



Decision Notice 095/2023

Verification and confirmation of a statement given by Police Scotland and whether these were the views of the Authority

Authority: Ayrshire and Arran Health Board
Case Ref: 202200188

Summary

The Applicant asked the Authority for information relating to the verification and confirmation of a statement given by Police Scotland, and whether statements given were the official views of the Authority. The Authority informed the Applicant, in line with section 17(1) of FOISA, that it held no relevant, recorded information. The Commissioner investigated and found that the Authority had been entitled to notify the Applicant that no information was held, but he also found that the Authority had breached Part 1 of FOISA in failing to process and respond to the Applicant's request and requirement for review under FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 8(1) Requesting information; 15(1) (Duty to provide advice and assistance); 16 (Refusal of request); 17(1) (Notice that information is not held); 19 (Content of certain notices); 21(1), (4), (5) and (10) (Review by Scottish public authority); 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 17 May 2021, the Applicant made a request for information to the Authority. He asked that the Accident and Emergency (A&E) Department of a named hospital verify and confirm whether certain information contained within a report provided to him by Police Scotland was the official position of the hospital. The Applicant was particularly seeking to understand whether the statement contained in the report from Police Scotland, and attributed to a named doctor, was the official position of the hospital A&E Department, the nurses who attended him, or whether it was based on the hospital official patient record.
2. The Authority responded on 9 June 2021. The Authority advised the Applicant that it was unable to provide verification concerning justification of the actions of Police Scotland. The Authority provided the Applicant with a form he could complete and return, should he wish to receive copies of his medical record containing relevant information about his attendance at hospital.
3. On 22 June 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant explained the background to his request for information was to understand whether the A&E Department of the hospital endorsed, or could confirm, the statement included in the Police Scotland report. Also, whether or not any interview with the Authority's staff was conducted. The Applicant stated that a yes or no answer would suffice. The Applicant also asked whether the A&E Department stood distant from the statement made by Police Scotland.
4. The Authority provided a response to the Applicant's requirement for review of 22 June 2021, in which it advised that it could not endorse or confirm a statement written by Police Scotland. It stated that Police Scotland was a separate body to the Authority and that the Authority had no access to police reports or statements gathered by Police Scotland.
5. The Authority also explained that it could not confirm or deny if any interview had taken place with its staff, because it did not keep records of this. It informed the Applicant that these records would be kept by Police Scotland, and it recommended that the Applicant contact them.
6. On 20 August 2021, the Applicant contacted the Authority again and expressed dissatisfaction with what he perceived to be a failure to follow the appropriate process regarding the disclosure of statement(s) made to Police Scotland by one or more of its clinicians. The Applicant also expressed dissatisfaction with the Authority's refusal to disclose the statement(s). The Applicant set out his belief that the Authority was failing to provide a service, failing to follow proper procedure, and the adequate standard and accountability expected.
7. In a response dated 29 September 2021, the Authority stated that it was unable to disclose information about statements made to the Police by clinicians. It explained this was because these records were held by Police Scotland, and were not recorded in the Applicant's medical record. The Authority again recommended that the Applicant contact Police Scotland to request any information in relation to the statements given to Police.
8. On 1 February 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review because

- of its failure to provide information on an interview with Police Scotland
- of its breaching of administrative proceedings in its handling of the complaint
- of his view that the position of the Authority not to disclose or provide an independent assessment of what is claimed on its behalf, or what it knows or withholds, encourages the practice of untrue and dishonest accounts of a public body, thereby exempting itself from further scrutiny (which creates a misrepresentation of facts).

Investigation

9. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
10. On 12 April 2022, the Authority was notified in writing that the Applicant had made a valid application.
11. Following receipt of the validation letter, the Authority contacted the Commissioner to explain that the information request had not been passed on to its FOI Team, so the Team had no knowledge of it. The Authority undertook to issue a response to the Applicant which followed the correct process and legislation.
12. On 26 April 2022, the Authority issued a formal response to the Applicant's requirement for review. In doing so, the Authority referred to its response of 9 June 2021, where it had explained that it was unable to provide verification concerning the justifications of Police Scotland. Opinions or views do not, it explained, fall under the remit of FOISA unless held by the Authority in recorded form. Therefore, as this information was not recorded and was not held by it, the Authority informed the Applicant, in line with section 17(1) that no information was held.
13. The Authority reiterated the separate regime available (under the UK General Data Protection Regulation) to enable the Applicant to request his own medical records, as well as the fact that it had provided a form for him to complete (should he wish to do so).
14. In response to the Applicant's request (in his letter of 22 June 2021) as to whether any interview with its staff was conducted, the Authority informed the Applicant, in line with section 17(1), that it did not hold this information. It also informed the Applicant that paramedics are not employees of the Authority.
15. The Authority also reiterated that Police Scotland may hold the information the Applicant was seeking.
16. The Applicant confirmed that he had received this revised review response from the Authority, but expressed dissatisfaction with it.
17. The case was then allocated to an investigating officer.
18. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to the nature and breadth of searches carried out by the Authority to establish whether it held recorded information covered by the Applicant's request.

