

# Decision Notice



Decision 043/2009 Misses P. and I. Lamond and Tayside NHS Board

Diary note recording contact between two district nurses

Reference No: 200800815  
Decision Date: 7 April 2009

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Misses P. and I. Lamond (the applicants) requested from Tayside NHS Board (the Board) a copy of the diary note showing that a particular district nurse (DN1) had contacted their mother's own district nurse (DN2). The Board responded by confirming to the applicants that contact was made, but it did not provide a copy of any diary note showing this, nor did it give any reason why it had not provided the requested information. Following a review, the applicants remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Board had failed to deal with the applicants' request for information in accordance with Part 1 of FOISA, by not giving them notice, in terms of sections 17 and 19 of FOISA, that it did not hold the information they had requested. The Commissioner also found that the Board had breached section 15 of FOISA by not giving the applicants advice and assistance. He did not require the Board to take any action.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 15 (Duty to provide advice and assistance); 17 (Notice that information is not held) and 19 (Content of certain notices)

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

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1. On 22 February 2008, the applicants wrote to the Board requesting the following information:

*A copy of the diary note showing that District Nurse 1 (DN1) contacted their mother's own District Nurse (DN2)*



2. The Board responded on 20 March 2008. It confirmed that contact between the two district nurses had taken place, but it did not provide any diary note recording the contact. The Board did not cite any sections of FOISA to indicate why it had not provided the requested diary note. The Board's letter did state that it enclosed an extract from DN1's diary for the date specified but this was not, in fact, provided. This letter did not provide any information regarding the applicants' right to request a review of the Board's handling of their information request.
3. On 24 March 2008, the applicants wrote to the Board and noted that the extract from DN1's diary had not been provided in its previous response of 20 March 2008. The applicants requested a copy of this diary extract, and the Board provided a copy in a letter dated 26 March 2009.
4. On 10 July 2008, after a further exchange of correspondence, the applicants wrote to the Board requesting a review of its decision. In particular, they drew the Board's attention to the fact that the previous letters it had sent them had not provided them with the information they were seeking, and they again asked for a copy of the diary note showing contact between the two District Nurses. The applicants argued that the diary page they had been provided with (from DN1's diary) did not show proof of contact between DN1 and DN2 and it was this information they were seeking.
5. The Board notified the applicants of the outcome of its review on 12 August 2008. It provided the applicants with copies of two diary notes (one of which was a duplicate of the diary page taken from DN1's diary and disclosed to the applicants on 26 March 2008), but it did not provide a copy of the diary note requested by the applicants nor did it give any indication (in terms of FOISA) why the requested diary note was not supplied.
6. On 31 October 2008, the applicants wrote to the Commissioner, stating that they were dissatisfied with the outcome of the Board's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that the applicants 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. The case was then allocated to an investigating officer.

## Investigation

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8. On 2 December 2008, the investigating officer contacted the Board, 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, the Board was asked to confirm whether it held the diary note requested by the applicants and, if not, why it had failed to notify the applicants, in terms of section 17(1) of FOISA, that it did not hold the requested information.



9. In subsequent correspondence the Board confirmed that it did not hold the diary note requested by the applicants and it answered other questions raised by the investigating officer.

## Commissioner's analysis and findings

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10. In coming to a decision on this matter, the Commissioner has considered the submissions made to him by both the applicants and the Board and is satisfied that no matter of relevance has been overlooked.

### Background information

11. At this point it may be helpful to understand some of the circumstances which led to the applicants requesting a copy of the diary note. The applicants raised several concerns with the Board regarding the medical care and treatment received by their mother, as well as perceived communication failures between nursing staff. As a result of these complaints (and in line with its complaints policy), the Board conducted a Significant Event Analysis (SEA) of the incident (a SEA is a reflective learning experience which facilitates discussion of the situation that led to the complaints, and provides an action plan to take forward any recommendations for change).
12. In the SEA Report, reference was made to the fact that the covering District Nurse (DN1) contacted the applicants' mother's own District Nurse (DN2) who was unable to carry out the visit due to work pressures. The applicants queried this and asked the Board to investigate the circumstances of this communication. Specifically, the applicants asked the Board for a copy of the diary note showing that this contact had taken place.

### Whether the information requested by the applicants is held by the Board

13. Section 17(1) of FOISA requires that, where an authority receives a request for information that it does not hold, it must give an applicant notice in writing that the information is not held.
14. In this case, the Commissioner must establish whether the Board holds (or held at the time of the applicants' request) a copy of the diary note requested by the applicants.
15. In order to determine whether the Board holds (or held) a copy of the diary note requested by the applicants, the Commissioner asked the Board to provide details of the searches it had undertaken to locate the requested diary note. In its response, the Board explained that it had asked staff involved in both the SEA and the handling of the applicants' complaints to confirm what records were available. The Board submitted that, in the case of diary notes, there are no electronic or filing systems to search as the only source of record would be in the practitioners' diaries. The Board advised that the diaries had been searched and that no entry relating to the contact between the two district nurses was found. In light of this, the Board submitted that it did not hold a copy of the diary note requested by the applicants.



