



Decision Notice 154/2024

National Appeal Panel letters

Authority: NHS National Services Scotland

Case Ref: 202400118

Summary

The Applicant asked the Authority for letters of appeal lodged with the National Appeal Panel. The Authority initially withheld the information requested on the basis that it was commercially sensitive. The Authority, in its review response, revised its position and withheld the information on the basis that disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs. The Commissioner investigated and found that the Authority had wrongly withheld the information. He required the Authority to disclose the information to the Applicant.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 30(c) (Prejudice to the effective conduct of public affairs); 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 November 2023, the Applicant made a request for information to the Authority. He asked for “copies of the letters of appeal submitted to the National Appeal Panel in relation to the contract award made to the TPB Partnership LLP, by NHS Lothian Pharmacy Practice Committee on 26th September 2023”.

2. By way of background, the National Appeal Panel hears appeals against decisions of Pharmacy Practices Committees under The National Health Service (Pharmaceutical Services) (Scotland) Regulations 2009. In September 2023, the NHS Lothian Pharmacy Practices Committee agreed to the establishment of a new pharmacy in Linlithgow.
3. The Authority responded on 14 December 2023, withholding the information requested under the exemption in section 33(1)(b) (Commercial interests and the economy) of FOISA.
4. On 18 December 2023, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he did not accept that the exemption in section 33(1)(b) of FOISA was engaged.
5. The Authority notified the Applicant of the outcome of its review on 17 January 2024. The Authority withdrew its reliance on the exemption in section 33(1)(b) of FOISA and instead withheld the information requested under the exemption in section 30(c) (Prejudice to the effective conduct of public affairs). The Authority explained that it considered that disclosure of the information requested would substantially prejudice the ability of the National Appeal Panel to perform its function effectively, independently and properly in relation to this case and to future cases.
6. On 17 January 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority's review because he did not accept that the exemption in section 30(c) applied and that the Authority had, in any event, failed to properly consider the public interest test.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 27 February 2024, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority 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 Authority was invited to comment on this application and to answer specific questions related to its application of the exemption in section 30(c). The Authority provided its comments.
10. The investigating officer sought further comments from the Authority related to its application of the exemption in section 30(c) of FOISA, including on the substantial prejudice that would, or would be likely to, be caused by disclosure of the withheld information and on any views expressed to the Authority on disclosure of the withheld information by the Chair of the National Appeal Panel. The Authority did not provide any further comments.

Commissioner's analysis and findings

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

Section 30(c) – Prejudice to the effective conduct of public affairs

12. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
13. The word "otherwise" distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority applying it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure.
14. There is no definition of "substantial prejudice" in FOISA, but the Commissioner considers the harm in question would require to be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur: therefore, the authority needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.

The Authority's submissions about the exemption

15. The Authority noted that the withheld information relates to an appeal before the National Appeal Panel, which was live at the time of both its initial response and review outcome.
16. The Authority considered that disclosure of the withheld information would, relating as it does to a live appeal, prejudice the process prior to the decision of the National Appeal Panel being issued and that the passage of time, therefore, had no weight in favour of disclosure.
17. The Authority submitted that disclosure of the withheld information would prejudice the ability of the National Appeal Panel to carry out "fair and unhindered investigations" and that the Panel must be free to consider cases independently "without the influence of case details being released into the public domain".
18. The Authority noted that the role of the National Appeal Panel is focused on errors in law, rather than review of the substantive arguments from interested parties. The Authority submitted that there was a risk that disclosure of the withheld information would prejudice the appeal process and prevent the National Appeal Panel from undertaking its role effectively and independently.
19. The Authority also submitted that disclosure of the withheld information would prejudice this appeal and all future appeals heard by the National Appeal Panel as it would establish that parties involved in the National Appeal Panel process could request and obtain information relating to live cases.

The Applicant's submissions about the exemption

20. The Applicant drew an analogy with judicial processes where the grounds of appeal are often known (and can receive substantial media coverage), but this does not have the effect of prejudicing the outcome of the trial.
21. The Applicant also submitted that the National Appeal Panel's investigation relates to circumstances at the time the Pharmacy Practices Committee heard the application. In other words, disclosure of the withheld information cannot affect the investigation of the National Appeal Panel or its decision.

