

# Decision Notice 059/2024

**Information relating to an email sent by a specified employee**

 **Authority: Ayrshire and Arran Health Board
Case Ref: 202200807**

## Summary

The Applicant asked the Authority for information relating to an email sent by one of its employees. The Authority told the Applicant that it did not hold the information requested. The Commissioner investigated and was satisfied that the Authority did not hold the information requested.

## Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (4) and (6) (General entitlement); 17(1) (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 12 October 2021, the Applicant made a request for information to the Authority. The Applicant asked for the information relating to an email sent on 8 January 2020 by an employee of the Authority. Specifically, the Applicant sought answers to the following specific questions arising from the content of the email:

(1) The email states that "I asked about the removal of the other garments...": what positions, departments and organisation within NHS Scotland did the author of the above email contact to ask "about the removal"?

(2) The email states that "I asked about the removal of the other garments...": what method did the author of the above email use (e.g. email, telephone, meeting, text message, letter, etc.)?

(3) The email states that "they stated it would be in Dec...": what official position, department and organisation within NHS Scotland is "they"?

(4) The email states that "I asked about the removal of the other garments...": does the "other garments" refer to "garments" produced by (i) Vanilla Blush or (ii) Vanilla Blush and other company products?

(5) The email states that "I asked about the removal of the other garments...": list the garments to which this refers.

1. The Authority responded on 31 December 2021 with a notice, under section 17(1) of FOISA, that it did not hold the information requested. The Authority explained that it had already disclosed all of the correspondence it held relating to the email the Applicant had referred to in his request in response to previous information requests and that it held no further correspondence that would enable it to answer the questions asked by the Applicant. The Authority advised the Applicant that another public authority may hold the information requested and provided him with its contact details.
2. On 20 January 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he considered the information requested should be held by the Authority, particularly since the email he referred to in his request was sent by an employee of the Authority when acting as a representative of the Authority.
3. The Authority notified the Applicant of the outcome of its review on 25 January 2022, upholding its original response without modification. The Authority also referred to the following guidance[[1]](#footnote-1) from the Commissioner: “Remember that FOI only applies to recorded information. It won’t, for example, cover someone’s thoughts or opinions, unless they’ve been recorded in some way.”
4. On 20 July 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 considered that if the Authority had followed its procedures correctly, it would hold a record of the information requested, as the email he had referred to in his request was sent by an employee of the Authority when acting as a representative of the Authority.

## Investigation

1. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
2. On 9 August 2022, the Authority was notified in writing that the Applicant had made a valid application. The case was subsequently allocated to an investigating officer.
3. 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 relating to why it was satisfied that it did not hold the information requested.

## Commissioner’s analysis and findings

1. 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

1. 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.
2. 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. 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.
3. 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 of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.
4. The Commissioner also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what the authority should hold, ultimately the Commissioner’s role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the authority.

