

Decision Notice

Decision 100/2016: Mr Colin Kerr and NHS Dumfries and Galloway

Policy information

Reference No: 201600024
Decision Date: 4 May 2016

Summary

On 19 September 2015, Mr Kerr asked NHS Dumfries and Galloway for a specific document referred to in earlier correspondence.

NHS Dumfries and Galloway responded by stating that the information requested was out for consultation and could not be provided.

The Commissioner investigated and found that NHS Dumfries and Galloway had failed to respond to Mr Kerr's request for information in accordance with Part 1 of FOISA. This was because it had not provided a response meeting the requirements of section 16 of FOISA. A compliant response was provided during the investigation, so no action was required.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 10(1) (Time for compliance); 16(1) (Refusal of request)

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. Mr Kerr had been in correspondence with NHS Dumfries and Galloway regarding cleaning services. On 26 August 2015, NHS Dumfries and Galloway wrote to Mr Kerr and made reference to a Monitoring Framework document for cleaning services. It also referred to a second, unnamed document which was "currently out for final consultation".
2. On 19 September 2015, Mr Kerr made a request for information to NHS Dumfries and Galloway. The information requested was a copy of the Monitoring Framework document and a copy of the unnamed document referred to in the letter of 26 August 2015.
3. NHS Dumfries and Galloway responded on 8 October 2015. It provided Mr Kerr with a copy of the Monitoring Framework document. It explained that the consultation document referred to was the NHS Audit Manual. It stated this could not be provided as it was a Health Facilities Scotland (HFS) document, which was currently under consultation. It further explained that the document should be published in early 2016.
4. On 2 November 2015, Mr Kerr wrote to NHS Dumfries and Galloway, requiring a review of its decision on the basis that the authority had failed to provide him with the information requested. In effect, this was on the basis that he had not received the response of 8 October 2015.
5. NHS Dumfries and Galloway notified Mr Kerr of the outcome of its review on 24 November 2015. It explained that a response had been sent to him on 8 October 2015 and provided him with a further copy, and with a further copy of the Monitoring Framework. In relation to the review, NHS Dumfries and Galloway repeated that as the NHS Audit Manual was out for consultation, it was unable to provide him with a copy. It provided him with a link to the HFS website.

6. On 24 December 2015, Mr Kerr wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Kerr stated he had not received the initial response of 8 October 2015. He asked the Commissioner to issue a ruling on: whether saying a document was out for consultation was a legitimate reason not to provide it; whether NHS Dumfries and Galloway was in a position to provide it in response to his request, and whether the document was held on NHS Dumfries and Galloway's internal intranet during 2015. He was also dissatisfied that NHS Dumfries and Galloway failed to provide him with the proper name of the document that was out for consultation until it communicated the review outcome to him.
7. In his application to the Commissioner, Mr Kerr also stated that an updated version of the NHS Audit Manual would be welcome but that he particularly wanted the version in use in May/July 2015.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mr Kerr 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. The case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 9 February 2016, the investigating officer notified NHS Dumfries and Galloway in writing that Mr Kerr had made a valid application. NHS Dumfries and Galloway was invited to comment on this application and answer specific questions, with a view to establishing what information was held and what could be provided to Mr Kerr.
10. NHS Dumfries and Galloway responded on 23 February 2016. It explained that it had been provided with a copy of the NHS Audit Manual, which it held in electronic form. It also stated that the document was password protected and it was unable to source the password (and therefore could not access it). It further explained that as it was unable to open the document, it could only refer to it as its file name, NHS Audit Manual. It did not believe it was in a position to provide Mr Kerr with information it could not access itself.
11. NHS Dumfries and Galloway suggested, therefore, that a response in terms of section 17(1)(b) of FOISA may have been appropriate, as this was not an NHS Dumfries and Galloway document. It considered it more helpful, however, to provide Mr Kerr with a link to the HFS website, where the updated document would be available in early 2016.
12. NHS Dumfries and Galloway explained that the document in force in May/July 2015 was the Monitoring Framework document, as provided to Mr Kerr in response to his request.
13. Following further communications with the investigating officer, NHS Dumfries and Galloway confirmed it had obtained a copy of the password required to open the document from HFS. NHS Dumfries and Galloway stated that it was only at that stage it had become aware of the proper name of the document (National Facilities Monitoring Framework Manual).
14. NHS Dumfries and Galloway confirmed that it had a further meeting with Mr Kerr on 5 April 2016, at which he was provided with a copy of the document, as held and now opened. It was, however, explained that this was an earlier draft to the one currently being considered by HFS.

15. Mr Kerr acknowledged that he had met with the Council and had been provided with a copy of the document. He wished the Commissioner to issue a decision and again commented that the Council had failed to provide him with the correct name of the document.

