

Decision Notice 029/2020

Information relating to a former medical practice

Applicant: The Applicant

Public authority: West Dunbartonshire Health and Social Care Partnership Board

Case Ref: 201901081



Scottish Information
Commissioner

Summary

WDHSCPБ was asked for information about a former medical practice.

WDHSCPБ disclosed information to the Applicant for parts a. and d. of her request. It notified her that it did not hold any recorded information for parts b. and c. of the request.

The Commissioner accepted that WDHSCPБ had carried out adequate searches to identify information prior to responding to part a. of the Applicant's request. He also accepted that WDHSCPБ was correct to notify the Applicant that it did not hold any information for part c. of the request.

However, he found that WDHSCPБ was wrong to notify the Applicant that it held no information which would fulfil part b. 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); 73 (Interpretation) (definition of "information")

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 1 October 2018, the Applicant made a request for information to West Dunbartonshire Health and Social Care Partnership Board (WDHSCPБ). The information requested was:
 - a. *All information held by (WDHSCPБ) relating to the petition submitted to [West Dunbartonshire Health and Social Care Partnership] offices and the staff email, including information showing the identity of all WDHSCPБ members with whom the documents were shared.*
 - b. *Information held by (WDHSCPБ) that explains why the views of patients and staff were disregarded by Board members.*
 - c. *The third document was provided to me by WDHSCPБ on 23 August in response to my request for review of the response (received 22 March) to my request made on 22 February 2018. It was described by solicitor [] as "Note of Solicitor to the Committee from the 27th August 2017" (Please see Freedom of Information Review Request –FOI Review/18/0301). Please provide me with:
 - i. *Information held relating to information relayed at the meeting that prompted or could have prompted [] to say "were we blindsided to what was going on?"*
 - ii. *Information held that justifies or could have justified named individual (b) relaying "Fundamental misunderstanding about senior partner ... will be better awareness now."*
 - iii. *Information held relating to [] relaying or relaying something similar to "Has been adventurous ... generated all sorts of interest in all sorts of places".**

iv. *Information held that justifies or could have justified [] relaying “In the past we have supported practices to manage themselves ... Couldn’t do this here”.*

d. *Please provide me with the minutes of the WDHSCP meeting that took place on 27 August 2017. These are not available online.*

2. WDHSCP responded on 29 October 2018. It made the following responses to the Applicant’s request:
 - a. The petition was hand delivered to WDHSCP’s Chief Officer on 10 July but no action was taken and the petition was not shared with the Board members.
 - b. It did not hold any information explaining if the views of patients and staff were disregarded.
 - c. In relation to points i. to iv., WDHSCP explained that the only information recorded at the meeting was the note of the Solicitor to the Committee on 23 August. It did not hold any additional information relating to this.
 - d. WDHSCP confirmed that there was no Board meeting on 27 August 2017. A copy of the minute of the Board meeting which took place on 23 August 2017 was provided to the Applicant in response to an earlier request. WDHSCP explained that the Board paper had the incorrect date of 27 August 2017 on the front page, but the meeting took place on 23 August.
3. On 21 November 2018, the Applicant wrote to WDHSCP, requesting a review of its decision for the following reasons:
 - She considered part a. of her request had been narrowly construed and no response had been provided in relation to the staff email. She also identified other shortcomings in the response in relation to the public petition, concluding that relevant information must be held.
 - For part b. of her request, the Applicant considered the response to be disingenuous. She asked the reviewer to read the petition and the staff email in their entirety, reach their own conclusions and then try to locate the information evidencing the decisions taken.
 - In relation to part c., the Applicant again considered the Board had interpreted each part narrowly: in each case, she believed information should be held by the Board which evidenced or justified the statements recorded.
 - For part d., the Applicant explained that she had not been provided with a copy of the minutes of the Board meeting that took place on 23 August 2017 and queried whether an additional meeting had been held on 27 August 2017.
4. WDHSCP notified the Applicant of the outcome of its review on 27 December 2018, responding for each part of the request as follows:
 - a. By way of advice and assistance, it explained what it had confirmed with the Board Members as to action taken in relation to the petition. It provided some further explanation of the context and gave the Applicant a copy of a letter sent by the Chief Officer to councillors. In relation to the staff email, WDHSCP understood there had been a separate FOI response to the Applicant dated 26 November 2018 from NHS Greater Glasgow and Clyde (NHSGGC), which outlined who the staff emails were sent to. It did not understand these emails were sent directly to Board Members and hoped the separate response had answered the Applicant’s query in this regard.

