

Decision Notice

Decision 072/2016: Mr Paul Delamore and Grampian Health Board

Death of Mr Willie McRae

Reference No: 201502113

Decision Date: 22 March 2016



Scottish Information
Commissioner

Summary

On 10 November 2015, Mr Delamore asked Grampian Health Board (NHS Grampian) for information concerning the death of Mr Willie McRae.

NHS Grampian responded, informing Mr Delamore that it did not hold the information requested. Following a review, Mr Delamore remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner was satisfied that NHS Grampian did not hold any information which would satisfy Mr Delamore's request. She also found that NHS Grampian failed to respond to Mr Delamore's requirement for review within the required timescale. She did not require NHS Grampian to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Notice that information is not held); 21(1), (4) and (5) (Review by Scottish public authority)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 26 August 2015, Mr Delamore made a request for information to NHS Grampian. The request was in 22 parts and sought information concerning the death of Mr Willie McRae. The full text of the request is reproduced in Appendix 2 to this decision. The Appendix forms part of this decision.
2. NHS Grampian responded on 23 September 2015. It issued a notice under section 17 of FOISA, informing Mr Delamore that it did not hold the information requested. NHS Grampian explained that the medical records of deceased persons were retained for a limited time and then destroyed in line with its Records Management Policy. NHS Grampian also informed Mr Delamore that the information requested was personal information, which would be exempt under section 38(1)(b) of FOISA.
3. On 25 September 2015, Mr Delamore wrote to NHS Grampian, requiring a review of its decision to issue a notice under section 17 of FOISA. He referred to a request made by a colleague, in March 2014, for information from Mr McRae's health records. Mr Delamore believed it could be inferred from NHS Grampian's response to the earlier request that Mr McRae's health records were held at that time. He asked NHS Grampian to explain why it claimed these records were no longer held, with evidence of their destruction.
4. Mr Delamore wrote to NHS Grampian on 28 October 2015, noting that more than 20 working days had elapsed since requesting his review, and asking NHS Grampian to inform him when a response would be provided.

5. On 29 October 2015, NHS Grampian wrote to Mr Delamore, apologising for the delay in responding to his requirement for review and informing him it would be provided the following week.
6. NHS Grampian notified Mr Delamore of the outcome of its review on 3 November 2015, again apologising for the delay in responding but upholding its original decision in full. NHS Grampian submitted that its response to the earlier request cited by Mr Delamore had not confirmed the information was held at that time. It outlined the searches it had carried out for the information and explained its policy concerning the retention and destruction of deceased persons' medical records. NHS Grampian confirmed its view that Mr Delamore had asked for personal information, which was, in any case, exempt under section 38(1)(d) of FOISA.
7. On 10 November 2015, Mr Delamore wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. Mr Delamore stated he was dissatisfied with the outcome of NHS Grampian's review because:
 - (i) he believed NHS Grampian's response to his colleague's earlier request had indicated Mr McRae's medical records were held at that time. He asked the Commissioner to investigate whether or not the information existed at the time of that earlier request.
 - (ii) he was dissatisfied that NHS Grampian had not responded to his requirement for review within the statutory 20 working day period.
 - (iii) he was dissatisfied that a particular member of staff had carried out the review, believing there to be a conflict of interest.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mr Delamore made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
9. On 24 November 2015, NHS Grampian was notified in writing that Mr Delamore had made a valid application. The case was allocated to an investigating officer.
10. On 9 December 2015 the investigating officer notified Mr Delamore of the scope of the investigation, explaining that the Commissioner could not investigate or comment on whether or not information was held at the time of his colleague's earlier request. The Commissioner could only consider what information relevant to his own request of 26 August 2016 NHS Grampian held at the time. Mr Delamore acknowledged and accepted this.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. NHS Grampian was invited to comment on this application and answer specific questions. These focused on the searches carried out to identify and locate any information falling within the scope of the request. NHS Grampian was also invited to comment on whether it had complied with the procedural requirements of Part 1 of FOISA in responding to Mr Delamore's requirement for review, and on whether it believed it had followed good practice.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both Mr Delamore and NHS Grampian. She is satisfied that no matter of relevance has been overlooked.

