

Decision Notice 101/2020

Details of suspension practices

Applicant

Public authority: Lothian Health Board

Case Ref: 201900964



Scottish Information
Commissioner

Summary

Following on from a wider request on employee suspensions to all NHS Boards, NHS Lothian was asked for further details of employees suspended from practice.

NHS Lothian initially said it did not hold the information, but later argued that it was not obliged to comply with the request as it would cost more than £600 to do so as individual personnel files would have to be searched.

The Commissioner accepted that complying with the request would incur excessive costs, but required NHS Lothian to provide advice and assistance to the Applicant.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 15 (Duty to provide advice and assistance); 17(1) (Notice that information is not held)

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 Appendix 1 to this decision. The Appendices form part of this decision.

Background

1. On 26 April 2019, the Applicant made a request for information to Lothian Health Board (NHS Lothian). The Applicant requested information related to employees who had been suspended from practice. The request is set out in Appendix 2.
2. NHS Lothian responded on 3 May 2019. NHS Lothian stated that it did not recognise the term “suspended from practice” and had made an assumption in order to respond. NHS Lothian explained that some people may be moved to alternate duties before resorting to suspension. NHS Lothian sought confirmation that this was the information being sought. It stated that, if this was the information expected, no information was held as it does not regard people as suspended, but doing meaningful work and receiving contracted pay for this period. NHS Lothian confirmed that it did not hold numbers, but considered it would only affect a small number of people at any one time. It stated it had no central database for this information.
3. On 7 May 2019, the Applicant wrote to NHS Lothian requesting a review of its decision. He believed the response was unacceptable and sought the information and responses to the questions asked.
4. NHS Lothian notified the Applicant of the outcome of its review on 6 June 2019. NHS Lothian stated it did not hold information on staff “suspended from practice” as it believed they were doing meaningful work. NHS Lothian reiterated that it held no central database, and if there was a record it would be in the individual personal files held locally by managers. NHS

Lothian considered that it was not required to create new information which would enable it to respond to the request.

5. On 11 June 2019, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of NHS Lothian's review because NHS Lothian had refused to provide the information requested.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 23 July 2019, NHS Lothian was notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. NHS Lothian was invited to comment on this application and to answer specific questions. These related to how it had determined no information was held, the searches undertaken and whether it was possible to extract information from other sources to provide a response to the request. NHS Lothian was asked to explain why, if information was held in individual employment records, it had stated that no information was held. It was also asked, if it now considered that it did hold the information was held, for details of the work which would need to be carried out to provide the information.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both the Applicant and NHS Lothian. He is satisfied that no matter of relevance has been overlooked.
10. In terms of 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.
11. NHS Lothian notified the Applicant that it did not hold the information sought. 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.
12. 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 lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He 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 recorded information is (or was, at the time the request was received) actually held by the public authority.
13. The investigating officer asked NHS Lothian for details and evidence of the searches conducted for information falling within the scope of each part of the Applicant's request.

14. In its response to the Commissioner, NHS Lothian commented that, while "suspension" is a defined category collected within their systems, "suspension from practice" is not a term used by NHS Lothian. It assumed that "suspension from practice" meant staff removed from their current duties during an investigation, but continuing to work for the organisation. It now considered that it was possible that managers may have entered information in individual personal files if the staff member's position had changed. Therefore, it no longer considered that section 17(1) applied in relation to this case.
15. NHS Lothian stated that, as section 17(1) no longer applied, it sought to rely upon section 12(1) of FOISA (see below), as it would be required to review all personal files relating to staff over the period requested to assemble the information sought.

