

Decision Notice



Decision 039/2009 Dr Christine Paterson and Highland NHS Board

Employment-related information

Reference No: 200801234

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Summary

Dr Paterson requested from Highland NHS Board (NHS Highland) copies of various organisational policies & procedures, along with copies of correspondence between various individuals. NHS Highland responded by claiming that Dr Paterson's request was vexatious and repeated in terms of section 14(1) and 14(2) of FOISA. Following a review, where NHS Highland upheld its original decision, Dr Paterson remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that NHS Highland failed to deal with Dr Paterson's request for information in accordance with Part 1 of FOISA, and that Dr Paterson's request was not vexatious or repeated under section 14 of FOISA. He required NHS Highland to respond to Dr Paterson's initial request for information.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 14(1) and 14(2) (Vexatious or repeated requests)

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

Background

1. On 10 June 2008, Dr Paterson wrote to NHS Highland requesting the following information:
 - (a) The gender of the locum GP who started at KLB/Scourie on 2 July 2006.
 - (b) A copy of NHS Highland's Equal Opportunity Policy.
 - (c) A copy of NHS Highland's Bullying and Harassment Policy.
 - (d) A copy of NHS Highland's policy/guidelines on dealing with concerns about a contracted doctor.
 - (e) Copies of all correspondence between [named individual] and the Scottish Ambulance Service.
 - (f) Copies of all correspondence between [named individual] and any other persons concerning herself.



- (g) Copies of all correspondence between [named individual] and any other persons regarding the Statutory Grievance Appeal meeting held on 03/07/07.
 - (h) Copies of all correspondence between [named individual] and any other persons concerning the formal complaints made against [other named individuals]
 - (i) Complaints procedures that deal with complaints that are not about patient care.
2. NHS Highland responded on 17 June 2008. In its response, NHS Highland made reference to the request for information made on 10 June 2008 but also to a previous request for information made by Dr Paterson on 15 May 2008. The significance of this is discussed later in this decision. In its response, NHS Highland stated that it was refusing to respond to Dr Paterson's request on the grounds that the request was vexatious in terms of 14(1) of FOISA and repeated in terms of 14(2) of FOISA.
 3. On 8 July 2008, Dr Paterson wrote to NHS Highland requesting a review of its decision. In particular, Dr Paterson submitted that the requests for information contained in her letter of 10 June 2008 were being made for the first time.
 4. NHS Highland notified Dr Paterson of the outcome of its review on 31 July 2008. Once again, NHS Highland referred to the requests of 15 May and 10 June 2008, upholding its original decision on the basis that the requests were vexatious and repeated.
 5. On 25 August 2008, Dr Paterson wrote to the Commissioner's Office, stating that she was dissatisfied with the outcome of NHS Highland's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
 6. The application was validated by establishing that Dr Paterson had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.
 7. During the validation process, Dr Paterson confirmed that she was asking the Commissioner to investigate only the request for information made on 10 June 2008. The case was then allocated to an investigating officer.

Investigation

8. On the 8 October 2008, the investigating officer contacted NHS Highland, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, NHS Highland was asked to justify its reliance on section 14(1) of FOISA in relation to Dr Paterson's request for information of 10 June 2008.



9. The investigating officer noted that NHS Highland's responses to Dr Paterson referred to the requests for information made on both 15 May and 10 June 2008. The letter of 8 October 2008 to NHS Highland confirmed that the application under consideration by the Commissioner in this case referred only to the request made by Dr Paterson on 10 June 2008. A copy of Dr Paterson's application was also included for ease of reference.
10. NHS Highland responded on 28 October 2008. Included in its response was information relevant to Dr Paterson's request and a schedule detailing the various information requests it had received from Dr Paterson. In its response, NHS Highland provided comments regarding the questions raised by the investigating officer in his letter of 8 October 2008, including its reasons for asserting that Dr Paterson's request was vexatious in terms of section 14(1) and repeated in terms of section 14(2) of FOISA. Further correspondence followed with NHS Highland on both parts of section 14. NHS Highland's arguments are discussed in detail in the analysis and findings section below.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Dr Paterson and NHS Highland and is satisfied that no matter of relevance has been overlooked.

Section 14(1) – Vexatious requests

12. Section 14(1) of FOISA states that section 1(1) (which confers the general entitlement to information held by such authorities) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious. Section 14 does not provide an exemption as such: instead, its effect is to render inapplicable the general right of access to information contained in section 1(1) of FOISA.
13. If NHS Highland was correct in its application of section 14(1), it would be under no obligation to comply with the Dr Paterson's request. The Commissioner is unable to require NHS Highland to comply with any request that he accepts to be vexatious.
14. FOISA does not define "vexatious". For the equivalent provision in the (UK) Freedom of Information Act 2000, the Information Tribunal, in the case of *Ahilathirunayagam v. Information Commissioner and London Metropolitan University* (EA/2006/0070), accepted that the normal use of this word is "to describe activity that is likely to cause distress or irritation, literally to vex a person to whom it is directed".
15. The Commissioner's approach is that a request (which may be the latest in a series of requests, or one among a large number of individual requests) will be vexatious where it would impose a significant burden on the public authority and one or more of the following conditions can be met:



