



Scottish Information
Commissioner
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Decision Notice 050/2023

Communication received by former Cabinet Secretary for Health and Sport

Authority: Scottish Ministers
Case Ref: 202200844

Summary

The Applicant asked the Authority for a communication to a former Cabinet Secretary and a named employee of NHS National Services Scotland, and for information about any action and/or subsequent communication arising. The Authority told the Applicant that it did not hold the information. The Commissioner investigated and was satisfied that the Authority did not hold the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 17(1) (Notice that information is not held); 47(1) and (2) (Application for decision by Commissioner)

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 22 May 2022, the Applicant made a request for information to the Authority. He asked for:

- (i) any communication received by the then Cabinet Secretary for Health and Sport Shona Robison from Alice Macleod (Senior Nurse: National Procurement NSS) dated 13 June 2018
 - (ii) any actions undertaken by the then Cabinet Secretary and/or her officials in relation to this communication from Alice Macleod and
 - (iii) any communications undertaken by the then Cabinet Secretary and/or her officials in relation to this communication from Alice Macleod.
2. The Authority responded to the Applicant on 21 June 2022 with a notice under section 17(1) of FOISA that it did not hold the information. The Authority also applied section 38(1)(b) of FOISA because it considered that some of the information within the scope of the request was personal information.
3. Later the same day, the Applicant wrote to the Authority requesting a review of its decision. The Applicant said that he was dissatisfied with the response because the Authority had not provided help or assistance. He also queried why the Authority was refusing to disclose some of the information because it was personal information whilst also stating that it did not hold any information within the scope of his request.
4. The Authority notified the Applicant of the outcome of its review on 19 July 2022. It apologised to the Applicant for citing section 38(1)(b) of FOISA in its original response, and said that this section should not have been applied because no information was held. The Authority confirmed that it did not hold any information within the scope of the request and it upheld its application of section 17(1) of FOISA.
5. On 29 July 2022 the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant was dissatisfied with the outcome of the Authority's review because he believed that the Authority did hold the information. He said that he had previously obtained a communication (dated 13 June 2018) from NHS National Services Scotland which, in his view, indicated that the information he had requested was held by the Authority.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 2 September 2022, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments.
8. The case was subsequently allocated to an investigating officer.

Commissioner's analysis and findings

9. The Commissioner has considered all the submissions made to him by the Applicant and the Authority.

Section 17(1) – Notice that 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 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 information an applicant believes the 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.

The Authority's submissions

12. The Authority explained to the Commissioner that it carried out searches in three separate electronic systems that would hold any correspondence between the then Cabinet Secretary for Health and Sport and Alice Macleod, or any information regarding actions or communications by the then Cabinet Secretary and her officials.
13. The Authority provided details of the search terms used in the searches of each system, explained why each search term was used and provided details of the results of those searches.
14. The Authority confirmed that it did not hold any information within the scope of the Applicant's request.

The Applicant's submissions

15. The Applicant provided the Commissioner with the communication from NHS National Services Scotland which, in his view, indicated that the information he had requested from the Authority was in fact held by it. The document, titled "*Recommendations and Action Plan from Stoma Support Garment Review Report January 2018 Background*", and addressed to "Shona Robertson [*sic*], Cabinet Secretary Scottish Government", appeared to be in memorandum format, was dated 13 June 2018, and was marked with a watermark containing the word "draft".
16. The document discussed a review of the prescribing practice for support garments for patients with certain medical conditions. The final paragraph of the document is headed "Actions" and states

"This communication in addition to the Garment Report and Action Plan should be sighted by the Scottish Government Cabinet Secretary prior to circulation of the Garment Report and Action Plan to NHS Health Boards and industry via the BHTA."
17. The Applicant added in his application to the Commissioner that from this communication it would be logical to assume that there were actions/communications that would also fall with parts 2 and 3 of his request. When asked by the Investigating Officer if he had any information to confirm that the document had been sent to the Authority, the Applicant said he did not. He acknowledged that the draft watermark on the document and the mis-spelling of the Minister's name gave some weight to the Authority's position that it did not receive it.

The Commissioner's conclusions

18. The Authority gave the Applicant notice in terms of section 17 that it did not hold the information requested. The question for the Commissioner is whether the Authority complied

with FOISA in responding in this way to the Applicant's request, or whether the Authority held any recorded information that fell within the request.

19. 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 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 the information is not held.
20. The request for information is precise in scope. It sought any communication between two named persons, specifically dated 13 June 2018, and details of any subsequent actions and/or communications arising from it. It would follow that if there was no information held for the first part of the request i.e. if there was no communication held dated 13 June 2018, then there would be less likelihood of information being held related to such a specific communication, unless the original communication were no longer held at the date of the Applicant's request.
21. The Commissioner notes the submissions provided by the Applicant. However, the existence of the draft memorandum in and of itself is not confirmation that it, or any final version of it, was sent to the Authority. Furthermore, the statement of actions within the draft memorandum is not confirmation that those actions were carried out, nor is there any certainty that those actions (or similar) were stated in any final version of the document that may exist.
22. The Commissioner accepts that the Authority has taken adequate and proportionate steps to establish whether it held any recorded information that fell within the scope of the Applicant's request. In reaching this conclusion, the Commissioner has taken into account that the information falling within the request would be readily identifiable, given that the request names those communicating and that there is a specific date, and that it relates to a potential ministerial communication. The Commissioner also notes that the Authority's searches are reasonable in the sense of the search terms used and locations searched and would be capable of locating the information requested.
23. Having considered in detail the Authority's submissions, and all the circumstances of the case, the Commissioner is satisfied on the balance of probabilities that the Authority took adequate, proportionate steps to establish whether it held any information falling within the scope of the Applicant's request.
24. The Commissioner is satisfied that the Authority does not (and did not, at the time of this request) hold the information requested by the Applicant. Therefore, the Commissioner concludes that the Authority was correct to give the Applicant notice, in terms of section 17(1) of FOISA, that it did not hold the requested information.

Decision

The Commissioner finds that the Authority complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or the Authority 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

24 May 2023

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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (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.
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

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.
- ...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
 - (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.
- (2) An application under subsection (1) must -

- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
- (b) state the name of the applicant and an address for correspondence; and
- (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);
and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).