

Decision Notice

Decision 200/2018: Mr S and Scottish Ministers

Whistleblowing Champions and related matters

Reference No: 201800295

Decision Date: 7 December 2018



Scottish Information
Commissioner

Summary

The Ministers were asked for details of Whistleblowing Champions for Health Boards in Scotland, along with other information on whistleblowing arrangements. The Ministers gave explanations and stated that some information was not held. They withheld some information as relating to policy which was still in the course of development.

The Commissioner accepted that some information was not held but found that some information, disclosed during this investigation, should have been disclosed earlier.

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)

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. By way of background, in England, an independent review into creating an open and honest reporting culture in the NHS was commissioned by the Secretary of State for Health. The “Freedom to Speak Up” review¹, which was chaired by Sir Robert Francis QC, published its report in February 2015. The report related to England only. The Scottish Government released a news item on 29 November 2017, which stated that a new Independent National Whistleblowing Officer (INWO) role would be created in Scotland and that legislation would be introduced next year [2018] to Parliament. The role of the INWO would be taken on by the Scottish Public Services Ombudsman (SPSO).
2. On 29 November 2017, Mr S made a nine-part request to the Scottish Ministers (the Ministers) on the subject of Whistleblowing Champions in Scottish Health Boards. He has only appealed four elements of his request and these are considered here. In these, he asked for the following:
 - (1) Why the appointment of Whistleblowing Champions was carried out in direct contravention of Sir Robert Francis’s recommendations and why Sir Robert’s recommendations were ignored or flouted in Scotland;
 - (2) How many of the whistleblowers contacting the independent confidential alert line in the past three years had their complaints resolved to their satisfaction;
 - (3) A list of all the named whistleblowing contacts, with their email contact addresses, for all the health boards in Scotland, and
 - (4) Copies of all the Ministers’ current up-to-date policies and measures relating to the INWO pertaining to their role in Scotland.

¹ <http://freedomtospeakup.org.uk/>

3. The Ministers responded to the request for information on 21 December 2017. They gave comment on part (1) above, explaining their position on Mr S's premise. For parts (2) and (3), they stated that they did not hold the information. For part (4), the Ministers applied section 29(1)(a) of FOISA, on the grounds that this information related to the ongoing development of Scottish Government policy. The Ministers also set out why they did not believe the public interest favoured disclosure of such information.
4. On 8 January 2018, Mr S wrote to the Ministers requesting a review of their decision. He did not accept the Ministers' position on Sir Robert's recommendations, or agree with their application of section 29(1)(a) of FOISA. In addition, he refused to accept that no information was held for parts (2) and (3) of the request.
5. The Ministers notified Mr S of the outcome of their review 8 February 2018. The Ministers upheld their original response, including the application of section 29(1)(a) of FOISA. They also set out their rationale on some points in more detail.
6. On 12 February 2018, Mr S wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr S stated he was dissatisfied with the outcome of Scottish Ministers' review, essentially for the reasons set out in his requirement for review.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr S 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 15 March 2018, the Ministers were notified in writing that Mr S had made a valid application. They were asked to send the Commissioner the information withheld from Mr S. The Ministers provided the information 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 Ministers were invited to comment on this application and answer specific questions including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.

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 Mr S and the Ministers. He is satisfied that no matter of relevance has been overlooked.
11. In his application to the Commissioner, Mr S also commented on the Ministers' handling of another part of his request, relating to contact with Whistleblowing Champions. In their review outcome, however, the Ministers treated the corresponding points in his request for review as comment, to be responded to by the policy team, rather than a request that they review their response to the relevant part of the information request. Having considered the points in question, the Commissioner agrees with this approach and consequently will not consider that part of the request further in this decision.

Information disclosed during investigation – part 3 of the request

12. During the investigation, Mr S agreed that just the list of names would meet his needs for part 3 of his request, without the associated contact details for each name. He asked that, given the passage of time, an updated or current list was also provided.
13. On 28 August 2018, the Ministers disclosed the two lists of names, one current and one contemporary with the request.
14. At that point, the Ministers offered no reasons why the list contemporary with the request (i.e. the names sought at that time and therefore the subject matter of that part of the request) could not have been disclosed at the time of asking. By not disclosing it at that point, the Commissioner finds that the Ministers failed to comply with Part 1 and, in particular, with section 1(1) of FOISA.

Parts 1, 2 and 4 – whether information held

15. 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. This is 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. These qualifications do not apply in this case.
16. The information to be given is that held by the authority at the time the request is received, (section 1(4)).
17. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
18. If no such information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice to that effect.
19. As stated in many previous decisions, the Commissioner's remit extends only to the consideration of whether a Scottish public authority actually holds the requested information and whether it has complied with Part 1 of FOISA in responding to a request. The Commissioner's role is not to determine whether a public authority should retain, record or hold more information about a subject.

