

Decision Notice 169/2019

Witness statements

Applicant: The Applicant

**Public authority: Social Care and Social Work Improvement
Scotland**

Case Ref: 201901035



Scottish Information
Commissioner

Summary

The Care Inspectorate was asked for witness statements taken by investigators in connection with an investigation into the care of a resident in a care home, and the documentation reviewed by them at the time of the investigation.

The Care Inspectorate disclosed some information (with some personal data redacted), stating it did not hold witness statements.

The Commissioner investigated, and was satisfied that the Care Inspectorate did not hold the witness statements.

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)

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 21 December 2018, the Applicant (through its solicitors) made a request for information to Social Care and Social Work Improvement Scotland (the Care Inspectorate). Referring to an investigation carried out into the care of a resident in a care home, the Applicant asked for copies of any witness statements taken by the investigators, and the documentation reviewed by them at the time of their investigation.
2. Subsequent references to the Applicant in this decision should be taken to include its legal representatives.
3. The Care Inspectorate responded on 12 February 2019. It disclosed some information (with third party personal data redacted) and confirmed it did not hold any witness statements.
4. On 14 March 2019, the Applicant wrote to the Care Inspectorate, requesting a review of its decision and questioning why witness statements were not held in circumstances where interviews were undertaken with a number of members of care home staff as part of its investigation.
5. The Care Inspectorate notified the Applicant of the outcome of its review on 4 April 2019, fully upholding its original response and citing section 17 (Notice that information is not held) of FOISA in respect of the witness statements. It confirmed that, having carried out a further search, it was satisfied that the witness statements did not exist.
6. On 24 June 2019, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated it was dissatisfied with the outcome of the Care Inspectorate's review because, given that care home staff had been interviewed during the investigation, it did not believe the information (the witness statements) would not exist.

Investigation

7. 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.
8. On 8 August 2019, the Care Inspectorate was notified in writing that the Applicant had made a valid application and 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. The Care Inspectorate was invited to comment on this application and to answer specific questions, with particular reference to the searches carried out to identify and locate the information requested.

Commissioner's analysis and findings

10. 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 the Care Inspectorate. He is satisfied that no matter of relevance has been overlooked.

Whether the Care Inspectorate held the information requested

11. 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 applicable in this case.
12. The information to be given is that held by the authority at the time the request is received, as defined by section 1(4). This is not necessarily to be equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
13. The standard of 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. 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.
14. The Commissioner has taken account of the arguments in both the Applicant's requirement for review and its application, in which it provides reasons as to why it considers the Care Inspectorate should hold the information requested (the witness statements).
15. In its submissions to the Commissioner, the Care Inspectorate explained and provided supporting evidence of the searches it had undertaken, to identify the information falling within the scope of the application (i.e. the witness statements):

- A search of its G:drive, using the name of the care home as the search term. This confirmed that no relevant information was recorded therein for the relevant timescale, the earliest search results postdating the investigation.
 - A search of its S:drive using the same search term, which returned no results.
 - A search of PMS (its database of all registered services and actions taken against them), which identified no witness statements.
 - A search of the hard copy file for the relevant complaint, which again identified no witness statements.
 - Enquiries were carried out with the inspectors concerned, who confirmed they did not hold any witness statements.
16. In conclusion, the Care Inspectorate was satisfied that, given the circumstances and the extent and results of the searches carried out, these were sufficient to allow it to conclude that it did not hold the witness statements requested.
17. Having considered all relevant submissions and the terms of the request, the Commissioner is satisfied that the Care Inspectorate took adequate, proportionate steps in the circumstances to establish whether it held any information that fell within the scope of the request. He is satisfied that the searches described by the Care Inspectorate would have been capable of identifying any information held and relevant to the request.
18. The Commissioner is therefore satisfied, on the balance of probabilities, that the Care Inspectorate does not (and did not, on receipt of the request) hold the witness statements requested. He finds that the Care Inspectorate was therefore correct to give notice, in terms of section 17(1) of FOISA, that it did not hold the information requested (i.e. the witness statements).

Decision

The Commissioner finds that Social Care and Social Work Improvement Scotland complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or the Care Inspectorate 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

19 November 2019

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.

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