

Decision Notice 128/2020

Closure of Craigowl ward, Strathmartine Hospital

Applicant: The Applicant

Public authority: Tayside Health Board

Case Ref: 202000201



Scottish Information
Commissioner

Summary

NHS Tayside was asked for correspondence regarding the closure of a ward at Strathmartine Hospital. NHS Tayside disclosed some information in response to the review request, and then later disclosed more information.

Although it had initially failed to identify and disclose the additional information, the Commissioner was satisfied that, by the end of his investigation, NHS Tayside had carried out appropriate searches and had disclosed all the relevant information it held.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement)

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. In July 2019, a nursing staff shortage led to the closure of the Craigowl ward at Strathmartine hospital.
2. On 30 July 2019, the Applicant made a request for information to Tayside Health Board (NHS Tayside) for a copy of all correspondence, including emails, minutes, etc., relating to the proposal and subsequent closure of Craigowl ward.
3. NHS Tayside did not respond and, on 1 September 2019, the Applicant requested a review of NHS Tayside's failure to respond to his request.
4. NHS Tayside responded on 10 October 2019. It disclosed a Board Paper regarding the operational changes to the ward.
5. On 22 January 2020, during the investigation of a related application to the Commissioner, NHS Tayside issued a revised review response, and disclosed redacted copies of correspondence regarding the ward closure. Redactions were made on the basis that section 38(1)(b) (Personal information) of FOISA applied.
6. On 2 February 2020, the Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant considered that he had not been provided with all the information requested and was dissatisfied with the handling of his request.

Investigation

7. 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.
8. On 18 February 2020, NHS Tayside was notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.

9. The Applicant confirmed that he did not require the Commissioner to issue a decision on the personal data being withheld in the correspondence disclosed by NHS Tayside.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. NHS Tayside was invited to comment on this application and to answer specific questions, including on the searches conducted to identify the information falling within scope of the request.
11. NHS Tayside responded to the questions, detailing the searches conducted, explaining the gaps in the disclosed correspondence and why it was satisfied that all of the relevant information had been identified and disclosed.

Commissioner's analysis and findings

12. 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 NHS Tayside. He is satisfied that no matter of relevance has been overlooked.

The Applicant's submissions

13. The Applicant stated that he had not been provided with all of the information requested. In his application, he identified examples of information that he considered missing.
14. He also questioned why NHS Tayside had failed to provide him with the requested correspondence when he initially asked for it as it had only come to light when it was subject of a related investigation by the Commissioner.

NHS Tayside's submissions

15. NHS Tayside told the Commissioner that, when the Applicant made his information request in July 2019, no searches were undertaken because there was no centrally held repository of correspondence relating to the ward consolidation.
16. NHS Tayside noted that there was a full proposal relating to the context and decision making regarding the ward and it considered that the Board Paper provided the Applicant with all of the information within the scope of the request.
17. At the time of the request, NHS Tayside understood that providing the Applicant with the Board Paper would provide him with the requested information on the background, context, decision making and covered the scope of the request. It was only in hindsight that NHS Tayside appreciated that the Applicant was seeking other sources of information.
18. NHS Tayside stated it was committed to ensuring that requests are fully complied with, but noted, on this occasion, this was not the case and it had denied the Applicant information relating to his request.
19. NHS Tayside provided the Commissioner with copies of the internal correspondence as to how it dealt with the Applicant's request and review, which also included a copy of its completed search form.
20. As part of the investigation, NHS Tayside confirmed that the officers involved searched their email records using specific terms.
21. NHS Tayside stated that it was now satisfied that all relevant information had been provided.

22. NHS Tayside was asked specific questions as to whether further information was held, in line with the examples of missing information identified by the Applicant in his application. In response, it explained that:
- it could not identify any correspondence prior to the first email disclosed to the Applicant about the consolidation of the ward;
 - teleconference calls were not recorded and it would not routinely produce a written record of all telephone conversations; and
 - all relevant information had been disclosed, including information referred to in the disclosed information.

The Commissioner's findings

23. 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, 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).
24. The Commissioner notes that it was only as a result of a related application that this information came to light. As a result of providing this additional information, the Applicant submitted this application. Having considered the terms of the Applicant's request, which included "all correspondence", it is clear that he sought information wider than the Board paper provided. The Commissioner is satisfied that NHS Tayside initially failed to comply with this request in line with Part 1(section 1(1)) of FOISA, in failing to identify all of the information encompassed by this request.
25. The Commissioner has considered the correspondence now disclosed to the Applicant and, having organised the correspondence into date order, notes that there is a clear structure to the discussion about the ward, from the date when concerns were first raised to the eventual ward closure.
26. Having considered the submissions from both parties, the Commissioner is satisfied that NHS Tayside has now taken adequate, proportionate steps to establish whether it held any further information falling within the scope of the request. Taking all of the above into consideration, the Commissioner is satisfied, on the balance of probabilities, that NHS Tayside does not hold any further information falling within the scope of the Applicant's request than it has already provided.

Decision

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

In initially failing to identify all of the information falling within the scope of this request, NHS Tayside failed to comply with section 1(1) of FOISA.

The Commissioner was satisfied, by the end of the investigation, that NHS Tayside had identified and disclosed all the information falling within scope of the request.

The Commissioner does not require NHS Tayside to take any action in respect of this failure in response to the Applicant's application.

Appeal

Should either the Applicant or NHS Tayside 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

8 October 2020

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.

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