

Decision Notice

Decision 012/2017: Dr David Neilson and Highland Health Board

Casualty department and out of hours GP cover rotas

Reference No: 201601702

Decision Date: 25 January 2017



Scottish Information
Commissioner

Summary

Highland Health Board (NHS Highland) was asked for Casualty department and out of hours GP cover rotas for Dunoon Hospital and the Cowal peninsula.

NHS Highland disclosed anonymised versions of the rotas, without showing which doctors worked each shift.

The Commissioner found that NHS Highland did not comply fully with FOISA in responding to the request. She found that there was a legitimate interest in three of the withheld names and that this interest outweighed the interests of the data subjects in the information remaining private. She therefore required NHS Highland to disclose the names.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(e)(ii) (Effect of exemptions); 19 (Content of certain notices); 21(4) (Review by Scottish public authority); 38(1)(b), (2)(a)(i), (2)(b) and (5) (definition of "the data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of "personal data"); Schedule 1 (The data protection principles, Part 1 - the principles) (the first, second and sixth data protection principles); Schedule 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (conditions 1 and 6)

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 9 June 2016, Dr Neilson made a request for information to NHS Highland. The information he requested was

“... copies of the rotas as worked for the casualty department and GP OOH [out of hours] cover for Dunoon hospital and the Cowal peninsula from June 2015.”

Dr Neilson also asked for any “proposed rotas” held for these same departments.
2. NHS Highland responded on 29 June 2016, disclosing anonymised versions of the rotas to Dr Neilson.
3. On 24 August 2016, Dr Neilson wrote to NHS Highland, requesting a review of its decision. He queried the redaction of doctors’ names, given he was seeking details of the rotas actually worked and who worked them. He also complained that there was no explanation of his right to seek a review.
4. NHS Highland notified Dr Neilson of the outcome of its review on 5 September 2016, in which it upheld its original response without change. It apologised to Dr Neilson for not advising him of his right to request a review, and provided information on his rights if he remained dissatisfied.

5. On 15 September 2016, Dr Neilson wrote to the Commissioner. Dr Neilson applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He expressed dissatisfaction with the review outcome because:
 - (i) NHS Highland continued to withhold information under section 38(1)(b) of FOISA, identifying the doctors who worked the shifts listed on the rotas. He did not believe the authority was justified in doing this.
 - (ii) the response letter still failed to advise him correctly of his rights if dissatisfied: in particular, he took issue with what he perceived as NHS Highland's offer of a further review (which he did not believe FOISA allowed for).

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Dr Neilson made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 21 September 2016, NHS Highland was notified in writing that Dr Neilson had made a valid application. NHS Highland was asked to send the Commissioner the information withheld from Dr Neilson. NHS Highland provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. NHS Highland was invited to comment on this application and answer specific questions, focusing on its application of section 38(1)(b) of FOISA.
9. NHS Highland provided submissions on 25 October 2016. Dr Neilson also provided submissions on his legitimate interests and gave permission for these to be shared with NHS Highland. Having considered these, NHS Highland provided additional comments supporting its application of section 38(1)(b).

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Dr Neilson and NHS Highland. She is satisfied that no matter of relevance has been overlooked.

Section 38(1)(b) - Personal information

11. NHS Highland withheld the doctors' names listed in the work rotas requested by Dr Neilson under this exemption.
12. The exemption in section 38(1)(b) of FOISA, as claimed by NHS Highland, exempts personal data where disclosure to a member of the public, otherwise than under FOISA, would contravene any of the data protection principles (contained in Schedule 1 to the DPA).
13. NHS Highland submitted that the first, second and sixth data protection principles would be breached by disclosure of the withheld information.

Does the withheld information comprise personal data?

14. "Personal data" are defined in section 1(1) of the DPA as "data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller" (the full definition is set out in Appendix 1).
15. The Commissioner has considered the submissions received from NHS Highland on this point, along with the withheld information. The Commissioner is satisfied that the information withheld comprises personal data. It is possible to identify individuals from the information itself. The withheld information clearly says enough about the activities of the individuals in question that it can be said to relate to them.

Would disclosure contravene the first data protection principle?