Commissioner's analysis and findings

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

Section 1(1) of FOISA

20. 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 here.
21. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4).

Section 17(1) – Information not held

22. Section 17(1) of FOISA requires that, where an authority receives a request for information that it does not hold, it must give the applicant notice in writing that it does not hold the information.
23. As mentioned above, in the revised review response issued to the Applicant on 26 April 2022, the Authority informed him, in line with section 17(1), that it did not hold any recorded information falling within the scope of his request.
24. The Authority explained, in relation to the Applicant's request for verification and confirmation of the statement given by Police Scotland, that Police Scotland would not, and did not, issue the Authority with a copy of any statements as it is not standard practice for it to provide or share information that pertains solely to a Police matter. The Authority also noted that statements would not be held in the patient's medical record, and it would be Police Scotland who would hold any relevant recorded information.
25. In respect of whether the statements given were the views of the Authority, the Authority reiterated its position that it would not have been issued with copies of any statements given. The Authority also submitted that opinions and views do not fall within the remit of FOISA, unless held in recorded form. The Authority submitted that as it did not hold a statement, it had no recorded information declaring if the statements given were its views.
26. The Authority also commented that whether any interview was conducted with its staff was not a health matter, and it would not be expected to record this information in either medical or staff notes. The Authority again stated that Police Scotland would hold a record of any interviews.
27. The Authority informed the Commissioner that, because information relating to witness statements would not relate to a function of the authority, and was not something it would be expected to record or hold, no searches were carried out by it for information falling within the scope of the Applicant's request. The Authority also explained that, as paramedics are not employees of the Authority, it would not hold any information in relation to them. It also reasserted that Police statements would not be held in staff records.

Commissioner's conclusions

28. 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 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 reasons 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 as to what information the authority should hold, ultimately the Commissioner's role is to determine what information is actually held by the public authority (or was, at the time the request was received).
29. Having considered all of the submissions, although no formal searches were carried out by the Authority, the Commissioner accepts that it would not reasonably be expected to hold copies of statements made by its employees to Police Scotland. He considers that it would be reasonable to expect the Authority to hold a record of actions taken by its employees when assessing and treating a patient, but that this information is most likely to be held within the patient's own medical records (which the Commissioner understands the Applicant obtained a copy of under a separate process to this request).
30. The Commissioner also accepts that whether an employee made a statement to Police Scotland, and what the content of that statement was, would be unlikely to be recorded in their personnel file, or other documents relating to their employment.
31. In all the circumstances, taking into account the explanations and submissions provided, the Commissioner is satisfied, on the balance of probabilities, that the Authority does not (and did not, at the time the request was received from the Applicant) hold recorded information which would fulfil the Applicant's request. The Authority was therefore entitled to rely on section 17(1) of FOISA, on the basis that it did not hold information which would fulfil the Applicant's request.

Section 15 – Duty to provide advice and assistance

32. Section 15 of FOISA provides that a Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
33. Whilst the Authority did not hold recorded information related to the specific request made by the Applicant, it provided him with a form that he could use to obtain his own medical records, as well as recommending that contact be made with Police Scotland, who would be more likely to hold the requested information.
34. The Commissioner finds that, in the circumstances, the Authority provided reasonable advice and assistance to the Applicant, and therefore complied with section 15 of FOISA.

Handling and processing of request

35. Section 1(1) of FOISA states that a person who requests information from a Scottish public authority which holds it is entitled to be given it 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. The qualifications contained in section 1(6) are not applicable here.
36. Section 8(1)(a) of FOISA outlines the information required, and form that such a request should take, for it to be considered to be valid.

