner should have been provided to the Applicant as part of its initial or review response.
22. The Authority should also ensure, in line with the wording of the Applicant's original request, that pathways for termination of pregnancy that begin with contact being made without a referral are considered when carrying out fresh searches and when issuing a revised review response to the Applicant.
23. The Commissioner cannot, therefore, find that the Authority has discharged its duties under section 1(1) of FOISA in this case.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

Specifically, the Authority has failed to satisfy the Commissioner that it does not hold any further information in addition to that disclosed already. As a result, the Commissioner finds that the Authority failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the Authority to carry out adequate, proportionate searches for the information, reach a decision on the basis of those searches and notify the Applicant of the outcome (all in terms of section 21 of FOISA), by **13 May 2024**.

Appeal

Should either the Applicant or the Authority 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.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

Cal Richardson
Deputy Head of Enforcement

28 March 2024