16. The Commissioner has considered the submissions made by the Board and he is satisfied that the only record of the diary note would have been that held in the actual diaries of the practitioners concerned. The Commissioner is also satisfied that the Board searched both practitioners' diaries for a note of the type requested by the applicants, and that it found nothing. Consequently, the Commissioner accepts that the diary note requested by the applicants is not held by the Board.
17. However, the Commissioner consequently finds that the Board did not act in accordance with Part 1 of FOISA by failing to advise the applicants in terms of section 17(1) of FOISA that it did not hold the information requested.
18. He also finds that, by failing to notify the applicants of their right to seek a review of its decision, and subsequently to make an application to the Commissioner, the Board failed to comply with the requirements of section 19 of FOISA.

#### **Section 15 – Duty to provide advice and assistance**

19. The Commissioner notes that, in their application to him, the applicants queried the relevance of the diary notes provided to them by the Board. The applicants noted that none of the information provided to them by the Board contained any recorded proof (by way of a diary note) that DN1 contacted DN2 on the day in question.
20. The Commissioner has noted that the Board provided the applicants with copies of the pages from the diaries of the two practitioners on the relevant date. Information relating to other appointments has been removed, but references to the applicants' mother was visible in these pages. Neither page makes any reference to contact between the two practitioners relating to the applicants' mother.
21. The Board has explained that it provided this information to illustrate to the applicants what information was recorded in the diaries of the practitioners regarding their mother on the relevant date.
22. The Commissioner has reviewed the Board's letter advising the applicants of the outcome of its review. He notes that this fails to mention that neither of the two diary pages it enclosed records a diary note showing contact between DN1 and DN2. Neither does the review provide any explanation as to why it has provided the applicants with these diary pages.
23. The Board might have expected the applicants to infer from this information that there was no diary note of the type requested. However, if this was the Board's intention, it would have been helpful to the applicants had it explained its reasons for providing this alternative information, and why it considered it to be relevant given the terms of their request. By providing information that did not fulfil the request with no explanation, the Board has created confusion, and led the applicants to ask why this was supplied.



24. The Commissioner is satisfied that the intention behind the provision of the diary notes was to assist the applicants in understanding more of the circumstances surrounding the communication that took place that day. However, the Commissioner would like to remind the Board of its obligations under section 15 of FOISA. Section 15(1) of FOISA provides that a Scottish public authority must, as far as is reasonable, provide advice and assistance to a person who proposes to make, or has made, a request for information. What constitutes *reasonable* advice and assistance will vary from case to case.
25. The Commissioner considers that in this case it would have been reasonable for the Board to have clearly advised the applicants at an early stage that it did not hold the diary note they had requested. Furthermore, the Commissioner considers that if it was the Board's intention to provide alternative information (in order to give the applicants a clearer idea of the information recorded in practitioner's diaries) it should have clearly communicated that it was alternative information, and not that requested.
26. As the Board failed to take steps to ensure that the applicants understood that it did not hold the diary note they requested, and as it did not fully explain to the applicants why it provided copies of other diary notes, it is the Commissioner's view that the Board failed to comply fully with the duty contained in section 15 of FOISA.

## DECISION

The Commissioner finds that Tayside NHS Board (the Board) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Misses P. and I. Lamond (the applicants). The Commissioner finds by not advising the applicants that it did not hold the information they had asked for, the Board failed to comply with Part 1 of FOISA, and in particular with sections 17 and 19 of FOISA.

The Commissioner also finds that the Board failed to provide the applicants with advice and assistance that would reasonably have been expected, in relation to their information request. In failing to provide such advice and assistance, the Board failed to comply fully with section 15 of FOISA.

Given that it does not hold the information requested by the applicants, the Commissioner does not require the Board to take any action in response to these failures.



## Appeal

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Should either the Misses P. and I. Lamond or Tayside NHS 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.

**Margaret Keyse**  
**Head of Enforcement**  
**7 April 2009**



## Appendix

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### 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.

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##### 15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

##### 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.

- (2) Subsection (1) is subject to section 19





## 19 Content of certain notices

A notice under section 9(1) or 16(1), (4) or (5) (including a refusal notice given by virtue of section 18(1)) or 17(1) must contain particulars-

- (a) of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and
- (b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).