



Decision Notice 049/2024

Response submitted to national stoma survey

Authority: NHS Dumfries and Galloway

Case Ref: 202200699

Summary

The Applicant asked the Authority for information relating to a response it had submitted to a data survey that had been circulated to stoma nurses via the Scottish Stoma Nurse Group (SSNG). The Authority informed the Applicant it did not hold the information. The Commissioner investigated and was satisfied that the Authority did not hold the information requested.

Background

1. On 12 May 2022, the Applicant made a request for information to the Authority. Among other things, the Applicant requested the response submitted by the Authority's Board Area to a data survey circulated to stoma nurses via the chair of SSNG in around 2018-2019.
2. The Authority responded on 26 May 2022 with a notice, under section 17(1) of FOISA, that it did not hold the information requested.
3. On 27 May 2022, the Applicant wrote to the Authority, requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision. The Applicant considered "with a very high degree of certainty" that the Authority had submitted a response to the survey, as survey responses from all mainland NHS Boards were referenced in a national report. The Applicant also noted that the Authority had a duty, under section 15 of FOISA, to provide him with advice and assistance in relation to his request.
4. The Authority notified the Applicant of the outcome of its review on 16 June 2022, fully upholding its original decision. The Authority explained that it had not retained a hard or saved copy of its response following submission.
5. On 17 June 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority's review because:

- he had received information from a separate information request, which showed that the Authority had submitted a response to the survey
- he did not accept that the response was not recorded, discussed further or shared with other staff
- he did not accept that no-one had knowledge of where the response was sent or to whom
- the Authority had not provided him with advice and assistance in relation to his request.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 1 September 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. The Authority provided comments.
8. The case was subsequently allocated to an investigating officer.

Commissioner's analysis and findings

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

Section 17(1) – Notice that information is not held

10. 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 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.
11. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4) of FOISA. This is not necessarily to be equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
12. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner must first of all consider the interpretation and scope of the request and thereafter the quality, thoroughness and results of the searches carried out by the public authority.
13. The Commissioner also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. Ultimately, however, the Commissioner's role is to determine what relevant recorded information is actually held by the public authority (or was, at the time it received the request).

The Authority's submissions

14. The Authority explained that it has one stoma nurse, who it contacted to help provide a response to the Applicant's request. The Authority stated that the stoma nurse undertook a full review of her emails for the submitted survey and of the Authority's shared drive for a saved copy of the submitted survey.
15. The Authority explained that searches had been undertaken prior to its initial response to the Applicant and again prior to its review outcome; neither search yielded a copy of the Authority's data survey response.
16. The Authority provided a copy of its Health and Administration Records Management Policy detailing the retention and destruction periods for each type of document. The Authority explained that there was no requirement for the completed survey to be retained after it had been submitted.
17. The Authority also explained that the stoma nurse did not recall there being any information included within the completed survey that could not be shared in response to an information request, so if it held the survey, then it would have provided it in response to the request.

The Applicant's submissions

18. The Applicant explained that he had received information in response to a separate information request to a different public authority that suggested that the Authority had submitted a response to a national survey.
19. The Applicant did not accept that the response had not been discussed at any further meetings, that the contents had not been shared by email with other staff within the Authority or that no-one knows where the response was sent or to whom.
20. The Applicant therefore did not accept that the Authority had no record of the response submitted.
21. The Applicant also explained that he considered the Authority had failed in its duty, under section 15 of FOISA, to provide advice and assistance to him to in relation to his request.

The Commissioner's view

22. Given the explanations and submissions provided, the Commissioner accepts that the Authority took adequate and proportionate steps in the circumstances to establish if the information was held and he is satisfied, on balance, that it does not (and did not, on receipt of the request) hold the information requested by the Applicant.
23. The Commissioner considers that the Authority's searches were reasonable in the sense of who it asked to carry out the searches and the locations searched; he finds that they would be capable of locating the information requested.
24. While the Applicant believed and expected the specified information to be held by the Authority, the Commissioner is satisfied that this was not the case.
25. The Commissioner notes that the Authority accepts that it did submit a response to the data survey, but he recognises that it was under no obligation, under its Health and Administration Records Management Policy, to retain the response after it had been submitted. Whether a public authority should hold information which it does not hold is not a matter for the Commissioner to decide.

26. The Commissioner therefore concludes that the Authority was correct to give the Applicant notice, in terms of section 17(1) of FOISA, that it did not hold the information requested.

Section 15 – Duty to advise and assist

27. Section 15(1) of FOISA requires a Scottish public authority, so far as reasonable to expect it to do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it.

28. In this case, the Applicant expressed general dissatisfaction that the Authority had not provided him with appropriate advice and assistance.

29. The Authority did not provide the Applicant with any advice or assistance, in either its initial response or review outcome, on where the information requested might otherwise be obtained.

30. As the Authority acknowledged that it did submit a response to the data survey, the Commissioner considers that the Authority should have advised the Applicant where he might otherwise be able to obtain the information requested.

31. While the Applicant appeared to have been aware of some public authorities that might be in possession of the Authority's data survey response, the Commissioner nevertheless considers that the Authority should have directed him to those authorities itself (and to any others that might hold the information requested).

32. The Commissioner therefore finds that the Authority failed to comply with the duty under section 15(1) of FOISA to provide advice and assistance.

33. During the investigation, the Applicant confirmed that he has made requests to other relevant public authorities for the information requested in this case. In the circumstances, the Commissioner does not require the Authority to take further action in respect of its failure to comply with its duty under section 15(1) of FOISA.

Decision

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

The Commissioner finds that the Authority was correct to notify the Applicant that it did not hold the requested information, but that it failed to comply with its duty under section 15(1) of FOISA to provide him with advice and assistance.

However, as rehearsed earlier, the Commissioner does not, in the circumstances, require the Authority to take any action in respect of this failure.

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.

David Hamilton
Scottish Information Commissioner
28 March 2024

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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (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 not be made before the information is given.
- ...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- ...

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.
- ...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
 - (a) a notice under section 21(5) or (9); or

- (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

(2) An application under subsection (1) must -

- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
- (b) state the name of the applicant and an address for correspondence; and
- (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).