Commissioner's analysis and findings

16. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Kerr and NHS Dumfries and Galloway. She is satisfied that no matter of relevance has been overlooked.
17. Mr Kerr has raised a number of issues with the Commissioner. The Commissioner will consider below those issues which fall within her remit.

Section 10 of FOISA (Time for compliance)

18. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request, or subsequent clarification of that request, to comply with a request for information, subject to qualifications which are not relevant in this case.
19. In this case, NHS Dumfries and Galloway's position is that it did respond timeously to Mr Kerr's request by posting its response on 8 October 2015. NHS Dumfries and Galloway stated that it posted the response to the address provided by Mr Kerr.
20. NHS Dumfries and Galloway's position was that, in the absence of any other contact information being provided to it, the assumption was made to send all correspondence to the address provided by Mr Kerr.
21. The Commissioner has noted the views that have been expressed both by Mr Kerr and NHS Dumfries and Galloway. In the absence of any conclusive evidence, the Commissioner is unable to form a definitive view on whether or not a response was actually issued to Mr Kerr. However, she considers it likely, on the balance of probabilities, that NHS Dumfries and Galloway did send its response of 8 October 2015 and in doing so complied with the requirements of section 10(1) of FOISA.

Information held by NHS Dumfries and Galloway

22. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not relevant in this case.
23. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4).
24. In its submissions to the Commissioner, NHS Dumfries and Galloway submitted that it should have explained to Mr Kerr that it did not hold the NHS Audit Manual, as it did not hold the password required to open it. As mentioned above, following further correspondence NHS Dumfries and Galloway obtained the password and provided the information to Mr Kerr.
25. In this regard, the Commissioner considers NHS Dumfries and Galloway did hold the information requested. It appears to be a document to which NHS Dumfries and Galloway

should have had access, supplied by HFS as a consultation document: that status suggests that NHS Dumfries and Galloway was expected to respond to the consultation, in pursuance of its own functions. Whilst accepting that the password was not readily to hand, it was readily obtainable by NHS Dumfries and Galloway as discovered during the investigation.

26. In all the circumstances, the Commissioner considers the NHS Audit Manual was held by NHS Dumfries and Galloway at the time it received Mr Kerr's request. It was this version, as held at that time, which fell within the scope of Mr Kerr's request: the Commissioner notes that he might be interested in an updated version, but that is not something she can consider here. With regard to Mr Kerr's wish for the document in use in May/July 2015, the Commissioner accepts (having considered all relevant submissions) that this was the Monitoring Framework supplied with the response to his information request. It is clear that the NHS Audit Manual was a consultation document at that time, and not a current operational document.
27. The Commissioner has no reason to believe that the document in question was held on NHS Dumfries and Galloway's internal intranet in 2015: in the circumstances, that would be surprising.

Section 16(1) – Content of notices

28. Section 16(1) of FOISA requires that where an authority holds information which is subject to a request under section 1(1) of FOISA, and which it intends to withhold under any exemption, the authority must give the applicant notice in writing to the effect that the information is held, and specify which exemption it considers applies to the information (with reasons).
29. In his application to the Commissioner, Mr Kerr asked whether stating that a document was out for consultation was valid reason for withholding the information.
30. The Commissioner notes that in its initial response to Mr Kerr, NHS Dumfries and Galloway informed him that the unnamed document was not being provided. It referred to this as the NHS Audit Manual, and explained that it was currently under consultation. It further advised that the document might be held by HFS.
31. The response did not inform Mr Kerr that the information was held by NHS Dumfries and Galloway (as the Commissioner is satisfied it was – see above), or explain which (if any) exemption it wished to rely upon to withhold the information, with its reasons for making that claim. In failing to do these things, NHS Dumfries and Galloway failed to comply with section 16(1) of FOISA.
32. In complying with section 16(1), it would have been helpful (at least) if NHS Dumfries and Galloway had provided the proper name of the document. This should have been straightforward had it obtained the password when it should have, i.e. on receipt of the request.
33. Given that the information held by NHS Dumfries and Galloway was provided to Mr Kerr during the investigation, the Commissioner does not require NHS Dumfries and Galloway to take any action in this case. She cannot comment on NHS Dumfries and Galloway's application of any exemptions in this case, as none has ever been claimed.

Decision

The Commissioner finds that NHS Dumfries and Galloway failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Kerr, by failing to give Mr Kerr notice in terms of section 16(1) of FOISA in relation to information it was refusing to provide. As the information has since been given to Mr Kerr, the Commissioner does not require NHS Dumfries and Galloway to take any action.

Appeal

Should either Mr Kerr or NHS Dumfries and Galloway 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.

Margaret Keyse
Head of Enforcement

4 May 2016

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.

...

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.

...

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-

- (a) discloses that it holds the information;
- (b) states that it so claims;
- (c) specifies the exemption in question; and
- (d) states (if not otherwise apparent) why the exemption applies.

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