



Scottish Information
Commissioner
www.foi.scot

Decision Notice 040/2025

Proposed Maggie's Centre in Dumfries and Galloway

Authority: Dumfries and Galloway Health Board

Case Ref: 202401289

Summary

The Applicant asked the Authority for information relating to the decision not to fund a proposed Maggie's Centre. The Authority provided some information it held but stated that any other information would be held by Dumfries and Galloway Health Board Endowment Fund, which was not subject to FOISA. The Commissioner investigated and found that any further information in the Authority's possession relevant to the request would be held by the Authority for the purposes of FOISA. He required the Authority to reconsider the request and issue a revised review outcome.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (4) and (6) (General entitlement); 47(1) and (2) (Application for decision by Commissioner)

The National Health Service (Scotland) Act 1978 (the 1978 Act) sections 82 (Use and administration of certain endowments and other property held by Health Boards); 83 (Power of Health Boards and local health councils to hold property on trust); 84A (Power to raise money, etc., by appeals, collections, etc.)

Background

1. On 22 July 2024, the Applicant made a request for information to the Authority. She asked for:
 - (1) "All recorded information held (including information contained in correspondence) relating to a proposed Maggie's Centre in Dumfries and Galloway."

- (2) This also includes relevant minutes from the Dumfries and Galloway health board endowment committee (excluding the meeting from 18 March 24 which is subject to a separate FOI)."
2. The Applicant stated that she was seeking information since 2014.
 3. The Authority responded on 13 August 2024. For part one the request, it disclosed one document, with personal information redacted, and gave notice that any other recorded information held was exempt from disclosure under section 30 of FOISA. For part two of the request, it stated that the Endowment Fund is a registered regulated charity and that endowment charities are not bound to respond to requests for information under FOISA. It further stated that endowment charities do not carry out public functions and that, as the Authority did not direct the Endowment Fund's activities, it was unable to comply with part two of the request.
 4. On 26 August 2024, the Applicant wrote to the Authority requesting a review of its decision. She stated that she was dissatisfied with the decision because she considered that it was in the public interest to publish the information requested and that, given the overlap between the members of the Authority's board and the Endowment Fund's board of trustees, she did not accept that the Authority did not direct the activities of the Endowment Fund.
 5. The Authority notified the Applicant of the outcome of its review on 24 September 2024. For part one of the request, it overturned its previous reliance upon section 30 of FOISA for all information (other than that contained in the letter already disclosed), on the basis that any information relating to the Maggie's Centre would be held by the Endowment Fund. For part two of the request, the Authority upheld its original response.
 6. On 24 September 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. She stated she was dissatisfied with the outcome of the Authority's review because she believed the Authority must hold more information than it had identified and because she did not believe the Endowment Fund was completely separate to the Authority.

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 8 October 2024, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information it considered it held for the purposes of FOISA, and the case was 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 primarily related to the relationship between the Authority and the Endowment Fund and how it had established what information it held relevant to the request.
10. The Applicant did not challenge the application of the exemption in section 30 of FOISA in her appeal to the Commissioner. The Commissioner will therefore not consider this exemption further in his decision notice.

Commissioner's analysis and findings

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

Whether information is held for the purposes of FOISA

12. 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 are not relevant in this case. The information to be given is that held by the authority at the time the request is received (section 1(4) of FOISA).
13. Section 3(2) of FOISA defines the circumstances in which information is held by a Scottish public authority. Section 3(2)(a)(i) of FOISA states that if a Scottish public authority holds the information on behalf of another person, then the information is not held by that authority for the purposes of FOISA. Consequently, if the information requested in any given case is held on behalf of another person, the authority must give the applicant notice under section 17(1) of FOISA.
14. The word "held", in relation to information requested under FOISA, has a specific meaning in section 3(2)(a)(i) of FOISA. When information is present within a Scottish public authority's premises and systems only because it is held on behalf of another person (in the legal sense, i.e. including another organisation) - or (in terms of section 3(2)(a)(ii)) the information was supplied by the Crown or UK government and held in confidence - that information is not held by the authority for the purposes of FOISA.
15. There is no suggestion that section 3(2)(a)(ii) of FOISA applies so, for the purposes of this decision, information will be held by the Authority if it is held by the Authority otherwise than on behalf of the Endowment Fund.

The Applicant's submissions

16. The Applicant argued that the Authority and the Endowment Fund are fundamentally intertwined as almost every member of the committee of the Endowment Fund is on the board of the Authority, with the chairman of the Endowment Fund also being the chairman of the board of the Authority.

The Authority's submissions

17. It is the Authority's position that any information it possesses, other than the letter already disclosed, would be held on behalf of the Endowment Fund.
18. The Authority submitted that all Scottish NHS charities are registered with the Office of Scottish Charity Regulator (OSCR). As such, Scottish NHS charities are bound by both charity law and by NHS legislation, namely the Charities and Trustee Investment (Scotland) Act 2005 and National Health Service (Scotland) Act 1978 (the 1978 Act). The 1978 Act allows NHS bodies to hold charitable property on trust, to define the charitable purpose and allows the Scottish Ministers various powers including the appointment of trustees.
19. The Authority stated that the Endowment Fund is, as a registered charity, a separate legal entity from the Authority. This means that core NHS business cannot influence the Endowment Fund's decision-making processes. Although trustees are appointed by the Scottish Government, they must always put the interests of the Endowment Fund before those of the Authority (when undertaking their trustee duties).

