



Decision Notice 160/2024

Hernia waiting times from referral to treatment

Authority: NHS Greater Glasgow and Clyde
Case Ref: 202301392

Summary

The Applicant asked the Authority for information relating to hernia waiting times from referral to treatment. The Authority informed the Applicant it did not hold the information. The Commissioner investigated and was satisfied the Authority did not hold the information requested.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (4) and (6) (General entitlement); 17(1) (Notice that information is not held); 20(3)(c)(ii) (Requirement for review of refusal etc.); 47(1) and (2) (Application for decision by Commissioner)

Background

1. On 30 May 2023, the Applicant made a request for information to the Authority. The Applicant asked for figures relating to hernia waiting times by year from 2018, broken down into:
 - (i) the overall waiting times from referral to treatment of hernia and that time broken down into
 - (ii) the time waited for a first appointment with a consultant and
 - (iii) the wait for an operation once a decision to treat was made.
2. The Authority responded on 28 June 2023. It provided information for part (iii) of the request, but it gave the Applicant notice, under section 17(1) of FOISA, that it did not hold any information falling within the scopes of parts (i) and (ii) of the request.

The Authority explained that referrals to a consultant will not necessarily be coded in the system as “hernia” as that diagnosis is likely to be made by the consultant themselves. Given this, the Authority stated that it did not hold, and could not provide information on the overall waiting times for hernia patients, or for the time taken for such patients to obtain a first appointment with a consultant.

3. On 19 July 2023, the Applicant wrote to the Authority, requesting a review of its decision. The Applicant stated that she was dissatisfied with the decision because every other health board had been able to provide them with the information.
4. The Authority notified the Applicant of the outcome of its review on 5 September 2023, upholding its original response in full. The Authority also apologised to the Applicant for its late response.
5. On 7 November 2023, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that she was dissatisfied with the outcome of the Authority’s review because she disagreed that the Authority did not hold the information.

Investigation

6. During the course of the investigation, the Authority queried the validity of this application – this is addressed in paragraph 23 below.
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. The Authority was notified in writing that the Applicant had made a valid application.
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 the application, and the case was allocated to an investigating officer.

Commissioner’s analysis and findings

10. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority. He is satisfied that nothing of relevance has been overlooked.
11. He asked the Authority to provide information including details of the steps taken to establish that the information was not held, the searches it undertook and the staff members consulted.

Section 17(1) – Notice that information is not held

12. 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.
13. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4) of FOISA.

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.

14. In this case, the Applicant disagreed that the Authority did not hold the information she had requested.
15. The Authority explained it had sent the request for information to its Business Intelligence team, which processes most of its recorded information. The team consisted of experienced analysts familiar with the national datasets and local systems used to capture waiting times data. It noted that the request referred to two aspects of hernia waiting times – the time taken for a first appointment and the subsequent time taken to undergo an operation.
16. The Authority said that while information was held on waiting times to treat hernia after a patient was diagnosed, no reliable data was held on overall waiting times from referral to treatment. This was because patients were only formally recorded as requiring hernia treatment after they were seen by a consultant. While some of the referral data may have contained references to potential or suspected hernia, the only verifiable information on hernia diagnoses was recorded post-referral.
17. The Authority explained that searches were carried out on the main Patient Management System (PMS) used to record waiting lists for outpatient and inpatient data and on the corporate data warehouse which contained data extracted and organised from the PMS.
18. The Authority provided a screenshot from the live patient administration system, TrakCare, for a search of outpatients on the waiting list for an appointment using the term “hernia”. The search returned no records.
19. The Authority also provided a screenshot of search options for inpatient waiting lists for hernia procedures. In contrast to the above, the second screenshot showed that a number of different hernia categories were recorded and a further screenshot showed a number of waiting list entries for one example of a specific hernia repair procedure.
20. The Authority said that because data were recorded for inpatients and day case stage of treatment, it had therefore been able to answer part (iii) of the Applicant’s request.
21. The authority said it would not expect to hold data on referral times for hernia treatment because a formal diagnosis was only made post-referral by a consultant added that there was no legal duty to hold that information.
22. The Authority also addressed the Applicant’s assertions, made in her requirement for review, that every other health board had been able to provide her with the information she had requested. It explained that it had contacted four other health boards and asked them for the responses they had provided to the Applicant in answer to the same request.
23. Their responses revealed that the Applicant had not received the data requested in full from any of the four other health boards it had contacted. The Authority commented that the Applicant had been disingenuous in her application, by claiming that the Authority was the only health board that had not been able to provide the information, when this was clearly not the case. Although the Authority submitted that this impacted the validity of this request, the Commissioner does not accept this position. He is satisfied that the Applicant’s request for review adequately met the requirements of section 20(3)(c)(ii).

The Commissioner's view

24. 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 must first of all consider the interpretation and scope of the request and thereafter the quality, thoroughness and results of the searches carried out by the public authority.
25. The Commissioner also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. Ultimately, however, the Commissioner's role is to determine what relevant recorded information is actually held by the public authority (or was, at the time it received the request).
26. Given the explanations, submissions and evidence provided by the Authority, the Commissioner accepts that the Authority took adequate and proportionate steps in the circumstances to establish if the information was held. He is satisfied that it does not (and did not, on receipt of the request) hold the information requested by the Applicant in parts (i) and (ii) of her request.
27. While the Applicant believed and expected the specified information to be held by the Authority, the Commissioner is satisfied that this was not the case. Whether a public authority should hold information is not a matter for the Commissioner to decide.
28. The Commissioner notes the Authority's comments on the Applicant's claims that all other health boards had provided the information she had requested. He has viewed the comments provided by the other health boards, and he is satisfied that the Authority was not the only health board unable to fulfil parts (i) and (ii) of the request.
29. The Commissioner therefore 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 information requested.

Decision

The Commissioner finds that the Authority complied with Part 1 of the Freedom of Information (Scotland) Act 2002.

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.

Jennifer Ross
(Acting) Deputy Head of Enforcement

2 August 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.”
- ...
- (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.

...

20 Requirement for review of refusal etc.

- (3) A requirement for review must-
 - (c) specify-
 - (ii) the matter which gives rise to the applicant's dissatisfaction mentioned in subsection (1).

...

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).