Searches

20. Having received limited submissions initially, the investigating officer requested further details of searches during the investigation. The Ministers undertook further additional searches of their electronic records management system (eRDM), the policy team's personal files and the legal division's restricted files. They identified the search terms used. The Ministers stated that they were confident that this extensive search of their corporate record was sufficient to identify all of the relevant information held which would fall within the scope of the request.
21. The Ministers stated that they recognised that they did not conduct thorough searches in handling the original request or the requirement for review. In retrospect, they conceded this was not the correct approach to take and the above searches should have been completed when responding originally. They apologised for this error.

22. By failing to conduct adequate searches at the time of the request and requirement for review, the Commissioner finds that the Ministers failed to comply with Part 1 (and particularly section 1(1)) of FOISA in responding to Mr S's request. He will now consider each part of the request (for which it was claimed no information was held) in turn below.

Part 1

23. For part 1, the Ministers did not consider they would hold any relevant information. Mr S was asking for evidence of his own view, which they did not share. The information, which appeared to ask for confirmation of a negative, was unlikely to exist in their hands.
24. Taking into account the factors set out above, the Commissioner accepts, on the balance of probabilities, that the Ministers did not hold recorded information for part 1 of the request. He is satisfied that the searches completed during the investigation would have been capable of identifying any relevant information, if held. In any case, as the Ministers do not share the underlying premise of this question, the Commissioner agrees that it is highly unlikely that the Ministers would record, and therefore "hold", information falling within the scope of part 1.

Part 2

25. Mr S stated in his application that he found it implausible that the Ministers would hold "no information on whether people who have contacted the NHS whistleblower confidential alert line have had their complaints resolved to their satisfaction".
26. The Ministers explained that the service in question was provided for them by Public Concern at Work, an independent whistleblowing charity. Public Concern at Work provided the Ministers with six-monthly reports, in line with their contractual obligations, containing data on the number and type of calls received. These reports (which were published on the Scottish Government website) were checked and did not contain the information in question.
27. The Ministers noted that they had advised Mr S to contact Public Concern at Work for this information, when responding to his request initially.
28. Having considered all relevant submissions, including those on searches and the explanations provided by the Ministers, the Commissioner is satisfied, on the balance of probabilities, that the Ministers would not hold information covered by part 2 of the request. The service – understandably – is provided at arm's length and it is not within the Commissioner's remit to say what statistical data the Ministers should be gathering from the service provider.

Part 4

29. Having revisited this part of the request during the investigation, the Ministers initially took the view that no information was held on current policies. Having conducted further searches, they identified some relevant information. Although this information was initially described as being exempt under section 29(1) of FOISA, the Ministers acknowledged that this was incorrect and confirmed that they did not wish to rely on any exemption for this information. The Commissioner has therefore not considered this exemption further.
30. Following discussion of what elements of this information fell within the scope of part 4, information was disclosed to Mr S on 1 November 2018, with an apology for not identifying and providing it earlier.

31. Given the explanations set out above, the Commissioner must conclude that the Ministers did hold information falling within the scope of part 4 Mr S's request, which they failed to identify, locate and provide when responding to his information request or his requirement for review. In this respect, the Ministers failed to comply with Part 1 and, in particular, with section 1(1) of FOISA,
32. The Commissioner is now satisfied that Mr S has received all the information he still wanted by the close of the investigation. However, the Commissioner cannot overlook the poor handling of this request by the Ministers and the impact on Mr S in terms of him receiving the information eventually identified and located. That process took nearly a year, from him first making his request on 29 November 2017.
33. The Commissioner has recorded issues with the searches and inaccurate responses in his compliance database, to inform his intervention work. This appeal has highlighted issues with the quality of searches, which in turn have contributed to unnecessary delays in making information available to Mr S and the wider public. The Commissioner has ongoing intervention work with the Scottish Ministers: details are published on his website, including a draft Action Plan and the Commissioner's response².

Decision

The Commissioner finds that, in respect of the matters specified in the application, the Scottish Ministers (the Ministers) partially failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr S.

The Commissioner finds that a list of names disclosed during this investigation (part 3) should have been disclosed in responding to the request. By not doing so, the Ministers failed to comply with section 1(1) of FOISA.

The Commissioner also finds that the Ministers failed to conduct adequate searches for the information covered by parts 1, 2 and 4 of Mr S's request, and to identify, locate and provide all the information held and covered by part 4 (and so, again, failed to comply with section 1(1) of FOISA).

Given that the Ministers have since completed adequate searches and disclosed the information which is capable of addressing the request, the Commissioner does not require the Ministers to take any action in respect to these failures, in response to Mr S's application.

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<http://www.itspublicknowledge.info/home/AboutSIC/WhatWeDo/Intervention201702016ScottishGovernment.aspx>

Appeal

Should either Mr S or Scottish Ministers 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.

Daren Fitzhenry
Scottish Information Commissioner

7 December 2018

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.

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