Whether NHS Grampian held any information

13. Under section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received.
14. 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, NHS Grampian notified Mr Delamore, both in its initial response and the review outcome, that it did not hold the information he had asked for.
15. The standard 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. She 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 information is (or was, at the time the request was received) actually held by the public authority.
16. In its submissions to the Commissioner, NHS Grampian maintained it did not hold any information falling within the scope of Mr Delamore's request.
17. Given the time frame for the information requested (i.e. relating to events in 1985, 30 years before the request), NHS Grampian submitted that any relevant records would have been destroyed. It explained its policy and procedures relating to the retention and destruction of medical records. The normal retention and disposal period for an adult health record is six years following the last episode of care, or three years following date of death. Records would be destroyed by date order, at the start of the year following the end of the relevant retention period. This meant that records of patients with dates of death in 1985 would have been destroyed in early 1989.
18. NHS Grampian explained that at the time of Mr McRae's death in 1985, all records were paper based, pre-dating its first electronic Patient Administration System (PAS), introduced in 1988/89 and since replaced by a new Patient Management System (PMS) in February 2011.
19. NHS Grampian explained, and provided evidence of, the searches and enquiries carried out in reaching its conclusion that it did not hold the information requested:
 - (i) Checks were carried out by its Systems Manager, who ascertained that the only information held for Mr McRae was basic demographic information held on its PMS (name, gender, date of birth, age, address and date of death). NHS Grampian commented that this was the same information as was identified at the time of Mr Delamore's colleague's earlier request. This information, NHS Grampian explained, was believed to have been recorded on the legacy PAS and transferred over to the new PMS in 2011. A screenshot of this information was provided.

- (ii) NHS Grampian had contacted a retired Health Records supervisor (who would have been working in the medical records library at the time of Mr McRae's death), who confirmed that no individual records of destruction were kept at that time. This individual considered it likely that they would have been the person who destroyed Mr McRae's medical records, as part of their duties.
 - (iii) NHS Grampian further confirmed that enquiries with its Head of Health Records, Legal Secretary and Mortuary Manager identified no information relevant to Mr Delamore's request. Emails confirming the outcome of these enquiries were provided to the investigating officer.
20. In conclusion, NHS Grampian submitted that it was satisfied all relevant searches had been exhausted and no information falling within the scope of Mr Delamore's request was held.
21. Having considered all relevant submissions and the terms of the request, the Commissioner is satisfied that NHS Grampian took adequate, proportionate steps to establish whether it held information which fell within the scope of Mr Delamore's request. She accepts that any information relevant to the request would have been identified using the searches and enquiries described by NHS Grampian. She is therefore satisfied, on the balance of probabilities, that NHS Grampian does not (and did not, on receiving the request) hold the information requested. By giving notice under section 17 at both response and review stages, therefore, NHS Grampian complied with Part 1 of FOISA.

Section 21 of FOISA – Review by Scottish public authority

Review process

22. In his application to the Commissioner, Mr Delamore expressed dissatisfaction with NHS Grampian's response to his requirement for review. He acknowledged that it was appropriate to seek comment from the member of staff in question, but believed this particular individual should not have conducted the review, as there could be a "conflict of interest".
23. Section 21(4)(a) of FOISA provides that an authority which receives a requirement for review may (among other options) confirm a decision complained of, with or without such modifications as it considers appropriate. Section 21(5) requires authorities to notify an applicant of the outcome of the review and give a statement of its reasons.
24. In this case, NHS Grampian notified Mr Delamore on 3 November 2015 that the original response had been upheld, confirming it held no information falling within the scope of his request.
25. Mr Delamore submitted that the reviewer should not have conducted the review.
26. FOISA does not stipulate how a review should be carried out or who should (or should not) be involved. Paragraphs 10.3.3 and 10.3.4 in Part 2 of the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the Environmental Information (Scotland) Regulations 2004 (the Section 60 Code¹) states that it is good practice for the reviewer to be a person who did not respond to or advise on the original request, where possible or practicable. The aim of a review is to allow the authority

¹ <http://www.gov.scot/Resource/0046/00465757.pdf>

to take a fresh look at its response to an information request, and the review procedure must be fair and impartial.

