



Scottish Information
Commissioner

Decision 018/2008 - Mr James Dickinson and Lanarkshire NHS Board

Job reports produced during matching process pertaining to the applicant's post

Applicant: Mr James Dickinson
Authority: Lanarkshire NHS Board
Case Nos: 200700495 and 200700788
Decision Date: 31 January 2008

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 018/2008 Mr James Dickinson and Lanarkshire NHS Board

Job reports produced during matching process pertaining to the applicant's post

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1 (General entitlement); 10(1) (Time for compliance); 17 (Notice that Information not held); 21(4) (Review by Scottish public authority; and 30(b) (Prejudice to effective conduct of public affairs).

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr James Dickinson (Mr Dickinson) made two information requests, which together sought all information held by the Board pertaining to the job-matching process for his post from Lanarkshire NHS Board (the Board). In response to the first request, for all job-matching reports for Mr Dickinson's post, the Board stated that it did not hold those prior to the final version. Mr Dickinson then made a second request for all other information held relating to the job matching process for his post. In response, the Board stated that it held an auditable job report for Mr Dickinson's post but this was exempt in terms of section 30(b) of FOISA. Following reviews of both requests, Mr Dickinson remained dissatisfied and applied to the Commissioner for decision.

During the investigation, the auditable job report was provided to Mr Dickinson, but he remained dissatisfied and asked me to reach a decision on whether it was correctly withheld in the first instance.

Following an investigation, the Commissioner found that the Board had dealt with Mr Dickinson's first information request in line with Part 1 of FOISA.

The Commissioner found that the Board had failed to deal with Mr Dickinson's second request for information in accordance with Part 1 of FOISA by misapplying



the exemptions in section 30(b). As the information had been supplied to Mr Dickinson's satisfaction, the Commissioner did not require any action to be taken.

Background

1. On 7 February 2007, Mr Dickinson wrote to the Board requesting the following information: all matched job reports produced during the matching process pertaining to his [Mr Dickinson's] post (Request 1). The reports concerned had been produced, as part of the process of job evaluation and assimilation under the "Agenda for Change" system.
2. The Board wrote to Mr Dickinson on 8 March 2007 in response to Request 1. It stated that it only held the final matched job report, and explained that the Computer Aided Job Evaluation (CAJE) system used in the job-matching process overwrites previous reports and updates the final report with any changes made during the matching process. The Board gave notice in terms of section 17(1) of FOISA that the information requested was not held.
3. On 12 March 2007, Mr Dickinson wrote to the Board requesting a review of its decision. In particular, Mr Dickinson expressed dissatisfaction that the Board had taken 30 [calendar] days to respond to his initial request. He also stated that it was his understanding, having spoken to persons involved with the CAJE system, was that it may still be possible to retrieve information produced by the job matching process even where the final report has been produced. He asked that this avenue be explored as a possible means of providing the information requested. Mr Dickinson also made a further request in this letter, for all remaining information held by the Board pertaining to the job-matching process for his post (Request 2).
4. On 27 March 2007, the Board wrote to notify Mr Dickinson of the outcome of its review in respect of Request 1. The Board repeated that it only keeps the final matched job report (which it had supplied). Further it explained that the company providing the CAJE system had confirmed that this software overwrites previous reports and that no print-outs are kept in order to avoid confusion. The review therefore upheld the initial notice in terms of section 17(1) of FOISA. In response to Request 2, the Board stated that it had been agreed at the Agenda for Change Board that any questions raised by staff would be dealt with once the Agenda for Change process was completed.
5. On 29 March 2007, Mr Dickinson wrote to my Office, stating that he was dissatisfied with the outcome of the Board's review and applying to me for a decision in terms of section 47(1) of FOISA (in respect of Request 1).



6. On 24 April 2007, Mr Dickinson wrote to the Board requesting a review of its decision in respect of Request 2. In particular, Mr Dickinson drew the Board's attention to the fact that he had requested information, not asked for a question to be answered. He also stated that from the response he assumed that the Board was withholding any relevant information until the process was complete.
7. The Board wrote to notify Mr Dickinson of the outcome of its review in respect of Request 2 on 22 May 2007. The Board explained that to answer information requests while the Agenda for Change process was ongoing would be detrimental to the overall process since it would require staff to divert resources from the job matching process. The Board held that in terms of section 30(b)(i) and (ii) of FOISA release of the information to Mr Dickinson would prejudice the discussions which were ongoing in regards to Mr Dickinson's job area and would inhibit substantially the free and frank exchange of views and advice.
8. On 29 May 2007, Mr Dickinson wrote to my Office, stating that he was dissatisfied with the outcome of the Board's review of his second request and applying to me for a decision in terms of section 47(1) of FOISA (in respect of Request 2).
9. Both applications were validated by establishing that Mr Dickinson had made requests for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its responses to these requests.

