

Decision Notice 017/2021

Whistleblowing Policy

Applicant: The Applicant

Public authority: Greater Glasgow and Clyde Health Board

Case Ref: 202000231



Scottish Information
Commissioner

Summary

NHSGGC was asked for information from a named member of staff as to why she did not consider the whistleblowing policy applicable to the contents of a particular email.

NHSGGC notified the Applicant that it held no information falling within the scope of her request.

The Commissioner investigated and found that NHSGGC had failed to respond to the Applicant's request for review within the required 20 working days, but accepted that it held no recorded information falling within the scope of the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Notice that information is not held); 21(1) (Review by Scottish public authority)

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 September 2018, the Applicant made a request for information to Greater Glasgow and Clyde Health Board (NHSGGC). The information requested was information from a named staff member as to why she did not consider the whistleblowing policy applicable to the contents of a particular email.
2. NHSGGC responded on 27 November 2018, apologising for the significantly late response and applying section 17(1) of FOISA in giving notice that it held no information falling within the scope of the request, in addition to information disclosed to the Applicant already.
3. On 29 November 2018, the Applicant wrote to NHSGGC, requesting a review of its decision as she did not agree that no additional information was held.
4. NHSGGC notified the Applicant of the outcome of its review on 15 August 2019, confirming that no information was held.
5. On 14 February 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of NHSGGC's review, because of the time taken to respond to her requirement for review and because she believed there must be recorded information regarding when and why the authority could – in her view – disregard safety concerns raised by employees.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 21 February 2020, NHSGGC was notified in writing that the Applicant had made a valid application. 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. NHSGGC was invited to comment on this application and to answer specific questions. These related to the searches carried out to establish what information was held and the time taken to respond to the request and requirement for review.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both the Applicant and NHSGGC. He is satisfied that no matter of relevance has been overlooked.

Section 17(1) Information 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 falling within the scope of the request and 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 an 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 Commissioner notes that the Applicant believes NHSGGC must hold the information requested.
13. In its submissions to the Commissioner, NHSGGC confirmed the searches and enquiries it undertook to ascertain whether it held information falling within the scope of the Applicant's request, and provided details of these, including evidence confirming that they had been carried out. These included searches of relevant electronic records and consultation with relevant staff, including the named individual. The conclusion of the searches and enquiries was that no information was held falling within the scope of the request being considered.
14. The standard 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 considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. Ultimately, 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. Having considered all the relevant submissions, the Commissioner accepts that NHSGGC took adequate, proportionate steps in the circumstances to establish what information it held. Given the explanations and submissions provided, he is satisfied that NHSGGC did not hold the information under consideration here and was correct to give the Applicant notice, in terms of section 17(1) of FOISA, that it held no information falling within the scope of the request that had not been provided already.

Timescale for compliance

16. Section 21(1) of FOISA gives authorities a maximum of 20 working days after receipt of the requirement to comply with a requirement for review, subject to qualifications which are not relevant in this case.
17. It is a matter of fact that NHSGGC failed to respond to the Applicant's review requirement in the timescale by a considerable margin, so the Commissioner must find that in this respect it failed to comply with section 21(1) of FOISA.

Decision

The Commissioner finds that Greater Glasgow and Clyde Health Board (NHSGGC) 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 by informing the Applicant, in line with section 17(1) of FOISA, that no information was held falling within the scope of her request, NHSGGC complied with Part 1.

However, he also finds that NHSGGC breached section 21(1) of FOISA, by failing to respond to the Applicant's requirement for review within 20 working days.

The Commissioner does not require NHSGGC to take any action in respect of these failures, in response to the Applicant's application.

Appeal

Should either the Applicant or NHS Greater Glasgow and Clyde 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.

Margaret Keyse
Head of Enforcement

29 January 2021

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.

...

- (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 be made before the information is given.

...

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.

...

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

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Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info