*The Authority’s submissions*

1. The Authority noted that the Applicant’s information request regarded information relating to an email that it had previously provided to him in response to a different information request.
2. The Authority explained that the Applicant had been trying to find out the process to get added to the stoma list and the information he had requested related to drug/appliance formulary for procurement.
3. The Authority stated that information in relation to the review process of formulary, including the membership of advisory groups and the addition and removal of products, is not held by the Authority.
4. The Authority explained that stoma supplies were previously procured and added to the Scottish Drug Tariff but are now managed by NHS Scotland’s National Procurement Service, who maintain a list of those items which may be ordered by authorised prescribers on the appropriate lists of NHS Health Boards.
5. The Authority noted that the email referred to in the Applicant’s information request was sent by one of its employees, a stoma clinical nurse specialist, as part of their role as the Authority’s representative on the Scottish Stoma Care Clinical Nurse Specialist Group.
6. The Authority explained that this is a national group whose membership comprises stoma clinical nurse specialists from each NHS Health Board in Scotland and that the group reports directly to the National Scottish Executive Nurse Director Group.
7. The Authority stated that both of those groups are national groups and it does not, for example, clerk meetings between those groups or hold the minutes of those meetings.
8. The Authority explained it would therefore not be expected to hold the information requested, although it noted it had previously provided to the Applicant, over a number of information requests, correspondence it held from its representative on the Scottish Stoma Care Clinical Nurse Specialist Group.
9. The Authority stated that it held that correspondence because its representative on the Scottish Stoma Care Clinical Nurse Specialist Group had used their NHS work email (the most appropriate means of communicating with colleagues at other NHS Health Boards) when corresponding in that capacity.
10. While the Authority had, in response to an earlier information request, disclosed to the Applicant the email he referred to in his request, it explained that, in line with its Email Policy & Best Practice Guidance, it was not required to retain such correspondence as it was of “transitory” nature. That is, “only needed for a short period of time and not required to document [the Authority’s] business”.
11. The Authority stated that the email in question was not connected to its functions, but was, as rehearsed earlier, sent by one of its employees in their capacity as a representative on a national group.
12. The Authority noted that it had advised the Applicant that the information he had requested may instead be held by another public authority.
13. The Authority provided evidence of the previous information requests made by the Applicant and explained that, in the circumstances, it did not consider it necessary to complete a search form for this request for the reasons explained earlier and because it had provided all of the information it held in response to the Applicant’s previous requests for information.
14. In summary, the Authority was satisfied that the requested information (i.e. information relating to the email it previously disclosed to the Applicant) was not held.

*The Applicant’s submissions*

1. The Applicant stated that had the Authority simply said that it did not hold “notes” or “minutes” relating to the email in his request, then he would have made a complaint to the Authority.
2. However, the Applicant explained that the Authority’s response and review outcome had linked its claim that it did not hold the information requested to the information being “separate” from the Authority.
3. The Applicant therefore considered that the Authority would, if it had followed its procedures correctly, hold the information requested because the communication trail related to an employee of the Authority when acting as a representative of the Authority.

*The Commissioner’s view*

1. Having considered all relevant submissions and the terms of the request, the Commissioner is satisfied that the Authority took adequate and proportionate steps in the circumstances to establish whether it held any information that fell within the scope of the Applicant’s request.
2. Given the nature of the information requested, the explanations provided by the Authority, the information it had disclosed in response to previous information requests and the time between the date of the email and the Applicant’s information request, the Commissioner is satisfied, on balance, that the Authority does not (and did not, on receipt of the request) hold any information falling within the scope of the Applicant’s request.
3. While the Applicant believed and expected the specified information to be held by the Authority, the Commissioner is satisfied, on balance, that this was not the case.
4. The Commissioner recognises that the Applicant considers that the Authority should, if it had followed its procedures correctly, hold the information requested. Whether a public authority should hold information which it does not hold is not a matter for the Commissioner to decide.
5. The Commissioner also notes that the Authority, in line with its duty to provide advice and assistance under section 15 of FOISA, advised the Applicant of a different public authority that might hold information falling within the scope of his request.
6. The Commissioner therefore finds that the Authority was correct to give notice, in terms of section 17(1) of FOISA, that it did not hold the information requested.

***Other matters***

1. In general terms, FOI law only provides a right of access to information which has been recorded by an authority.
2. Requesters should bear this in mind when wording requests, and try to ask for information which is likely to be recorded and held. Asking, for example, for correspondence or documentation relating to a particular issue is generally likely to be more precise than asking for specific answers to specific questions (particularly where those answers cannot easily be linked to recorded information).
3. Equally, every public authority has a duty to advise and assist people who are making requests for information. This includes helping requesters to formulate requests that give them the best opportunity to receive the information that they are interested in.
4. The Commissioner also notes that the Authority stated that it had previously disclosed to the Applicant communication between members of the Scottish Stoma Care Clinical Nurse Specialist Group as it was obliged, under FOISA, to do so as the emails were held within its email system.

## Decision

The Commissioner finds that the Authority 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 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.

**Cal Richardson**

**Deputy Head of Enforcement**

**24 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.”

…

(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.

…

(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).

1. [Your Rights FAQs | Scottish Information Commissioner (itspublicknowledge.info)](https://www.itspublicknowledge.info/your-rights-faqs) [↑](#footnote-ref-1)