The Investigation

10. The Board was notified in writing that Mr Dickinson's first and second applications had been received on 4 April and 8 June 2007 respectively. In each case the Board was asked to provide my Office with specified items of information required for the purposes of the investigation. The Board responded with the information requested and the cases were then allocated to an investigating officer.
11. On 8 May and 25 September 2007 the investigating officer contacted the Board concerning requests 1 and 2 respectively to ask it to provide comments on the applications and to respond to specific questions on these. The two cases were subsequently conjoined for the purposes of further investigation.



12. During the investigation, the Board disclosed the information that had been withheld in response to Request 2 to Mr Dickinson, subject to the redaction of a small amount of information that would reveal the identities of those involved with the assimilation process. Mr Dickinson indicated that this disclosure satisfied his request, but that he remained dissatisfied with the Board's initial decision to withhold this information. He confirmed that he still wanted my decision to consider whether this was in line with Part 1 of FOISA.

Submissions for the applicant

13. With respect to Request 1, Mr Dickinson expressed dissatisfaction with the timescale within which a response was provided to his initial request. He was also dissatisfied that the Board failed to consider this matter when responding to his request for review. He also questioned whether it was the case that no information was held concerning matched job reports prior to the final version.
14. With respect to Request 2 Mr Dickinson noted that one reason given by the Board for withholding the information was that it would disrupt the Agenda for Change process. Inconvenience to an authority, Mr Dickinson submitted, was not a valid exemption under FOISA and in any event the Board's response did not explain how responding to his information request would substantially interfere with the Agenda for Change process.
15. Mr Dickinson stated that he had requested information in order to understand how his post had been assimilated by the Agenda for Change Panel. The Board had stated that questions would be answered once assimilation was complete but Mr Dickinson said that he had requested information, not asked questions and the Board had not indicated if it held the information nor addressed whether it could provide the information, as oppose to answer the questions. Mr Dickinson expressed dissatisfaction that the Board had not specified the information it held which came within the terms of the request.
16. Not having access to such information (at the point of making his application to my office), Mr Dickinson argued, affected his ability to prepare for any appeal against the banding assigned to his job under the Agenda for Change.
17. In respect of the Board's application of the exemptions in section 30(b), Mr Dickinson argued that the information he sought related to his post only and he could not understand how it fell within the exemption relating to prejudice to the effective conduct of public affairs. Additionally, Mr Dickinson questioned the use of an exemption on review that had not previously been cited by the Board.



Submissions from the Board

18. With respect to Request 1, the Board explained that Mr Dickinson was provided with a copy of his matched job report but that the Board did not hold all the previous matched job reports for Mr Dickinson's position since they had been overwritten by the CAJE System. The Board explained that the CAJE system cannot reinstate overwritten matched job reports. The Board also provided background information to explain the time taken to provide its response to this request.
19. The Board confirmed that, in responding to Request 2, it had withheld one document (an audit evaluation report for Mr Dickinson's post). It explained that this is the only record of processing of the job from start to completion. The Board stated that this was, at the time of Mr Dickinson's request, exempt from disclosure in terms of sections 30(b)(i) and (ii) of FOISA.
20. The Board indicated that there was a current active discussion of issues relating to the Agenda for Change process, including the area which Mr Dickinson's job fell under, and that releasing the information would have prejudiced the discussion and decision making process for that and other posts, because staff would have had access to partial or incomplete information.
21. The Board also noted that for Mr Dickinson's departments, some staff were still to submit job descriptions to be considered in the assimilation process. It suggested that should the auditable event report relating to his post be disclosed, then other staff may be able to amend their job descriptions to enable a more favourable outcome based on information contained in the log.
22. In more general comments, the Board noted that, although the auditable event report for Mr Dickinson's post was a short document, some auditable event reports may contain more than 70 pages. The Board argued that to provide redacted auditable event reports for staff whose posts had been assimilated would require the transfer of resources from the assimilation process to the production of redacted job reports which would mean that those staff still to be assimilated would suffer (in the sense that they would less quickly receive any new grade). The effect, the Board argued, of providing all auditable event reports for all assimilated staff would halt the Agenda for Change process.
23. The Board also commented that it was of the view that there was not a public interest in disclosure of the auditable event report for this particular [Mr Dickinson's] job, but it acknowledged that there may be a public interest in 'the completed agenda for change in relation to all NHS staff where new pay scales are agreed'



24. The Board said that the Agenda for Change team had indicated that it would supply Mr Dickinson with a copy of the auditable event report in September 2007. As noted above, this information has now been supplied to Mr Dickinson.