27. In its submissions to the Commissioner, NHS Grampian argued that there was no evidence of any conflict of interest, believing Mr Delamore's claim to be based solely on the fact that the same reviewer carried out the review relating to his colleague's earlier request.
28. NHS Grampian submitted that all reviews were carried out independently under its standard procedures and the reviewer in question was its designated person to conduct independent reviews. The reviewer, NHS Grampian maintained, was not involved in responding to freedom of information requests, as these were handled by its Information Governance Team, based at a separate location. Upon receipt of Mr Delamore's requirement for review, the reviewer was provided with all associated correspondence to allow this to be carried out independently. NHS Grampian argued that it complied with the Section 60 Code fully in this regard, and so followed best practice in carrying out reviews.
29. The Commissioner acknowledges that the initial response to Mr Delamore and the review outcome were issued by different people. Mr Delamore has not explained why he believes the reviewer in question was not capable of conducting an unbiased review of the initial response to his request. The Commissioner cannot accept that a conflict arises inevitably from that person's involvement in an earlier review and, having considered all relevant submissions, is satisfied that the review carried out by NHS Grampian followed good practice as set out in the relevant paragraphs of the Section 60 Code. She can find no evidence that NHS Grampian breached the requirements of section 21(4) or (5) of FOISA in handling Mr Delamore's requirement for review.

Timescales

30. In his application to the Commissioner, Mr Delamore expressed dissatisfaction that NHS Grampian's response to his requirement for review had not been provided within the 20 working day statutory timescale.
31. In its submissions to the Commissioner, NHS Grampian acknowledged that it had not responded to Mr Delamore's requirement for review in time. It explained that the delay in responding was mainly due to the prolonged time involved in progressing a number of enquiries on the matter, but also to staff absence during the statutory review period.
32. From the Council's submissions to the Commissioner, it is apparent that staff absence contributed to NHS Grampian's failure to respond to Mr Delamore's requirement for review in time.
33. The Commissioner acknowledges that it is a matter for the authority how it organises its resources to meet its statutory duties. An authority may, for example, decide to have recognised staff whose specific remit is responding to information requests or requirements for review. However, authorities must remember that the duty is the authority's and does not fall to a single individual or team, and so must ensure it has contingency arrangements in place.
34. Paragraph 1.4.1 in Part 2 of the Section 60 Code states:

Staff contingency and cover

Authorities should have in place robust arrangements to ensure that staff absence (whether planned or un-planned), does not affect the authority's ability to respond to requests for information, and requests for review, within statutory timescales.

35. The Commissioner expects authorities to have robust arrangements in place to enable them to meet statutory duties under FOISA (and the Environmental Information (Scotland) Regulations 2004) and to comply with the Section 60 Code, including when the regular staff and other resources are not available.
36. The Commissioner would draw NHS Grampian's attention to Module 1 of her Self-Assessment Toolkit, "Responding on Time"². While she does not require it, the Commissioner would ask NHS Grampian to consider whether there are steps it can take to monitor compliance with timescales and adjust practice, to minimise the likelihood of failing to respond in time in the future, in particular in relation to ensuring that statutory FOI duties are adequately resourced and provision is made to cover absence.
37. It is a matter of fact that NHS Grampian did not provide a response to Mr Delamore's requirement for review within 20 working days, so the Commissioner finds that it failed to comply with section 21(1) of FOISA. NHS Grampian responded to Mr Delamore's requirement for review on 3 November 2015, so the Commissioner does not require it to take any further action in relation to Mr Delamore's application, in this regard. She notes that the review outcome included an apology for the delay in responding.

Commissioner's observations about handling

38. The following observations are not part of the Commissioner's findings on compliance with FOISA, but cover practice issues the Commissioner has identified during this investigation and about which she has concerns. These comments are intended to be helpful to all Scottish public authorities and requesters.

Citing correct provisions / exemptions

39. In responding to Mr Delamore's request, NHS Grampian informed him, in terms of section 17 of FOISA, that it held no information falling within the scope of his request. It also informed him that the information requested was personal information, which would be exempt from disclosure in terms of section 38(1)(b) of FOISA. When upholding its original decision at review stage, it changed this to section 38(1)(d) of FOISA.
40. The Commissioner finds this response somewhat confusing. In responding to any request under FOISA, a Scottish public authority must first identify, locate and retrieve the information requested. Only then, and only to the extent that there is any relevant information held, can it consider whether the information can be disclosed under FOISA or withheld under an exemption. A Scottish public authority cannot apply an exemption in FOISA to information it does not hold. Where the authority does not hold any information, it must give notice to this effect under section 17 of FOISA. It is inappropriate, and potentially confusing to the applicant, to cite an exemption while simultaneously giving notice under section 17 of FOISA.
41. The Commissioner further notes that NHS Grampian's review outcome referred to a different sub-section to that cited in its original response. Assuming an exemption had been applicable, this change (if it was a conscious change) should have been clearly explained.
42. The Commissioner would ask NHS Grampian to take care in future, to ensure the correct provisions of exemptions are cited on all occasions where they are applied. Any modification