The Commissioner's view about the exemption

22. The Commissioner has taken account of all of the relevant submissions, together with the withheld information.
23. The [Commissioner's guidance on the exemption in section 30\(c\)](#)¹ sets out factors which may be relevant to consider when applying the exemption, including the sensitivity of the information and the passage of time.
24. In terms of the sensitivity of the information, there is a limited right of appeal to the National Appeal Panel against a decision of the Pharmacy Practices Committee of the relevant Health Board. This right of appeal is limited to the occurrence of specific circumstances and to errors of law.
25. With this in mind, and having reviewed the withheld information, the Commissioner does not consider the information to be particularly sensitive. He also notes that the minute of the meeting of the Pharmacy Practices Committee of NHS Lothian is [available online](#)², which sets out in detail the evidence heard by the Committee in reaching its decision.
26. In terms of the passage of time, the appeal was live before the National Appeal Panel at both the time of the original request and the review outcome. While the risk of substantial prejudice may well diminish as time passes, the Commissioner must, at the latest, consider the position when the Authority carried out the review (January 2024).
27. As the appeal was live in January 2024, this is a factor that would generally increase the sensitivity of the information. However, in this case, the Commissioner does not consider the fact that the matter was live before the National Appeal Panel increases the sensitivity of the information in any significant way.
28. This is partly because of the nature of the withheld information and the information already published online following the meeting of the Pharmacy Practices Committee, but also because the Chair of the National Appeal Panel must be an advocate, a solicitor or a solicitor-advocate. The Commissioner considers that the Chair would, therefore, by virtue of their professional status and qualifications, be capable of insulating themselves from the potential effects of disclosure of the withheld information and of concentrating their mind on the limited grounds of appeal falling within the remit of the National Appeal Panel.
29. As rehearsed earlier, the Commissioner expects any public authority applying the exemption in section 30(c) of FOISA to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information and how that harm would be expected to follow from disclosure.
30. In this case, the Commissioner does not consider that the Authority has provided sufficient evidence to demonstrate the above.
31. While the Authority has described various potential forms of prejudice to the work of the National Appeal Panel, it has not provided the Commissioner with a satisfactory explanation, despite being given a further opportunity, of how disclosure of the withheld information in this

¹ <https://www.foi.scot/sites/default/files/2022-04/BriefingSection30PrejudicetotheEffectiveConductofPublicAffairs.pdf>

² <https://services.nhslothian.scot/pharmacyapplication/wp-content/uploads/sites/9/2023/10/2023-09-26-Linlithgow-Minutes-Final-Website-version.pdf>

case would cause substantial prejudice to the conduct of public affairs (which is required to engage the exemption in section 30(c) of FOISA).

32. The Authority expressed concern that disclosing the withheld information would establish that information can be requested and obtained by participants in various cases before the National Appeal Panel. FOISA, of course, grants everyone the right to ask for any recorded information held by a Scottish public authority.
33. While the Commissioner recognises that some information generated in the National Appeal Panel process may be properly exempt from disclosure under FOISA, this does not imply that all information associated with cases before the National Appeal Panel should, or can, be withheld.
34. It is important for public authorities to treat each request for information on a case by case basis. That information is withheld in one case should not be taken to imply that information of a particular type will be routinely withheld in future. The circumstances of each case, including the content of the specific information under consideration, must be taken into consideration and (where required) the public interest in each case assessed on its own merits.
35. In the specific circumstances of this case, the Commissioner finds, on balance, that the Authority was not entitled to rely on the exemption in section 30(c) of FOISA to withhold the information requested.
36. Given that the Commissioner is satisfied that the exemption in section 30(c) of FOISA does not apply, he is not required to go on to consider the public interest test.

Decision

Having concluded that the information is not exempt from disclosure under the Freedom of Information (Scotland) Act 2002 (FOISA), the Commissioner finds that the Authority failed to comply with Part 1 of FOISA (and, in particular, with section 1(1) of FOISA) in responding to the information request made by the Applicant

The Commissioner therefore requires the Authority to disclose to the Applicant the information found to have been wrongly withheld, subject to the redaction of any personal data, by **3 September 2024**.

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.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

David Hamilton
Scottish Information Commissioner

18 July 2024

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.
- ...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

- ...
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.
- ...

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).