- (a) It has the effect of harassing the public authority; and/or
 - (b) It does not have a serious purpose or value; and/or
 - (c) It is designed to cause disruption or annoyance to the public authority; and/or
 - (d) It would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.
16. In an earlier decision (*Decision 062/2005 MacRoberts and the Scottish Executive*, which related to 720 requests for information made to the then Scottish Executive on the same day), the Commissioner provided guidance in relation to the meaning of vexatious. In particular, the Commissioner is likely to be sympathetic to public authorities refusing a request under section 14(1) where responding to that request would impose a significant burden on the public authority and would, in the opinion of a reasonable person, be considered to be manifestly unreasonable or manifestly disproportionate.
17. In considering what is manifestly unreasonable or manifestly disproportionate, it will sometimes be necessary to consider the effect of dealing with the request on a public authority. Even if an applicant does not intend a request to be vexatious, it is possible that dealing with that request will impose a significant burden on a public authority and the request should be considered manifestly unreasonable or manifestly disproportionate. The nature and effect of the request, rather than the intentions of the applicant, must therefore be taken into account.
18. The Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under FOISA (the Section 60 Code) makes it clear that authorities should be prepared to provide justification for deciding that a request is vexatious, stating that the power to refuse to respond to a request on the grounds contained in section 14(1) should be used sparingly and should not be abused simply to avoid dealing with a request for information. Paragraph 5 of the Section 60 Code also states the following: "Staff should also be aware that, in giving assistance, an applicant's reasons for requesting the information are not relevant. Applicants should not be given the impression that they are obliged to disclose the nature of their interest or that they will be treated differently if they do so."
19. Although the term "vexatious" must be applied to the request and not the requestor, the Commissioner notes that the applicant's identity and the history of their dealings with a public authority may be relevant. This does not mean, however, that a request for information should be automatically refused in the light of such issues.



20. In its submissions, NHS Highland provided arguments in support of its view that the request for information should be treated as vexatious and repeated. In summary, it provided an overview of the circumstances surrounding the relationship between Dr Paterson and NHS Highland, concluding that to deal with the request would impose a significant burden in terms of distraction and that (given the circumstances of the relationship) the purpose of the request was to cause disruption or annoyance. It argued that the request had the effect of harassing the public authority. It pointed out that she was at the same time pursuing the information she was seeking through the Employment Tribunal process.
21. The Commissioner has reviewed in detail the arguments presented by NHS Highland to support its assertion that the request for information under investigation in this case was vexatious, and in conclusion he does not accept that the request is vexatious in terms section 14(1) of FOISA.
22. The Commissioner has taken into consideration the content of the request (as detailed in paragraph 1) and notes that parts (b), (c), (d) and (i) all seek copies of organisational policies, guidelines or procedures. The remaining information sought comprises correspondence between various individuals, with the exception of request (a), which appears to pose a question rather than necessarily making a specific request for recorded information (although it is possible that NHS Highland may hold recorded information falling within its scope).
23. The Commissioner concludes that NHS Highland has failed to demonstrate in its submissions that responding to Dr Paterson's information request which was initially made on 10 June 2008 would impose a significant burden on the authority. The Commissioner is unable to accept that dealing with this request would, in the circumstances of this case, require a disproportionate amount of time and the diversion of an unreasonable proportion of NHS Highland's financial and human resources away from its core operations.
24. In considering whether a request is vexatious in terms of FOISA, a Scottish public authority is certainly required to consider points (a) to (d) as detailed in paragraph 15 above, but before doing this it should consider in the first instance whether dealing with the request would in fact impose a significant burden on it. It is not evident in the circumstances of this case that responding to the request would be particularly burdensome for NHS Highland to deal with.
25. The Commissioner has noted NHS Highland's point that Dr Paterson has sought (and indeed has been able to obtain) information through the Employment Tribunal process. It appears that her applications to the Tribunal for the production of documents overlap, at least to some extent, with her information requests to NHS Highland. The Commissioner accepts that a Scottish public authority may, under section 25(1) of FOISA, be entitled to refuse to provide an applicant with information where that applicant can reasonably obtain it elsewhere. It does not follow, however (in terms of any of the tests set out in paragraph 15 above), that seeking such information under FOISA should be considered vexatious.
26. Accordingly, the Commissioner does not uphold NHS Highland's application of the provisions in section 14(1) of FOISA in the circumstances of Dr Paterson's request made on 10 June 2008.



Section 14(2) – Repeated requests

27. Having concluded that the request made by Dr Paterson on 10 June 2008 was not vexatious in terms of section 14(1) of FOISA, the Commissioner has gone on to consider whether the request was repeated in terms of section 14(2) of FOISA.
28. Although in its submissions to the Commissioner NHS Highland focused on section 14(1) of FOISA, reference was also made to the request being repeated in terms of section 14(2) of FOISA. Analysis by the investigating officer established that although Dr Paterson's request of 15 May 2008 sought certain information which had been requested in previous requests, there was no evidence to suggest that anything sought in the request of 10 June 2008 had specifically been requested before. The Commissioner notes the possibility that responses from NHS Highland to previous requests made by Dr Paterson might have incorporated information pertinent to the request made on 10 June 2008, but does not consider this to be sufficient evidence to engage section 14(2) of FOISA. Any overlap with previous requests would appear to have been incidental.
29. Accordingly, the Commissioner does not uphold NHS Highland's application of the provisions in section 14(2) of FOISA in the circumstances of Dr Paterson's request made on 10 June 2008.

DECISION

The Commissioner finds that Highland NHS Board failed to comply with Part 1 of FOISA in applying section 14(1) and 14(2) of FOISA to the information request made by Dr Paterson on 10 June 2008.

The Commissioner notes that during the course of the investigation Dr Paterson received certain of the information requested as a consequence of a court order. However, the Commissioner still requires Highland NHS Board to respond to Dr Paterson's request for information in terms of Part 1 of FOISA, other than in terms of section 14(1) or 14(2), by 18 May 2009.



Appeal

Should either Dr Paterson or NHS Highland 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
02 April 2009



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.

...

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

14 Vexatious or repeated requests

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.
- (2) Where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.