² <http://www.itspublicknowledge.info/ScottishPublicAuthorities/Self-AssessmentToolkit/1Self-AssessmentToolkit.aspx>

to the exemption(s) claimed at review stage must be clearly explained. This kind of attention to detail will contribute to the building of confidence in the authority's handling of the request, and may also help avoid future applications to the Commissioner (with all the consequent savings in both time and work).

Decision

The Commissioner finds that Grampian Health Board (NHS Grampian) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Delamore.

The Commissioner finds that:

- (i) NHS Grampian was entitled to inform Mr Delamore that it held no information falling within the scope of his request, and so complied with Part 1 of FOISA;
- (ii) by failing to respond to Mr Delamore's requirement for review within the required statutory timescale, NHS Grampian failed to comply with section 21(1) of FOISA, and so failed to comply with Part 1.

The Commissioner does not require NHS Grampian to take any action in respect of this failure, in response to Mr Delamore's application, given that it has since issued a review outcome.

Appeal

Should either Mr Delamore or Grampian Health Board 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.

Rosemary Agnew
Scottish Information Commissioner

22 March 2016

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.

...

(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.

...

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

(1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

(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.

(5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

...

Appendix 2: Mr Delamore's request of 26 August 2015

"I am requesting information on Mr William McRae who died in Aberdeen Royal Infirmary at 3.30 am on the 7th April 1985.

While I am aware that prior requests for information have been turned down and rejected, I would like to point towards the recent decision of the Scottish Information Commissioner:

<http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2015/201500190.aspx>

In this Decision, the Commissioner ordered Police Scotland to release more information about the case – mainly timings of events so as to ascertain a clear timeline of events.

She did not find that the release of such information would cause further distress to the family nor would it stop the press from speculating about the circumstances of Mr McRae's death.

I, therefore, ask for the following information from the Grampian NHS Board:

1. At what time is Mr McRae recorded as arriving at Aberdeen Royal Infirmary?
2. At what time were staff at Aberdeen Royal Infirmary first called by Raigmore Hospital regarding the condition of Mr McRae?
3. Is there a record of the times at which Mr McRae arrived, and then left, Raigmore Hospital?
4. When was the entry wound in Mr McRae's head first discovered?
5. When was the bullet in Mr McRae's head first discovered?
6. Was Mr McRae flown to Aberdeen Royal Infirmary from Raigmore, or transferred via road ambulance?
7. Does Grampian NHS Board still have any records of toxicology or blood tests performed on Mr McRae? I do not ask for them to be released, only to clarify that they exist/still exist. If not, please outline the administrative process behind their destruction/absence.
8. At what time did staff at Aberdeen Royal Infirmary first inform the police of the entry wound?
9. At what time did staff at Aberdeen Royal Infirmary first inform the police of the bullet?
10. At what time did Northern Constabulary officers arrive at Aberdeen Royal Infirmary? And when did they leave?
11. Please detail the movements of Mr McRae – including details of any wards (for example, when Mr McRae arrived in Ward 40) – from when he first arrived in Aberdeen Royal Infirmary up until when his body was taken away.
12. At what time was Mr McRae's body collected to be taken to Raigmore Hospital for post-mortem?
13. At what time did Mr McRae's relatives (i.e. Dr Ferguson McRae and partner) arrive at the hospital?
14. At what time were Mr McRae's relatives notified of the gunshot wound?
15. Was a Mr Ronald Welsh consulted before Mr McRae's life-support machine was turned off?
16. At what time was Mr Welsh informed of the bullet wound?
17. Were the x-rays of Mr McRae's head taken at Aberdeen Royal Infirmary or Raigmore?
18. When were the x-rays first consulted at Aberdeen Royal Infirmary?
19. Did Mr McRae have any other injuries to his body apart from the bullet wound?
20. At what time were staff at Raigmore Hospital informed of the entry wound to Mr McRae's head?
21. At what time were staff at Raigmore Hospital informed of the bullet in Mr McRae's head?
22. To ask whether or not Raigmore Hospital or Aberdeen Royal Infirmary's staff took blood from Mr McRae?"

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