

Decision Notice



Decision 081/2010 Mrs A and Fife NHS Board

Access road at St Andrews Hospital

Reference No: 200901887

Decision Date: 2 June 2010

www.itspublicknowledge.info

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Scottish Information Commissioner

Kinburn Castle

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Summary

Mrs A requested from Fife NHS Board (NHS Fife) information relating to an access road. NHS Fife responded by stating that the cost of complying with the request would exceed the cost limit for the purposes of section 12(1) of FOISA. Following a review, Mrs A remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that NHS Fife had partially failed to deal with Mrs A's request for information in accordance with Part 1 of FOISA. The Commissioner accepted that the cost of compliance in this case would exceed £600 and consequently that (by virtue of section 12(1) of FOISA) NHS Fife was not obliged to comply with the request. He accepted that NHS Fife had provided Mrs A with reasonable advice and assistance in the circumstances. He also found, however, that NHS Fife had failed to comply with section 21(1) of FOISA by not responding to Mrs A's requirement for review within the relevant timescale.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 15(1) (Duty to provide advice and assistance) and 21(1) (Review by Scottish public authority)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs) and 5 (Excessive cost – prescribed amount)

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 26 July 2009, Mrs A wrote to NHS Fife requesting the following information:

All correspondence, documents, records of meetings, transcripts of phone calls or any other records in the possession of the Health Board relating to the access road (and any safety issues pertaining to that road) from the roundabout on the Largo Road at the new St Andrews Hospital and Health Centre, Largo Road, St Andrews, since the beginning of 2000 to date.



2. NHS Fife responded on 24 August 2009, stating that the cost of responding to Mrs A's request would exceed the limit of £600 set out in the Fees Regulations and that it was therefore not obliged to comply with the request by virtue of section 12(1) of FOISA.
3. On 3 September 2009, Mrs A wrote to NHS Fife requesting a review of its decision. She advised NHS Fife that she understood (having taken advice to the Commissioner's Office) that she should have been provided with a breakdown of the costs of responding and with advice on how the request could be modified to reduce the cost. She suggested it was possible that much of the information held by NHS Fife on the subject was not relevant to her request, while pointing out that until she knew the nature of the information held, she would not be in a position to make a judgment on this. She clarified that she was concerned about the access road, rather than the roundabout she had referred to in describing it, confirming that she was not interested in certain technical documents, but was interested in any discussions of the width of the road.
4. Following intervention from the Commissioner's Office, NHS Fife notified Mrs A of the outcome of its review on 12 October 2009. It upheld its original decision in terms of section 12(1) of FOISA, while confirming that it was mindful of its obligation to try and work with Mrs A to help refine her request so that it could provide her with the information she was seeking. It outlined the steps it proposed to take to this end, including an offer to examine two boxes in its archive which appeared relevant to her request, advising that in any event there was unlikely to be any information relating to the access road dating from before 2005.
5. On 21 October 2009, Mrs A wrote to the Commissioner, stating that she was dissatisfied with the outcome of NHS Fife'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 Mrs A 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

7. The investigating officer subsequently contacted NHS Fife, 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 Fife was asked to provide detailed calculations estimating the cost of responding to Mrs A's request and also to respond to a number of more specific questions.



8. NHS Fife responded on 17 December 2009, providing details of the projected costs it considered applicable to complying with Mrs A's request for information. It also referred to documents identified in the course of examining two of the archived boxes held in respect of the project in question (one of the steps it had referred to in its response to Mrs A's request for review). It stated that it had done this with a view to assisting Mrs A in relation to her request, although it understood from contact with her that she wished the request to be complied with in full. The documents identified by NHS Fife were placed on compact discs and passed to Mrs A in the course of the investigation: she acknowledged receipt of them, while advising that she did not believe them to comprise all relevant documents held by NHS Fife, suggesting that a list of documents would be useful.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner has considered the submissions made to him by both Mrs A and NHS Fife and is satisfied that no matter of relevance has been overlooked.
10. The Commissioner notes Mrs A's view that not all relevant information held by the authority has been provided in response to her request for information. The Commissioner must, however, consider this assertion (at least in the first instance) in the context of NHS Fife's claim that the cost of compliance with the request would exceed the upper limit of £600 specified in regulation 5 of the Fees Regulations. In other words, he must first of all consider whether NHS Fife was justified in refusing to comply with the request under section 12(1) of FOISA.

Section 12(1) – Excessive cost of compliance

11. Section 12(1) provides that a Scottish public authority is not obliged to comply with a request for information where the cost of doing so (on a reasonable estimate) would exceed the relevant amount prescribed in the Fees Regulations. Regulation 5 of the Fees Regulations currently sets this amount at £600. Consequently, the Commissioner has no power to require the release of information should he find that the cost of responding to a request for information exceeds that limit.
12. The projected costs a Scottish public authority can take into account in complying with a request for information are, according to regulation 3 of the Fees Regulations, the total costs, whether direct or indirect, which that authority reasonably estimates it is likely to incur in locating, retrieving and providing the information in accordance with Part 1 of FOISA. The public authority may not charge for the cost of determining (i) whether it actually holds the information requested or (ii) whether or not it should provide the information. The maximum rate a Scottish public authority can charge for staff time is set at £15 per hour.