The Commissioner's Analysis and Findings

25. As noted above, Mr Dickinson made two requests, seeking:
- all matched job reports produced during the matching process pertaining to his post (Request 1);
 - all remaining information held by the Board pertaining to the job matching process for his post (request 2).
26. In what follows, I will consider in turn the three areas where Mr Dickinson has asked me to consider whether the Board complied with Part 1 of FOISA in responding to requests 1 and 2; that is:
- Time for compliance with Request 1 and the Board's failure to respond on review to his expressed dissatisfaction about response timescales;
 - The question of whether information is held (other than the final matched job report) that would provide a response to Request 1.
 - Whether the Board was correct to withhold the auditable event report falling within the scope of Request 2 under the exemptions in section 30(b) of FOISA, when it first responded to Mr Dickinson's request.

Section 10 – Time for compliance (Request 1)

27. Mr Dickinson expressed dissatisfaction that the Board's response to his initial request was received after 30 [calendar] days and that the Board's review did not address his dissatisfaction in respect of this timescale. He stated that he was aware of other persons who had made similar requests and who had received a response within a shorter timescale.
28. Section 10(1) of FOISA provides that a public authority must comply promptly with a request for information and in any event not later than the twentieth working day from receipt of the request. It is important to note that this period computes working days and that it is not necessary for the applicant to receive the response within 20 working days.



29. The Board submitted, and I accept that it responded within twenty working days of receiving the request, as required by section 10(1) of FOISA. The request was dated 7 February 2007, and (I am advised by Mr Dickinson) sent by recorded delivery. Had this been received on 8 February 2007 (and so 9 February the first working day to be counted for the purposes of the 20 working day timescale), the response date of 8 March 2007 would have been the 20th working day following receipt. The Board has explained that it used the full time available because its Agenda for Change Team had been confirming whether it was technically possible to reinstate the previously matched job reports, and if possible to allow full assimilation of Mr Dickinson's staff group.
30. Mr Dickinson did express his dissatisfaction about the time taken in responding to his request in his request for review and in his appeal to my Office expressed dissatisfaction that the Review Panel had not addressed this. In the light of such an expression of dissatisfaction, I would have expected the Board in its review response to clarify to Mr Dickinson that the timescale specified in section 10(1) involves calculation of working days rather than calendar days, and have explained the reason why it had taken the full time available to it.
31. Although I have not found any breach of Part 1 of FOISA in this instance, I would remind the Board to ensure that in future it takes care to address the reasons for dissatisfaction raised by the applicant when conducting a review and providing notice of its outcome.

Information held (Request 1)

32. Mr Dickinson has asked me to consider whether the Board was correct to assert that it was not possible to retrieve the matched job reports prior to the final version. He indicated that he had received information from the company that produced the CAJE software (the company) that suggested it would be possible to retrieve this information.
33. The Board explained to me the steps taken to establish whether the information requested could be retrieved. These steps included checking whether the company was capable of reinstating matched job reports. In respect of the CAJE software itself, the Board had explained that it was the end user of this web-based system and it does not have a server for this system. The Board also provided my Office with a copy of an email from the National Pay Modernisation Unit of the Health Department of the [as it then was] Scottish Executive (SEHD) confirming that previously overwritten matched job reports could not be reinstated.



34. Given the details provided to me by the Board, I am satisfied that at the time of the request it did not hold information – other than that supplied (i.e. final matched job report) - which fell within Mr Dickinson's first request. Therefore, I have found that it acted in accordance with Part 1 of FOISA when it provided notice in terms of section 17(1) of FOISA that this information was not held.

Application of section 30(b)(i) and (ii) – Request 2

35. Mr Dickinson's Request 2 asked for "all remaining information held [by the Board] pertaining to the job matching process for my [Mr Dickinson's] post". This request would cover the report on auditable events for Mr Dickinson's post. This report on auditable events will detail any alterations made to that specific job within CAJE. I am satisfied that this is all information held that would fulfil Request 2.
36. The Board initially cited no exemption when withholding this information, but at review confirmed that it had applied the exemptions in section 30(b)(i) and (ii) of FOISA. It has since disclosed the information and so it is clear that the risk of harm from disclosure has now passed. What I must consider in this case is whether the Board correctly applied these exemptions at the time of its response to Mr Dickinson's request for review.
37. Mr Dickinson has questioned whether the Board was entitled to substitute exemption in the review process which had not been claimed in respect of an initial request. Section 21(4) of FOISA provides that an 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; or (b) substitute for any such decision a different decision; or (c) reach a decision, where the complaint is that no decision had been reached. By applying an exemption at review, the Board substituted a new decision for that previously made (which failed to specify any exemption or reason for withholding the information). I am satisfied that there was no breach of Part 1 of FOISA in so doing.
38. The exemptions in sections 30(b) of FOISA allow public authorities to withhold information if its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice (section 30(b)(i)) or the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)). Both exemptions are subject to the public interest test in section 2(1)(b) of FOISA.