16. NHS Highland submitted that disclosure would breach the first data protection principle, which states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met. In the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA must also be met. The Commissioner is satisfied that the withheld information does not fall into any of the categories of sensitive personal data in section 2 of the DPA.
17. NHS Highland was of the opinion that disclosure (which is a form of processing) would not meet any of the conditions listed in Schedule 2 of the DPA and, accordingly, would not be lawful processing.
18. When considering the conditions in Schedule 2, the Commissioner has noted Lord Hope's comment in the case of *Common Services Agency v Scottish Information Commissioner [2008] UKHL 47*¹ that the conditions require careful treatment in the context of a request for information under FOISA, given that they were not designed to facilitate the release of information, but rather to protect personal data from being processed in a way that might prejudice the rights, freedoms or legitimate interests of the data subject.
19. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. These three aspects are interlinked. For example, if there is a specific condition in Schedule 2 which permits disclosure, it is likely that disclosure will also be fair and lawful.
20. The Commissioner will now consider whether there are any conditions in Schedule 2 which would permit the requested information to be disclosed. If any of these conditions can be met, she must then consider whether such disclosure would be fair and lawful.

Can any of the conditions in Schedule 2 be met?

21. Condition 1 applies when the data subjects (i.e. the individuals to whom the data relate) have consented to disclosure of the information. During the investigation, NHS Highland stated that it had not approached the doctors seeking their consent to disclose their names.
22. The Commissioner accepts that consent has not been given by the data subjects in this case, and therefore condition 1 in Schedule 2 cannot be met.
23. The Commissioner's view is that condition 6 in Schedule 2 is the only one which might permit disclosure in response to Dr Neilson's request. Condition 6 allows personal data to be

¹ <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>

processed if the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects (the individuals to whom the data relate).

24. There are a number of different tests which must be satisfied before condition 6 can be met. These are:
- (i) Does Dr Neilson have a legitimate interest or interests in obtaining the personal data?
 - (ii) If yes, is the disclosure necessary to achieve those legitimate interests? In other words, is the processing proportionate as a means and fairly balanced as to ends, or could these interests be achieved by means which interfere less with the privacy of the data subject?
 - (iii) Even if the processing is necessary for Dr Neilson's legitimate interests, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects?
25. There is no presumption in favour of disclosure of personal data under the general obligation laid down by section 1(1) of FOISA. Accordingly, the legitimate interests of Dr Neilson must outweigh the rights and freedoms or legitimate interests of the data subjects before condition 6 will permit disclosure. If the two are evenly balanced, the Commissioner must find that the Council was correct to refuse to disclose the information to Dr Neilson.

Does Dr Neilson have a legitimate interest or interests in obtaining the personal data?

26. Dr Neilson submitted that he was concerned about the working practices of three particular doctors, which he believed could impact on patient safety. He had other information about their working patterns, aggregated over a number of different commitments, and needed the NHS Highland data to complete the picture.
27. Dr Neilson explained the context in which his concerns had arisen. He had serious concerns about fatigue arising from the doctors' work patterns and its impact on patient safety. He believed the general public would share these concerns. He highlighted the mistakes that could happen as a result of fatigue and the relentless and exhausting nature of daytime general practice. Additional (voluntary) out of Hours (OOH) commitments such as those listed in the withheld information needed to be fitted around the day time commitments in such a way as to ensure safety at all times. Dr Neilson queried whether this was the case here. He submitted that there was no available official channel for addressing concerns arising from aggregate work commitments such as these.
28. Dr Neilson provided his consent to share his legitimate interest submissions (provided during the investigation) with NHS Highland. NHS Highland was invited to comment on these, and did so. It acknowledged that Dr Neilson had serious concerns, but submitted that these were addressed by the redacted information provided to him (this latter point is considered further below).
29. Having considered these submissions, the Commissioner is satisfied that Dr Neilson has a legitimate interest in patient safety, as does the public. She concludes that this interest extends to the rotas for the three doctors he has identified in his submissions, but not to those for any the other doctors named in the rotas.

30. In light of the above, the Commissioner is satisfied that NHS Highland correctly applied section 38(1)(b) to some of the doctors' names in the rotas.
31. The Commissioner will now continue to consider only the names of the three doctors in which Dr Neilson has established a legitimate interest.

Is disclosure of the information necessary for the purposes of these legitimate interests?

32. The Commissioner must now consider whether disclosure of the three names would be necessary to meet the identified legitimate interest. This will include consideration of whether the legitimate interest might be met by alternative means which interfere less with the privacy of the data subject.
33. NHS Highland commented in its submissions that there were more appropriate means of pursuing Dr Neilson's concerns. It suggested that pursuing them through its Clinical Governance Directorate, in the first instance, would offer a more robust and accurate investigation. If he did not wish to take the matter up internally, the Scottish Government's policy on whistle blowing might be useful.
34. NHS Highland also submitted that the information in the redacted documents was sufficient for Dr Neilson's purposes, providing a means which interfered less with the privacy of the data subject than providing the withheld information.
35. Although NHS Highland was given the opportunity to comment on Dr Neilson's legitimate interest submissions, there is nothing in the authority's submissions to indicate that the suggested alternative means of addressing Dr Neilson's concerns would be capable of going to the core of these concerns, which relate to hours worked in aggregate across a number of commitments (not all within NHS Highland) rather than hours worked in the one employment. The submissions also fail to explain how anonymised data would be capable of addressing concerns relating to three particular doctors, working the rotas along with a number of others.
36. In the circumstances, the Commissioner can see no other way in which the identified legitimate interest can be met in full, without the names of the three doctors being disclosed to Dr Neilson (or without anonymised data being disclosed for those three alone, which would carry with it a substantial risk of identification). Disclosure is therefore necessary for Dr Neilson's legitimate interests.