- b. The reviewer confirmed that they had read the petition and also the staff email but were unable to answer the question asked. They could only look at what recorded information was held, rather than explaining views and whether or not they were disregarded. WDHSCPБ notified the Applicant that it upheld its original response that no information was held which would fulfil this part of her request.
 - c. WDHSCPБ explained that the Clerk to the Board's note was a non-verbatim written note of remarks recorded by the Clerk at the time. The note had been provided as information held, but WDHSCPБ considered there was a difficulty in looking behind the remarks recorded and finding any recorded information to justify what was actually said. It therefore confirmed that, for the reasons outlined in its original response and those detailed above, it did not hold recorded information which would fulfil this part of the Applicant's request.
 - d. A copy of the Board report for the meeting of 23 August 2017 was provided. WDHSCPБ apologised for the error in recording of the date of the meeting on the report and confirmed that no additional meeting was held after the meeting of 23 August 2017.
5. On 26 June 2019, the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of WDHSCPБ's review because she believed it was withholding information from her which fell within scope parts a. to c. of her request.

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 17 September 2019, WDHJSCPБ was notified in writing that the Applicant had made a valid application. The case was then 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. WDHSCPБ was invited to comment on this application and to answer specific questions. These related to the Applicant's view that WDHSCPБ held other recorded information which was relevant to parts a. to c. of her request and asked the authority to provide details of the searches it had carried out to ascertain what was held. WDHSCPБ was also invited to respond to specific comments made by the Applicant in her application, regarding her reasons for asserting that it should have held other relevant recorded information.
9. During the course of the investigation, further submissions were sought and received from WDHSCPБ, clarifying the previous responses provided. Further searches were carried out by WDHSCPБ and information located as a result of those searches was disclosed to the Applicant.

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 him by both the Applicant and WDHSCPБ. He is satisfied that no matter of relevance has been overlooked.

11. WDHSCP explained that it is responsible for the governance and operational oversight of WDHSCP, which is the delivery vehicle for health and social care services in its area (apart from NHS acute hospital services). Staff remain employed, however, by NHS Greater Glasgow and Clyde and West Dunbartonshire Council (the Council): the arrangements for information management are considered further below.

Information held by the WDHSCP – part a. of the request

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, 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.
13. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with the information an applicant believes the authority should hold, although an applicant's reasons may be relevant to the investigation of what is actually held.
14. 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.

Submissions from the Applicant

15. WDHSCP considered it had provided responses to the Applicant's request and requirement for review which fulfilled part a. of her request.
16. However, in her application to the Commissioner, the Applicant questioned the relevance of the letter given to her by WDHSCP at review stage, submitting that the letter made no reference to the petition and staff email and contained nothing that would link it to any councillor or councillors. The Applicant queried whether additional information might be held which would either confirm a link or constitute separate communication falling within scope. She also referred to additional individuals who she believed were likely to have received the petition or discussed it in some way or other. With reasons, she identified other individuals she believed would hold information relating to staff emails.

Submissions from WDHSCP

17. As indicated above, WDHSCP is an Integrated Joint Board with responsibility for the governance and oversight of the vehicle set up for delivering health and social care services in West Dunbartonshire. Staff are employed by either NHSGGC or by the Council. WDHSCP explained that the information it had been able to provide to the Applicant was, and the sources of information it has been able to search were, those held by the Council (although see below in relation to searches carried out by NHSGGC staff).
18. WDHSCP provided the Commissioner with details of its FOI Policy, which provides guidance on processing and responding to information requests it receives (including determination of when a request would more appropriately be dealt with by NHSGGC and/or the Council). In this case, noting that the request was made directly to it and involved members of the WDHSCP Board, it explained that the request was discussed the health and local authorities and a decision made that WDHSCP should respond.