20. The Authority explained that the beneficiaries of the Endowment Fund are the Authority's patients, not the Authority itself. The statutory remit of the Endowment Fund means that donations received, unless specified by the donor, are held to benefit patients of the whole of the NHS. In practice, though, it is recognised that donors are giving support to the Authority or a particular ward, service or department.
21. The Authority explained that, as a corporate trustee, it manages the property of the Endowment Fund. However, the members of the Authority must manage this property in the interests of the Endowment Fund and its beneficiaries when undertaking their trustee duties (i.e. separate from their duties at the Authority).
22. The Authority also explained that, in practice, the Authority and the Endowment Fund manage their funds separately, with distinct bank accounts and auditors – although these funds are consolidated for some reporting purposes.

The Commissioner's view

23. The Commissioner has fully considered the Authority's submissions and [the charter of the Endowment Fund](#)¹.
24. The Commissioner notes that the Endowment Fund is a registered charity with OSCR. However, he is not convinced that the Endowment Fund is a separate entity from the Authority for FOISA purposes – particularly given that the Authority is the "corporate trustee" of the Endowment Fund. OSCR registration does not, of itself, create a separate legal entity and the Authority's designation under Schedule 1 of FOISA makes no distinction between the capacities in which the Authority might be acting for FOISA purposes.
25. In the Commissioner's view, this is not dissimilar to the position of local authorities, which act as sole trustee for the purposes of certain endowments and in relation to the Common Good. He has never regarded information held by a local authority in these capacities as held other than by the relevant authority for FOISA purposes.
26. In this case, even if the Endowment Fund is to be regarded as a separate entity, the Commissioner would still find it necessary to consider whether the information in question is (or would be), for the purposes of section 3(2) of FOISA, held by the Authority.
27. In considering whether an authority holds information for the purposes of FOISA, the Commissioner will consider a number of factors, including (but not limited to):
 - whether there is an appropriate connection with the authority, meaning that the information is for the purposes of carrying out its functions as a public authority (as described by the Upper Tribunal (England and Wales) in its decision [University of Newcastle v Information Commissioner \[2011\] UKUT 185 \(AAC\)](#)² and expressly approved by the Court of Session in [Graham v Scottish Information Commissioner \[2019\] CSIH 574](#))³
 - the content of the information
 - the circumstances in which it was created, and

¹ <https://dghbef.org/wp-content/uploads/2023/01/DGE-001-Endowment-Charter-and-Standing-Orders-v9.pdf>

² <https://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=3263>

³ <https://web.archive.org/web/20240517235106/https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2019csih57.pdf?sfvrsn=0>

- how it is held.

28. In this case, irrespective of his comments at paragraphs 24 and 25, the Commissioner considers the key factor to be whether there is an appropriate connection between the information and the Authority.
29. The Authority has various powers, set out in sections 82, 83 and 84A of the 1978 Act, to “stimulate giving,” hold property “on trust” and to use property held on trust or raised through this “giving” for certain purposes. As set out in section 5.1 of the Endowment Fund’s charter and standing orders, the Authority exercises these powers through the Endowment Fund.
30. The Commissioner therefore considers that any information in the Authority’s possession relating to the Endowment Fund’s holding or use of this property relates to a power vested, by statute, in the Authority. Consequently, he finds that any information relating to this property is held (to the extent to which they are indeed separate) both for the Endowment Fund’s purposes and the purposes (specifically, the exercise of its statutory powers) of the Authority.
31. As decision-making around potential funding of a Maggie’s Centre would involve decision making about property (specifically funds) acquired and used under the aforementioned provisions of the 1978 Act, the Commissioner considers that there is an appropriate connection between information relating to this matter and the Authority, with the result that such information would be held by the Authority for the purposes of section 3(2) of FOISA.
32. While he considers the key factor to be whether there is an appropriate connection between the information and the Authority, the Commissioner has also considered whether the Authority exercises, or can exercise, control over the information.
33. The Authority advised the Commissioner that it has no control over this information, as it considers the Endowment Fund to be a separate body. However, it also confirmed that no memorandum of understanding, or similar document, exists regulating the relationship between the Authority and the Endowment Fund.
34. Given the Authority and the Endowment Fund share facilities, IT and leadership (albeit with certain obligations when members of the board are acting as trustees), the Commissioner is not satisfied that the informal understanding described by the Authority is sufficient to demonstrate that the Authority does not exercise, or could not exercise, control over the information.
35. Having considered all of the submissions provided in this case, the Commissioner finds that any information in the Authority’s possession relevant to the request would be held by the Authority in terms of section 3(2) of FOISA.
36. To date, other than the document it disclosed to the Applicant, the Authority’s searches for information relevant to the request have been predicated upon the assumption that any such information would not be held by the Authority for the purposes of FOISA. In the circumstances, the Commissioner must require the Authority to take further steps to identify and locate any relevant information it actually held at the time of asking.
37. The Commissioner requires the Authority to carry out a further review, to undertake fresh searches for information relevant to the request and to respond to the Applicant afresh (all in terms of section 21 of FOISA).

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.

In notifying the Applicant that any information relevant to the request, other than the document it disclosed, would not be held by it for the purposes of section 3(2) of FOISA, the Commissioner finds that the Authority failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the Authority to carry out a further review, to undertake fresh searches for information relevant to the request and to respond to the Applicant afresh (all in terms of section 21 of FOISA), by **Monday 7 April 2025**.

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.

Euan McCulloch
Head of Enforcement

19 February 2025