Would disclosure nevertheless be unwarranted by reason of prejudice to the rights and freedoms of legitimate interests of the data subjects?

37. NHS Highland submitted that disclosure of the withheld information would prejudice the rights, freedoms and legitimate interests of the data subjects (the three doctors). It identified risks to the safety and security of the staff and their places of residence, on the basis that the information would identify those members of staff and provide indications of their whereabouts over an extended period. NHS Highland commented that such information would include their places of work, their duty days and shift times. It argued there was a higher potential for lone working in the OOH Service, particularly in remote and rural locations. Disclosure, it argued, would not only enable staff to be identified but also heighten anxiety because their whereabouts could be predicted.
38. NHS Highland went on to argue that disclosure created the opportunity for any unscrupulous member of the public to pursue named staff (i.e. "stalking"), thus increasing the potential for staff concern and distress. It suggested it had first-hand knowledge of this occurring but did not specify whether it occurred at any of the locations covered by the requested rotas or in

connection with any of these three doctors. In this connection, it highlighted concerns about patterns of working being predicted, submitting that rotas usually operated on a rolling basis, allowing anyone to determine when a particular individual would start, finish and be at work at a particular location: it did not, however, explain the intervals at which shift patterns would be repeated, or provide any further detail in relation to the recurrence of a pattern for allocating shifts.

39. NHS Highland concluded that it was reasonable to withhold the names to protect staff, for whom it had a clear duty of care.
40. NHS also suggested there was a link between the withheld data (which relates to the doctors' professional lives) and their private lives. NHS Highland contended that the doctors' names, with the numbers of shifts worked, would reveal personal choices to supply OOH services and enable comparisons of shift numbers and highlight which GPs received remuneration for carrying out additional duties. It considered this would be distressing for the doctors concerned and could have implications for future recruitment for OOH services.
41. In coming to a view on this, the Commissioner has taken account of the submissions by both parties and her own briefing on the exemptions relating to personal data published on her website².
42. Whilst the Commissioner understands the points being made on the risks of stalking generally, there is nothing in the submissions to suggest the risk is real and more than hypothetical here, in relation to the individuals and locations under consideration. In any case, by the time of the request for review was submitted by Dr Neilson, the data described in the request was largely historical as the shifts had already been worked. If there was a recurring pattern to allocating shifts to particular doctors, which would give an indication of future rotas, NHS Highland failed to identify one in its submissions. The Commissioner is not satisfied that any such pattern is readily apparent from the withheld information.
43. The names of these three doctors, in the context of the rotas requested by Dr Neilson, clearly relate to their public and professional lives, as opposed to their private lives. GP practices routinely show when doctors are scheduled to be available – as would be expected. The Commissioner also notes that equivalent information has been disclosed under FOISA by the other health board to which Dr Neilson's concerns relate. There is nothing in NHS Highland's submissions here to suggest why the position in NHS Highland should be any different.
44. The three doctors hold significant public-facing roles. It is not inconceivable that these doctors might expect their patients and families of patients to have a good idea of when they are on duty and which services they provide, including any work outwith the relevant GP practices, given that they run busy GP surgeries providing services with a direct impact on public health and safety. She considers the doctors must have some expectation that their identities in these rotas might be subject to disclosure to the public.
45. The Commissioner is not sufficiently persuaded by NHS Highland's arguments as to the relationship between the withheld information and the individuals' private lives. She has already discounted any established link between the information and a risk of stalking. From the submissions offered, she is not satisfied that the withheld information would be

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>

sufficiently revealing of remuneration levels to impinge on the doctors' private lives. From the withheld information, it might be clear that some doctors are working more hours than others and can be expected to receive more remuneration as a result, but that is all. Pay scales for 2016 are published by the Scottish Government³ but there is nothing in the rotas to indicate where each of the three doctors is placed on the pay scale.

