



Scottish Information
Commissioner
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Decision Notice 209/2024

End of life care plans, treatments or protocols including euthanasia plans

Authority: Lothian Health Board
Case Ref: 202300028

Summary

The Applicant asked the Authority for information about any “end of life care” plans, treatments or protocols including euthanasia plans. The Authority provided information relating to end of life care. The Applicant believed the Authority may have held further relevant information which had not been disclosed. The Commissioner investigated and found that the Authority held further relevant information which it had not disclosed to the Applicant, or withheld under an exemption. He also found that the Authority had failed to provide a response to the part of the request relating to euthanasia, and that the review outcome had failed to meet certain requirements of FOISA. He required the Authority to carry out a fresh review and issue a revised review outcome.

Relevant statutory provisions

[Freedom of Information \(Scotland\) Act 2002](#)¹ (FOISA) sections 1(1), (2) and (4) (General entitlement); 17(1) (Notice that information is not held); 19 (Content of certain notices); 21(4), (5) and (10) (Review by Scottish public authority); 47(1) and (2) (Application for decision by Commissioner)

Background

1. On 23 September 2022, the Applicant made the following request for information to the Authority:

¹ <https://www.legislation.gov.uk/asp/2002/13/contents>

Please provide all and any recorded information pertaining to any "End of life care" plan(s) or treatment(s) or protocol(s) including details of voluntary, none-voluntary and involuntary Euthanasia plans, if held, by [the Authority] for members of the British public - particularly those who are deemed disabled, elderly or nurses of [the Authority] itself.

2. The Authority responded on 18 October 2022, stating that there were a number of documents used in different departments. It provided a link to information which was publicly available online, together with a copy of an Authority-specific document, with explanation of its use. The Authority stated that these provided an overview of the principles involved.
3. On 25 November 2022, the Applicant wrote to the Authority requesting a review of its decision. Referring to the "number of documents used in different departments" referenced in the Authority's response, the Applicant requested a copy of these documents. The Applicant also requested a copy of all voluntary, non-voluntary and involuntary plans, protocols or policies held by the Authority for the elderly, disabled and nurses of the British public who are or were patients of the Trust.
4. The Authority responded to the Applicant's requirement for review on 6 January 2023. It disclosed copies of three further documents used in different departments for end of life care and stated that there were no separate policies for the elderly, disabled or current and former nurses – the same policies would be used. The Authority also provided a link to other information which was publicly available online. The Authority's response also included notice of the Applicant's rights to request a review if dissatisfied with its response.
5. On 9 January 2023, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant wished to verify whether the Authority had supplied all information falling within the scope of their request and whether it held any information concerning voluntary, non-voluntary and involuntary euthanasia particularly regarding the elderly, disabled and nurses and, if so, they wished that information to be disclosed.

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 18 January 2023, 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 Authority provided its initial comments on 15 February 2023. The case was subsequently allocated to an investigating officer.
9. Following consideration of the Authority's initial comments, the Investigating Officer invited the Authority to provide further comments and to answer specific questions. These focussed on the searches undertaken by the Authority to establish whether it held any further information falling within the scope of the request, and why the Authority appeared to have dealt with the Applicant's request for review as a new request for information.

Commissioner's analysis and findings

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

Does the Authority hold any further relevant information?

11. 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 public 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.
12. The information to be given is that held by the Authority at the time the request is received, as defined by section 1(4). This is not necessarily to be equated with information that an applicant believes the public authority should hold. If no such information is held by the public authority, section 17(1) of FOISA requires the authority to give the applicant notice in writing to that effect.
13. 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 of probabilities 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 reason 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 about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.
14. The Commissioner has taken account of the arguments in both the Applicant's requirement for review and their application, in which they provide reasons why they consider the Authority may hold the information requested.
15. In its submissions to the Commissioner, the Authority maintained that all relevant documents that it held on end of life care had been disclosed to the Applicant and that it held no further relevant documents.
16. The Authority provided details of the searches and enquiries it had carried out to establish what relevant information was held, which included links to information identified which, the Authority considered, may be relevant to the request. It explained, with supporting evidence, which members of staff had been involved in these, and why those individuals were considered best placed to do so. These searches and enquiries, the Authority explained, identified the documentation that had already been disclosed to the Applicant. The Authority confirmed that it held no further relevant information and also that it held no plans concerning euthanasia.

The Commissioner's views

17. Having considered all relevant submissions and the terms of the request, the Commissioner is satisfied that the Authority took adequate, proportionate steps in the circumstances to establish whether it held any information that fell within the scope of the request. He has considered the explanations and supporting evidence provided by the Authority setting out its position in relation to the request.