37. In its submissions, the Authority recognised that it had not processed the Applicant's request as a Freedom of Information request. It was, instead, treated as a "Business as Usual" request, on the basis that the Applicant was not seeking recorded information.
38. The Authority acknowledged that there was a point, during correspondence with the Applicant, that his request should have been treated as a FOISA request and that, at the very least, the Applicant should have been informed of his statutory rights under FOISA.
39. The Commissioner is satisfied that the Applicant submitted a valid request for information to the Authority on 17 May 2021.
40. It is a matter of fact that, in responding to the request, the Authority did not provide a response in accordance with sections 16 or 17 and 19 of FOISA (see Appendix 1)
41. In failing to provide a response to the Applicant's request in line with sections 16 or 17 and 19 of FOISA, the Commissioner finds that the Authority failed to comply with Part 1 of FOISA.
42. Section 21(1) of FOISA gives authorities a maximum of 20 working days following the receipt of the requirement to comply with a requirement for review, subject to exceptions which are not applicable in this case.
43. The Applicant submitted a valid requirement for review on 22 June 2021. The Authority did not provide a response to the Applicant's requirement for review, in line with section 21 of FOISA, until 26 April 2022. This was after the Authority was informed of the Applicant's appeal to the Commissioner.
44. The Commissioner therefore finds that the Authority failed to respond to the Applicant's requirement for review within the 20 working days allowed under section 21(1) of FOISA. In failing to comply with this timescale, the Authority failed to comply with Part 1 of FOISA.
45. Given that the Authority did provide a response to the Applicant's requirement for review, the Commissioner does not require the Authority to take any further action in relation this particular breach, in response to this decision.

Decision

The Commissioner finds that the Authority partially failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the Applicant's request.

The Commissioner finds that the Authority was entitled to inform the Applicant, in line with section 17(1) of FOISA, that it did not hold information which would fulfil his request. The Commissioner also finds that the Authority provided the Applicant with advice and assistance, in line with section 15 of FOISA.

However, in failing to provide a response to the Applicant's information request in line with sections 16 or 17 and 19 of FOISA, the Authority failed to comply with Part 1. Similarly, in failing to provide a response to the Applicant's requirement for review within 20 working days, in line with section 21 of FOISA, the Authority failed to comply with Part 1 of FOISA.

However, given that the Authority did provide a response to the Applicant's requirement for review after it was informed of the Applicant's application to the Commissioner, no action is required to be

taken by the Authority in relation to this particular breach, in response to the Applicant's application.

The Commissioner will, however, note the Authority's failure to comply with section 1 of FOISA for the purposes of his intervention procedures.

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

4 September 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.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

8 Requesting information

- (1) Any reference in this Act to “requesting” information is a reference to making a request which –
 - (a) is in writing or 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) states the name of the applicant and an address for correspondence; and
 - (c) describes the information requested.
- ...

15 Duty to provide advice and assistance

- (2) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- ...

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a “refusal notice”) which-
 - (a) discloses that it holds the information;
 - (b) states that it so claims;
 - (c) specifies the exemption in question; and
 - (d) states (if not otherwise apparent) why the exemption applies.

- (2) Where the authority's claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.
- (3) The authority is not obliged to make a statement under subsection (1)(d) in so far as the statement would disclose information which would itself be exempt information.
- (4) A Scottish public authority which, in relation to a request for information, claims that section 12(1) applies must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice which states that it so claims.
- (5) A Scottish public authority which, in relation to such a request, claims that section 14 applies must, within that time, give the applicant a notice which states that it so claims; except that the notice need not be given if-
 - (a) the authority has, in relation to a previous identical or substantially similar such request, given the applicant a notice under this subsection; and
 - (b) it would in all the circumstances be unreasonable to expect it to serve a further such notice in relation to the current request.
- (6) Subsections (1), (4) and (5) are subject to section 19.

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.

...

19 Content of certain notices

A notice under section 9(1) or 16(1), (4) or (5) (including a refusal notice given by virtue of section 18(1)) or 17(1) must contain particulars-

- (a) of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and
- (b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).

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.
- ...
- (4) The authority may, as respects the request for information to which the requirement relates-
- (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
 - (b) substitute for any such decision a different decision; or
 - (c) reach a decision, where the complaint is that no decision had been reached.
- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.
- ...
- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.

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).