39. I have previously expressed the view that in section 30(b) of FOISA, the chief consideration is not whether the information itself constitutes advice or the exchange of views for the purposes of deliberation (although that will be relevant in most cases), but whether the release of the information that has been withheld would or would be likely to inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
40. In this case the auditable event record is not what I would categorise as advice nor can it be seen as an exchange of views. Rather it is a record of any changes made to a job description. However, I recognise that the Board is claiming that its disclosure would affect the exchange of views i.e. those staff involved in submitting or giving consideration to job descriptions for assimilation and that the Board is arguing that release would, or would be likely to, inhibit substantially these persons when they were involved in assimilating a job.
41. I look for authorities demonstrating a real risk or likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is a remote possibility. Also, the harm in question should take the form of substantial inhibition from expressing advice and/or views in as free and frank a manner as would be the case if disclosure could not be expected to follow. The word "substantial" is important here: the degree to which a person will or is likely to be inhibited in expressing themselves should be of some real and demonstrable significance.
42. The Board's submissions in respect of the withholding of the auditable job report are summarised in paragraphs 20-22 above.
43. In relation to the withheld material, the Board has described the specific harm which they believe would result from disclosure of the information. The harm would be:
- The possibility of unfair advantage to some staff members if they had sight of an auditable event log before their own post had been subject to the same process;
 - The inhibition to those involved in the assimilation process in exchanging views, and recording views, if they thought that these views would be disclosed.
44. The Board has also suggested that disclosure would have an adverse affect to the whole assimilation process, by diverting resources from the assimilation process if the Board had to respond to requests for auditable event logs from staff whose posts had already been assimilated.



45. Having considered all of the Board's submissions, I do not think it has demonstrated disclosure in this case would have substantially inhibited, or would have been likely to substantially inhibit, the free and frank provision of advice or exchange of views at the time when it responded to Mr Dickinson's request for review concerning its response to Request 2.
46. Firstly, I do not accept the necessary causal link between disclosure of the material and the harm that is argued, but even were I to accept this connection I do not accept that there would be, or would be likely to be, the effect of substantial inhibition from expressing advice and/or views in a free and frank a manner.
47. In this instance the persons engaged in the assimilation were doing so in an official capacity and other factors come into play such as their commitment to a quality service, and ensuring the quality of the Agenda for Change process. I think it is acknowledged by the Board that this is a rigorous process and I do not think that disclosure of this material, in this instance, would have had the effect argued by the Board.
48. I have noted that the identities of those involved in the assimilation process were removed from the version of the auditable event report supplied to Mr Dickinson (and he has accepted this redaction). By disclosing the information in this form, the Board has limited the scope for any inhibition that individuals might feel if they were identified with the decisions taken.
49. I also do not think that it is relevant to the consideration of whether the exemptions in section 30(b) apply in respect of Mr Dickinson's request that the Board may have had to respond to further requests for similar material and this would have an adverse effect on the Agenda for Change process. Whilst the assimilation process is of importance to the Board, I agree with Mr Dickinson's submission that possible inconvenience were others to make a similar request is not a relevant consideration when applying the exemptions in section 30(b).
50. As I have said in previous decisions, I will decide on a case by case basis and I am not in a position to decide, as Mr Dickinson requested, whether future requests for similar or analogous documentation would be exempt.
51. After considering the content and context of the information I have not found any reason to uphold the use of either of the exemptions in section 30(b) in respect of the information under consideration.
52. As I am not satisfied that this information was exempt under section 30(b)(i) or (ii) of FOISA at the time of the Board's consideration of Mr Dickinson's request for review, I am not required to go on to consider the application of the public interest test in section 2(1)(b) of FOISA.



53. However, during the investigation the Board supplied a copy of the withheld information to Mr Dickinson and I therefore do not require any action from the Board.

Decision

This case has considered whether I find that Lanarkshire NHS Board (the Board) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to Request 1 and Request 2.

I have found that the Board complied with Part 1 of FOISA in its responses to Request 1. In particular, I have found that it correctly notified Mr Dickinson in terms of section 17(1) that the information requested was not held, and that it did so within the timescale required by section 10(1) of FOISA.

I have found that the Board failed to comply fully with the requirements of Part 1 of FOISA in responding to Request 2. I find that the Board misapplied section 30(b) of FOISA in withholding the auditable job report and so the Board failed to comply with section 1(1) of FOISA.

Given that the Board has now provided Mr Dickinson with a copy of the auditable job report, I do not require the Board to take any action in response to this failure.

Appeal

Should either Mr Dickinson or Lanarkshire NHS Board (the Board) wish to appeal against this decision, there is an 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 notice.

Kevin Dunion
Scottish Information Commissioner
31 January 2008



Appendix

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.

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
 - (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
 - (b) in a case where section 1(3) applies, the receipt by it of the further information.

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.

21 Review by Scottish public authority

...

- (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.

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-
 - (i) the free and frank provision of advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation; or