18. The Commissioner is satisfied that, although somewhat limited given the passage of time, the searches and enquiries carried out by the Authority would have been capable of identifying any information held relevant to the request.
19. The Commissioner has considered the Authority's submissions in which it concludes that it held no further information falling within the scope of the request, other than that which it had already disclosed to the Applicant. Having also considered the evidence of the searches carried out, the Commissioner cannot agree with the Authority's conclusion here. In the Commissioner's view, the evidence provided by the Authority lists a link to information which, having been considered by the Commissioner, appears to fall within the scope of the request, in that it is information described as a *"...policy [applying] to all NHSScotland Staff and the care of adult patients in all care settings within the remit of NHSScotland..."*.
20. The Commissioner can see nothing in the Authority's submissions explaining why this information, which he considers falls within scope, was not disclosed to the Applicant or withheld under an exemption in FOISA.
21. In addition, the evidence of searches provided to the Commissioner also lists links to information in two documents on the Authority's intranet site relating to procedures which were in place during the COVID-19 pandemic, and which the Authority deemed to be *"...out of date..."* and *"...should not be used as no longer relevant..."*. While he accepts that this information may no longer be current, this appears to him to be academic. The Applicant's request does not specify a timeframe and the fact remains that the Authority holds this information, which potentially falls within the scope of the request, irrespective of whether it is in use or not.
22. Turning to the element of the Applicant's request concerning information relating to euthanasia, the Commissioner notes that euthanasia is illegal in Scotland and, as such, he considers it is highly unlikely that the Authority (or indeed any health authority in Scotland for that matter) would hold end of life care plans which included plans for euthanasia in any of the circumstances described in the Applicant's request. Given the nature of the information requested, together with the explanation of the searches carried out by the Authority which, the Commissioner considers, would have been capable of identifying any relevant information, the Commissioner is satisfied that the submissions put forward by the Authority sufficiently explained why it did not hold the information on euthanasia requested.
23. In the circumstances, therefore, the Commissioner is satisfied, on the balance of probabilities, that the Authority does not (and did not, on receipt of the request) hold any information relating to euthanasia (as per the circumstances described in the request) falling within the scope of the Applicant's request.
24. However, under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give the applicant notice in writing to that effect. In this case, the Authority did not provide the Applicant with such notice in respect of that element of their request concerning information relating to euthanasia.
25. Given that the Authority did not hold any such information (i.e. relating to euthanasia), it had a duty to issue a notice in writing to that effect, to comply with the terms of section 17(1) of FOISA.
26. As the Authority failed to provide such a notice to the Applicant, the Commissioner finds that it failed to comply with the requirements of section 17(1) of FOISA in relation to any relevant information relating to euthanasia, as per the terms of the Applicant's request.

Handling of request for review

27. The Authority initially stated that it had treated the Applicant's email of 25 November 2022 as a new request, rather than a request for review, as it believed they were asking for additional information.
28. The Commissioner notes that, in their email of 25 November 2022, the Applicant had clearly stated that they were requesting a review. Given this, and also that the information requested in that email appeared to fall within the scope of the initial request, the Authority was asked to explain why it considered that the Applicant was seeking additional information at that point and so had treated the Applicant's email as a new request for information.
29. In response, the Authority submitted that, having checked the Applicant's emails of 23 September 2022 (the initial request) and 25 November 2022 (the request for review), it accepted that it was a mistake not to have considered the latter as a request for review, as no new information had been requested.
30. Having examined the Authority's response of 6 January 2023, the Commissioner is concerned to note that it did not appear to meet the notice requirements set out in section 21(4) and (5) of FOISA. These provide that the review outcome must inform the requester what steps the public authority has taken (i.e. confirm its original decision; substitute a different decision, or reach a decision where no decision had been reached) (section 21(4)), and why it has taken these steps (section 21(5)). Nor did the review outcome contain particulars of the requester's rights of application to the Commissioner and of appeal to the Court of Session, as required by section 19 and section 21(10) of FOISA.
31. It is a matter of fact that the Authority failed to recognise the Applicant's email of 25 November 2022 as a requirement for review and, as such, its response of 6 January 2023 failed to meet the requirements set out in paragraph 30 above. The Commissioner must therefore find that the Authority failed to comply with section 19 and section 21(4), (5) and (10) of FOISA in those respects.

Action required by Authority

32. The Commissioner requires the Authority to carry out a fresh review and to issue a revised review outcome compliant with the requirements of section 19 and section 21 of FOISA. In doing so, the Commissioner expects the Authority to consider the information which he deems to fall within scope (described in paragraph 19 above), and whether the information referred to at paragraph 21 above falls within scope. (Details of this information will be made clear to the Authority along with this Decision Notice). He also requires the Authority to issue the Applicant with a formal notice in relation to that part of their request concerning information relating to euthanasia, as addressed at paragraphs 25 and 26 above.

Decision

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

The Commissioner finds that the Authority complied with Part 1 of FOISA to the extent that it identified some of the information it held, falling within the scope of the Applicant's request, which it made available to them.

However, the Commissioner finds that the Authority failed to comply with Part 1 of FOISA in the following respects:

- (i) The Authority failed to fully disclose (or withhold under an exemption) information falling within the scope of the request and, in so doing, failed to comply with section 1(1) of FOISA.
- (ii) The Authority failed to fully comply with section 17(1) of FOISA by failing to inform the Applicant that it held no information relating to euthanasia, as per the terms of the request.
- (iii) The Authority failed to carry out a review which met the requirements of section 19 and section 21(4), (5) and (10) of FOISA.

The Commissioner therefore requires the Authority to carry out a fresh review and to issue a FOISA-compliant revised review outcome in line with his findings in paragraphs 19, 21, 24, 25 and 31 of this Decision Notice, by **14 November 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.

Jill Walker
Deputy Head of Enforcement

30 September 2024