46. The Commissioner is also of the view that disclosing the withheld data would be less intrusive than other data currently (properly) in the public domain relating to doctors. For example, surgical mortality rates for individual consultants are routinely published by NHS Scotland online, with explanatory comments for the public, and have been since the Scottish Information Commissioner's *Decision 065/2005 – Mr Camillo Fracassini of The Sunday Times and the Common Services Agency for the Scottish Health Service* and *Decision 066/2005 – Mr Peter MacMahon of The Scotsman and the Common Services Agency for the Scottish Health Service*. In all the circumstances, it is difficult to see how disclosing these doctors' names as part of the requested rotas would constitute an unfair intrusion into their privacy.
47. Having drawn these conclusions, the Commissioner finds, on balance, that condition 6 in Schedule 2 (to the DPA) can be met in this case in relation to disclosure of the three doctors' names in the rotas.
48. As the Commissioner has not accepted that disclosure of the personal data would lead to unwarranted prejudice to the rights, freedoms or legitimate interests of the data subjects, the Commissioner also concludes, for the same reasons, that disclosure of the withheld information would be fair and (given a condition permitting disclosure) lawful.
49. The Commissioner therefore finds that disclosure of some of the withheld information (the names of three doctors) would not breach the first data protection principle.

Would disclosure breach the second and/or the sixth data protection principle?

50. NHS Highland also submitted that disclosure would breach the second and sixth data protection principles.
51. The text of these data protection principles is reproduced in the Appendix 1. With regard to these principles, NHS Highland simply stated that its staff had the right to have their data processed "for limited purposes and in an appropriate way" and "in line with their personal rights", before asserting that the second and sixth principles would be breached by disclosure of the withheld personal data. It did not explain how disclosure would bring these breaches about. All of its remaining submissions appear to focus on the first data protection principle.
52. On the basis of the submissions provided by NHS Highland, the Commissioner is unable to conclude that disclosure of the withheld information would breach either the second or the sixth data protection principle.
53. The Commissioner now requires NHS Highland to provide Dr Neilson with the names of three doctors, within the requested rotas, by 13 March 2017.

³ [http://www.sehd.scot.nhs.uk/pcs/PCS2016\(DD\)01.pdf](http://www.sehd.scot.nhs.uk/pcs/PCS2016(DD)01.pdf)

Other matters

54. In his application, Dr Neilson complained that NHS Highland had failed to advise him correctly of his rights of review and appeal.
55. NHS Highland accepted that its responses did not comply with the requirements of section 19(b) of FOISA, as it failed to give details of the rights of application to the authority and the Commissioner conferred by section 20(1) and 47(1) of FOISA. The failure was acknowledged in NHS Highland's review outcome, but this still offered confusing information about internal remedies prior to applying to the Commissioner.
56. Assistance has been provided to NHS Highland to address this matter, in keeping with the Commissioner's Interventions Procedures (level 1 intervention)⁴. Advice was also provided to NHS Highland during this investigation on removing confusing text regarding the review process under FOISA. NHS Highland has taken steps to amend its template letters accordingly.

Decision

The Commissioner finds that Highland Health Board (NHS Highland) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Dr Neilson.

The Commissioner finds that:

- (i) NHS Highland was correct to withhold some personal data covered by his request under section 38(1)(b) of FOISA. In this respect, it complied with Part 1.
- (ii) NHS Highland was wrong to withhold the names of three doctors under section 38(1)(b) of FOISA. In this respect NHS Highland failed to comply with Part 1.
- (iii) NHS Highland's response did not comply with the requirements of section 19(b) of FOISA. In this respect, too, NHS Highland failed to comply with Part 1.

The Commissioner therefore requires NHS Highland to disclose the names of the three doctors to Dr Neilson **13 March 2017**.

Appeal

Should either Dr Neilson or Highland Health Board 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.

⁴ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Briefings.aspx>

Enforcement

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

Margaret Keyse
Head of Enforcement

25 January 2017

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.

...

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

2 Effect of exemptions

(1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

(a) the provision does not confer absolute exemption; and

...

(2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

(e) in subsection (1) of section 38 –

...

(ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

...

19 Content of certain notices

A notice under section 9(1) or 16(1), (4) or (5) (including a refusal notice given by virtue of section 18(1)) or 17(1) must contain particulars-

(a) of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and

(b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).

21 Review by Scottish public authority

...

(4) The authority may, as respects the request for information to which the requirement relates-

- (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
- (b) substitute for any such decision a different decision; or
- (c) reach a decision, where the complaint is that no decision had been reached.

...

38 Personal information

(1) Information is exempt information if it constitutes-

...

- (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;

...

(2) The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

- (i) any of the data protection principles; or

...

- (b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

...

(5) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;

"data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;

...

Data Protection Act 1998

1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

Schedule 1 – The data protection principles

Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

...

6. Personal data shall be processed in accordance with the rights of data subjects under this Act.

...

Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

1. The data subject has given his consent to the processing.

...

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

...

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