19. In its submissions, WDHSCPБ explained its position in relation to the petition and related correspondence, referring to information disclosed to the Applicant. It also described the searches carried out for the information covered by part a.
20. WDHSCPБ submitted that, as part of the response to the Applicant's review request, enquiries were made of the three councillors the Applicant asserted had received an email copy of the petition. All confirmed that they had taken no action, although one had consulted WDHSCPБ's Chief Officer first.
21. With regard to the staff email, WDHSCPБ explained that the individuals who received the email were asked to carry out searches of their own inboxes, folders and network drives. All of the individuals concerned were employed by NHSGGC. No relevant recorded information was located. The original searches covered an earlier request from the Applicant (made just before the one under consideration here). Further searches were carried out during the investigation and WDHSCPБ confirmed that no relevant recorded information was identified. Copies of emails and attachments evidencing the searches carried out were provided, and any information found was disclosed to the Applicant, either during this investigation or in response to the earlier information request.

The Commissioner's findings

22. Having considered all relevant submissions and any supporting evidence provided, the Commissioner is satisfied that WDHSCPБ carried out adequate, proportionate searches to identify and locate any recorded information held and falling within scope of part a. of the Applicant's request. He notes the provision of related information during the investigation, even if it did not strictly fall within scope of part a. In reaching this conclusion, the Commissioner has taken account of the fact that he can only consider what information is actually held, not what information the Applicant might expect the WDHSCPБ to hold.

Section 17 – Notice that information is not held (parts b. and c. of the request)

23. 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 subject to qualifications, but these are not applicable here. If no such information is held by the authority, section 17(1) of FOISA requires the authority to give the Applicant a notice in writing to that effect.
24. "Information" is defined in section 73 of FOISA as "information recorded in any form". Given this definition, it is clear that FOISA does not require a public authority to create recorded information in order to respond to a request, or to provide information which is not held in a recorded form (e.g. about a person's intentions or opinions).
25. 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. He 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 information 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 public authority.

26. WDHSCPБ confirmed that it wished to rely on section 17(1) of FOISA in relation to parts b and c of the Applicant's request, as it did not hold recorded information which would fulfil these parts of her request.
27. The Commissioner will look at parts b. and c. separately below:

Part b

Submissions from the Applicant

28. In part b. of her request, the Applicant asked for information held by the WDHSCPБ explaining why the views of patients and staff were disregarded by the Board members.
29. In her requirement for review, the Applicant asked that the person conducting the review of WDHSCPБ's response to her request read the petition and the staff email, in their entirety, reach their own conclusions and then try to locate the information that evidences the decision taken.
30. The Applicant submitted that it was evident (taking account of circumstances she described in greater detail) that the views of patients and staff were disregarded by WDHSCPБ and NHSGGC. The Applicant considered there must be some reason for the dismissal of their views, which WDHSCPБ must hold. She questioned the relevance of one item disclosed during the investigation and submitted that further searches were required.

Submissions from WDHSCPБ

31. In its submissions, WDHSCPБ reaffirmed its position (stated in its review outcome) that all relevant information it held had already been sent to the Applicant. It described searches carried out in response to a previous information request made by the Applicant, in February 2018, which it considered relevant to this part of the request (as it sought any information held about the dissolution of the medical practice in question), detailing the resources searched and the individuals involved.
32. Further searches were carried out during the investigation and WDHSCPБ explained that no relevant, recorded information was identified. Copies of emails and attachments evidencing the searches carried out and the information found were disclosed to the Applicant, either during this investigation or in response to an earlier information request.