Section 12(1) – Excessive cost of compliance

16. Under section 12(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the amount prescribed for that purpose in the Fees Regulations. This amount is currently £600 (regulation 5). Consequently, the Commissioner has no power to order a public authority to disclose information should he find that the cost of responding to a request for that information exceeds this sum.
17. The projected costs the public authority can take into account in relation to a request for Information are, according to regulation 3 of the Fees Regulations, the total costs, whether direct or indirect, which the authority reasonably estimates it is likely to incur in:
 - (i) locating
 - (ii) retrieving, and
 - (iii) providingthe information requested in accordance with Part 1 of FOISA. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.
18. In its submissions to the Commissioner, NHS Lothian reiterated that "suspended from practice" is not terminology used by NHS Lothian as it did not consider people to be suspended if they have been moved to other duties or are engaged in meaningful work. It also submitted that there was no NHS Scotland requirement for it to report on suspensions or "suspensions from practice".
19. Any information held would be in paper-based personal files and not in electronic format as it would have been written by the individual manager in the personal file. Therefore, in order to produce the information requested, NHS Lothian would be required to identify individual managers and arrange for review of personal files to identify if relevant correspondence is held. NHS Lothian explained that it has approximately 26,000 staff and in excess of 3,000 managers with 400 general employee relations case referrals per annum plus a further 250 actively managed absence cases.
20. NHS Lothian provided a breakdown of the costs which, it estimated, it would incur in determining how many staff had been allocated other duties/meaningful work pending an investigation. NHS Lothian submitted that at an estimated 10 minutes per case would equal 73 hours work at £15 per hour which would provide an estimated cost of £1,095. It considered this was likely to be a conservative estimate.

21. Taking account of all the circumstances in this case, the Commissioner is satisfied that the only way of retrieving the information which would satisfy the Applicant's request would be to examine individual personal files held in hard copy because the information would be entered into their file by their individual manager. The Commissioner notes that NHS Lothian managers may be able to limit the searches as they would be aware of staff who have been moved from regular duties. However, he accepts that this would entail contacting over 3,000 managers to undertake the identification of relevant staff.
22. The Commissioner finds that NHS Lothian has provided a reasonable estimate of the cost of compliance with the Applicant's request. Having taken all of the above into consideration, the Commissioner is satisfied that NHS Lothian was entitled to rely on section 12(1) in relation to the Applicant's request and was under no obligation to comply with the request.

Section 15 of FOISA – Duty to provide advice and assistance

23. During the investigation the Applicant was notified that NHS Lothian had changed its approach to his request and that, while it had now confirmed it held the information, it considered it was under no obligation to comply with the request, given the costs involved.
24. The Applicant expressed concern that NHS Lothian had not offered to provide what information it could within the cost limit.
25. Section 15(1) of FOISA requires a Scottish public authority, so far as is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
26. Section 15(2) states that, provided an authority complies with the Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 (the Section 60 Code)¹, it will be taken to comply with the duty in section 15(1).
27. Paragraph 9.4.3 of the Section 60 Code says:

When refusing a request on cost grounds, it is good practice for the authority's response to provide clear advice on how the applicant could submit a new, narrower request within the cost limit.
28. As NHS Lothian did not apply section 12 until during the investigation, it has not provided the Applicant with advice and assistance specifically with a view to allowing the Applicant to consider whether there are alternative ways to access the information or how the cost of providing a response may be lessened. The Commissioner now requires NHS Lothian to provide advice and assistance to the Applicant in line with section 15 of FOISA and the Section 60 Code

¹ <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

Decision

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

The Commissioner finds that NHS Lothian was wrong to notify the Applicant that it did not hold the information. This was a breach of section 1(1) of FOISA. However, the Commissioner is satisfied that NHS Lothian was entitled to refuse to comply with the request on the grounds of excessive cost.

The Commissioner requires NHS Lothian to provide reasonable advice and assistance to the Applicant, in line with section 15 of FOISA and the Section 60 Code, to determine whether there are ways to reduce the cost of the request. The Commissioner requires NHS Lothian to do this by 19 October 2020.

Appeal

Should either the Applicant or NHS Lothian 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.

Enforcement

If NHS Lothian fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that NHS Lothian has failed to comply. The Court has the right to inquire into the matter and may deal with NHS Lothian as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

2 September 2020

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.
- (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.

...

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.

Appendix 2: The request

- How many workers and employees are currently suspended from practice by NHS Lothian
- How many workers and employees have been suspended from practice for a year or more
- What is the longest duration of such a suspension of a worker/employee of NHS Lothian
- What are the career implications for the workers/employees of this suspension
- Do workers/Employees of NHS Lothian who are suspended from practice remain on their original full pay grade related pay for the duration of their suspension from practice
- Are workers/Employees who are suspended from practice suspended for disciplinary reasons or investigations? If so how many of the number suspended from practice are suspended for disciplinary reasons
- Explanation of the difference between suspended from practice and suspended from work

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info