



# Decision Notice 058/2024

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## Survey of out of hours GP services

Authority: NHS Greater Glasgow and Clyde

Case Ref: 202400158

### Summary

The Applicant asked the Authority for information relating to the results of a survey on GP out of hours services. The Authority informed the Applicant that it did not hold some of the information requested. The Commissioner investigated and found that the Authority had breached FOISA by informing the Applicant that it did not hold the information requested. He required the Authority to provide a revised review outcome to the Applicant.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 17 (Notice that information is not held); 47(1) and (2) (Application for decision by Commissioner)

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 19 December 2023, the Applicant made the following request for information to the Authority:
  1. The number of responses received to the engagement survey conducted as part of the GP Out of Hours service consultation.
  2. The number of responses received from (a) Glasgow City (b) East Renfrewshire (c) Renfrewshire (d) Inverclyde (e) East Dunbartonshire

(f) West Dunbartonshire

3. The number of people who answered 'Yes' to the question "Do you agree that our proposal to make this arrangement permanent meets the needs of our patients?". Please break down the number of yes responses by local authority area.

4. The number of people who answered 'No' to the question "Do you agree that our proposal to make this arrangement permanent meets the needs of our patients?". Please break down the number of no responses by local authority area.

2. The Authority responded on 22 January 2024 stating that it planned to publish the information requested within the next 12 weeks. The Authority therefore withheld the information requested under section 27(1) (Intended for future publication) of FOISA.
3. On 23 January 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because the date of publication that the Authority referred to was outwith the period of 12 weeks specified for the purposes of section 27(1) of FOISA.
4. The Authority notified the Applicant of the outcome of its review on 2 February 2024. The Authority agreed that it was not entitled to rely on section 27(1) of FOISA.
5. The Authority answered questions 1 and 2 of the Applicant's request. For questions 3 and 4, the Authority explained that, while it held the data generated from the consultation exercise, it had yet to be processed in such a way that would specifically address those questions. The Authority therefore issued a notice, under section 17 of FOISA, that it did not hold this information.
6. On 5 February 2024, 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 considered it nonsensical for the Authority to claim it did not hold the information for questions 3 and 4 of his request, when it clearly held the raw information from which the answers to those questions could be derived.

## **Investigation**

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 29 February 2024, the Authority was notified in writing that the Applicant had made a valid application. The case was subsequently allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to the process of compiling this information. The Authority did not provide any submissions.

## Commissioner's analysis and findings

10. The Commissioner has considered the submissions made to him by the Applicant and the Authority's response to the Applicant's requirement for review.

### **Section 17 – Information not held**

11. 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 the 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.
12. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). 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.
13. The standard of proof to determine whether a Scottish public authority holds information is the civil standard on 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.
14. 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 information is actually held by the public authority (or was, at the time it received the request).
15. In this case, the Authority, in its review response, stated that, while it held the data generated from the consultation exercise, it had yet to be processed in such a way that would generate the information to address questions 3 and 4 of the Applicant's request.
16. The Commissioner's [guidance on section 17 of FOISA](#)<sup>1</sup> (at paragraph 46) states that if compiling information in order to respond to a request would require skill and complex judgement, it is less likely the information can be said to be held for the purposes of FOISA.
17. In [Decision 210/2013](#)<sup>2</sup> (at paragraph 144), the Commissioner established that a public authority will hold information if it holds the "building blocks" to generate the information and no complex judgement is required to produce it.
18. The Commissioner notes that questions 3 and 4 of the Applicant's request asked for the number of people who responded "yes" and "no" to a specific question and for those numbers to be broken down by local authority area.
19. The Commissioner also notes that the Authority accepted, in its review response, that it held the data generated from the consultation exercise.
20. In the circumstances, the Commissioner considers that the Authority does hold the "building blocks" to generate the information requested and that, given their nature, answering questions 3 and 4 of the Applicant's request would not require skill and complex judgement.

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<sup>1</sup> <https://www.itspublicknowledge.info/sites/default/files/2022-03/BriefingSection17Informationnotheld.pdf>

<sup>2</sup> <https://www.itspublicknowledge.info/decision-2102013>

21. In the absence of submissions from the Authority to the contrary, the Commissioner cannot, therefore, find that the Authority was entitled to rely on section 17(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 Commissioner finds that the Authority breached section 1(1) of FOISA by notifying the Applicant, in terms of section 17(1) of FOISA, that it did not hold the information requested.

The Commissioner therefore requires the Authority to issue a revised review response to the Applicant, otherwise than in terms of section 17(1) of FOISA, by **10 June 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**

**23 April 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.”

...

- (6) This section is subject to sections 2, 9, 12 and 14.

...

#### 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).