Calculation of costs

13. In its submissions to the Commissioner, NHS Fife provided projected costs in relation to the work it considered would be required in relation to the two boxes of files referred to above. It went on to explain that in its archives it held ten boxes of documents which might contain information relevant to Mrs A's request. Discounting those which did not appear to be immediately relevant to the request, it advised that this would leave a further six boxes to be examined on the same basis as the two in respect of which detailed estimated costs had been provided. NHS Fife submitted that on a simple pro-rata basis, the same level of search would have incurred a cost three times that of the smaller-scale search.
14. In relation to the two boxes of files it had identified earlier, NHS Fife estimated that the cost of complying with Mrs A's request would be £572.40. Extrapolating those costs to the six additional boxes, it identified an approximate additional cost of £1,215.00.
15. In providing the projected costs noted above, NHS Fife advised the investigating officer of the levels of seniority of staff it considered were required to carry out the work. In this connection, it believed that the expertise and background of the Project Manager for the St Andrews Project (since assigned to other duties) were required to ensure that the work was done effectively. It noted that the original Project Team had been disbanded. In relation to the two boxes on which detailed work had been done, it provided a breakdown of the hours required from each member of staff and the relative costs, taking account of the £15 maximum hourly rate.
16. Having taken due account of the submissions made by both Mrs A and NHS Fife, together with the relevant provisions of section 12(1) and the Fees Regulations, the Commissioner accepts as reasonable in the circumstances the work identified by NHS Fife for the purposes of complying with Mrs A's request. In the circumstances, he also accepts that the resulting costs of complying with that request would exceed the sum of £600 prescribed in regulation 5 of the Fees Regulations. Consequently, the Commissioner is satisfied that, in line with section 12(1) of FOISA, NHS Fife was not obliged to comply with Mrs A's request for information.

Section 15 of FOISA – duty to provide advice and assistance

17. The Commissioner notes that in coming to its conclusion that the cost of complying with Mrs A's request would exceed the cost limit, NHS Fife identified two boxes of documents which it believed might contain material relevant to Mrs A's request. Notwithstanding the cost of responding to the full request, NHS Fife offered to carry out a search of these files and to provide Mrs A with any relevant information discovered. Although it did not hear from Mrs A further in this connection (and although her application to the Commissioner suggests that she did not consider this proposal helpful), NHS Fife proceeded to carry out these searches in the course of the investigation and Mrs A was provided with relevant information as a result.



18. While noting Mrs A's desire for a list of documents or types of documents held by NHS Fife in relation to the Hospital Project, he is satisfied that the authority held no such records at the time it dealt with her information request. He also notes, however, that NHS Fife has acknowledged the need to review its records management practice in 2010, and notes in particular the work it is undertaking with a view to recording the information it holds electronically in relation to this project. On this last point, he would observe that the records produced to date as a result of this exercise are not of specific relevance to the access road.
19. In the circumstances, therefore, the Commissioner is satisfied that NHS Fife discharged its duty under section 15(1) of FOISA to provide Mrs A with reasonable advice and assistance in relation to her request for information, given the application of section 12(1) of FOISA.

Technical breach of FOISA

20. In her application to the Commissioner, Mrs A highlighted that NHS Fife had failed to respond to her request for review timeously. The request for review was made on 3 September 2009 and a response was not provided (after intervention from the Commissioner's Office) until 12 October 2009.
21. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days after receipt of the requirement to comply with a requirement for review, subject to exceptions which are not relevant here.
22. Accordingly, the Commissioner finds that NHS Fife did not comply with section 21(1) of FOISA in dealing with Mrs A's request for review. He notes the authority's apology for this failure in its submissions to him, and also that a response was provided on 12 October 2009. In the circumstances, the Commissioner does not require NHS Fife to take any action in relation to this breach.

DECISION

The Commissioner finds that Fife NHS Board (NHS Fife) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mrs A. He finds that section 12(1) of FOISA applied in this case and that consequently NHS Fife was under no obligation to comply with Mrs A's request. The Commissioner also finds that NHS Fife discharged its duties under section 15(1) of FOISA appropriately by providing reasonable advice and assistance to Mrs A in dealing with her request.

However, NHS Fife failed to comply with Part 1 of FOISA by failing to respond to Mrs A's requirement for review within the relevant timescale laid down by section 21(1) of FOISA. Given that a review has since been carried out and NHS Fife has apologised for the delay, the Commissioner does not require NHS Fife to take any action in response to this particular breach.



Appeal

Should either Mrs A or Fife 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
2 June 2010



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.

12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.

...

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.

...

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.

...



Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

3 Projected costs

- (1) In these Regulations, "projected costs" in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.
- (2) In estimating projected costs-
 - (a) no account shall be taken of costs incurred in determining-
 - (i) whether the authority holds the information specified in the request; or
 - (ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and
 - (b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

5 Excessive cost - prescribed amount

The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.