Commissioner's conclusion

33. Having considered the submissions from WDHSCPБ in relation to recorded information which would fulfil part b. of the Applicant's request, the Commissioner is not satisfied that WDHSCPБ carried out adequate, proportionate searches for any relevant recorded information it held. This was because the searches undertaken related to an information request submitted by the Applicant in February 2018, eight months before the request under investigation. The Commissioner is satisfied, however, that (by the end of his investigation) thorough, relevant searches had been undertaken by WDHSCPБ and any information held by WDHSCPБ and of potential relevance to this part of the request had been disclosed to the Applicant.
34. The Commissioner therefore finds that WDHSCPБ breached section 1(1) of FOISA in giving the Applicant notice, in line with section 17(1) of FOISA, that no relevant recorded information was held which fell within scope of part b of her request. However, as any relevant information has now been provided to the Applicant, the Commissioner does not require any action to be taken in relation to this breach.

Part c

Applicant's submissions

35. In part c. of her request, the Applicant made reference to a document described as "Note of Solicitor to the Committee from 27th August 2017", and asked for information relating to comments recorded in this note attributed to particular named individuals. She believed more information should be held about what prompted the individuals in question to make the comments.

WDHSCPБ submissions

36. WDHSCPБ submitted that the Clerk to the Board's note was a non-verbatim written note of the remarks recorded at the time, and attributed to persons attending the meeting in their professional capacity. WDHSCPБ commented that there was a difficulty in looking behind these remarks and finding any recorded information that justifies or could justify what the remarks of the persons said. WDHSCPБ considered this would be something the persons who were reported to have made the remarks might be able to answer, referring to the definition of recorded information.
37. WDHSCPБ explained that Legal and Committee administration staff were consulted about their specific role at the Board Meeting. WDHSCPБ also advised that checks were made by the Principal Solicitor of the non-verbatim note transposed by the typist, to ensure it was an accurate reflection of the final version. No searches were carried out by WDHSCPБ to determine if any relevant, recorded information was held as WDHSCPБ submitted that the additional staff consulted were specific about their limited role in matters.

Commissioner's conclusion

38. Having considered the explanations provided by WDHSCPБ, the Commissioner is satisfied, on the balance of probabilities, that WDHSCPБ does not hold relevant recorded information which would provide an explanation or justification for the statements recorded in the Clerk to the Board's note and attributed to named individuals present at the meeting on 23 August 2017. In reaching this view, the Commissioner has considered the information disclosed by WDHSCPБ and the explanations provided as to why no searches were required and why consultation with appropriate members of staff was sufficient to identify any recorded information held falling within scope of part c. of the request. Bearing in mind that FOISA only confers a right to recorded information, and not to comment or opinion, the Commissioner considers it unlikely that any further relevant information would be held.
39. The Commissioner is therefore satisfied that WDHSCPБ complied with section 1(1) of FOISA in giving the Applicant notice, in line with section 17(1) of FOISA, that no relevant recorded information was held which fell within scope of part c. of her request.

Decision

The Commissioner finds that West Dunbartonshire Health and Social Care Partnership Board (WDHSCP) 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 carrying out adequate searches to determine what recorded information was held which would fulfil part a. of the Applicant's request, WDHSCP complied with Part 1. The Commissioner also finds that WDHSCP complied with Part 1 by notifying the Applicant, in line with section 17 of FOISA, that no relevant recorded information was held which would fulfil part c. of her request.

However, the Commissioner finds that WDHSCP failed to comply with Part 1 in notifying the Applicant, in line with section 17 of FOISA, that no relevant recorded information was held which would fulfil part b. of her request.

Given that recorded information held by WDHSCP falling within scope of the Applicant's request was disclosed to her during the investigation, the Commissioner does not require WDHSCP to take any action in respect of this failure, in response to the Applicant's application.

Appeal

Should either the Applicant or West Dunbartonshire Health and Social Care Partnership 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.

Margaret Keyse
Head of Enforcement

11 February 2019

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.

...

73 Interpretation

In this Act, unless the context requires a different interpretation –

...

“information” (subject to sections 50(9) and 64(2)) means information recorded in any form;

...

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