



# Decision Notice 073/2024

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## Correspondence with Health Secretary

**Applicant: The Applicant**

**Authority: NHS National Services Scotland**

**Case Ref: 202201047**

### Summary

The Applicant asked the Authority for information about a communication sent to a former Cabinet Secretary and to named employees of the Authority. The Authority told the Applicant that it did not hold the information. The Commissioner investigated and was satisfied that the Authority did not hold the information.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (4) and (6) (General entitlement); 17(1) (Notice that information is not held); 47(1) and (2) (Application for decision by Commissioner)

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 29 July 2022, the Applicant made the following request for information to the Authority:
  - (i) “Previously in an answer to an FOI, [the Authority] provided a document that it states was sent from Alice Macleod the then Senior Nurse with National Procurement (NSS) to the then Cabinet Secretary for Health Shona Robison dated the 13/6/18 (...). Can you confirm that this document and/or a similar one was sent to the then Health Secretary?”

- (ii) The Communication referenced above states that Martin Street (Strategic Director at National Procurement) was copied into this Communication. Can you confirm if Martin Street was copied into this communication and/or was aware of it or anything similar?
  - (iii) The Communication referenced above states that Paul Hornby (Head of Strategic Sourcing & Commercial at National Procurement) was copied into this Communication. Can you confirm if Paul Hornby was copied into this communication and/or was aware of it or anything similar?"
2. The Authority responded to the Applicant on 22 August 2022 with a notice, under section 17(1) of FOISA, that it did not hold the information falling within the Applicant's request. The Authority suggested to the Applicant that he make part (i) of his request directly to the Scottish Ministers, and it supplied him with their Freedom of Information (FOI) contact email to do so.
  3. Later the same day, the Applicant wrote to the Authority requesting a review of its decision. The Applicant was dissatisfied with the Authority's response because it had not answered his three questions, and he stated that "one would have thought that checking the e-mails of all three NSS staff would give clear unambiguous results."
  4. The Authority notified the Applicant of the outcome of its review on 15 September 2022. The Authority confirmed that it did not hold any information within the scope of the Applicant's request and upheld its application of section 17(1) of FOISA. For parts (i) and (ii) of the request, the Authority explained that it no longer had access to the email accounts of the two named persons, who no longer were employees of the Authority. The Authority also explained that its data retention policies provide that if an individual has left the Authority then their email account is deleted within 30 days.
  5. On 16 September 2022 the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant was dissatisfied with the outcome of the Authority's review because he believed that the Authority did hold the information he had requested.

## **Investigation**

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 31 October 2022, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments.
8. The case was subsequently allocated to an investigating officer.

## **Commissioner's analysis and findings**

9. The Commissioner has considered all the submissions made to him by the Applicant and the Authority.

### **Section 17(1) – Notice that information not held**

10. 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.

11. The information to be given is that held by the authority at the time the request is received, as defined in 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.
12. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, 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 the information is not held.

### ***The Authority's submissions***

13. The Authority explained that it had previously disclosed the document (a draft memorandum) referred to at the start of the Applicant's request in response to an FOI request.
14. For part (i) of the request (i.e. whether the Authority was able to confirm that this document had been sent to the then Cabinet Secretary for Health), the Authority stated that, as the document was not the original email, it "could not absolutely confirm that this email was sent and received by the named individuals".
15. For parts (i) and (ii) of the request, the Authority explained that both Alice Macleod and Martin Street no longer worked for it, and it was therefore not possible to search for emails in their account.
16. The Authority explained that when someone no longer works for it, their account is removed and mailbox data is retained for 30 days. At this stage, the data can still be recovered by "un-deleting the account".
17. After this 30-day period has passed, the Authority explained that the data is permanently removed "unless a hold has been placed on the account prior to its deletion where the account would be converted to an inactive mailbox". For the two named persons, the accounts and mailbox data had not been retained and therefore the Authority could not access their accounts or their emails.
18. For part (iii) of the request, the Authority explained that Paul Hornby had carried out searches but had not retained the email or a copy of the communication.
19. The Authority supplied the Commissioner with a record of the searches carried out by Paul Hornby. The searches included the following areas: all networked Business Classification Scheme folders (both current & legacy), all local laptop drives, "all relevant databases", "all relevant paper and physical files" and email inbox, personal folders, sent email and deleted emails. The searches used the following search terms: "Shona Robinson", "Alice Macleod", "13/6/18", "Cabinet Sec", and "Health Sec".
20. The Authority added that, since the referenced communication was sent in 2018, it had moved to a different mail server. Consequently, some users lost access to old inbox/sent/deleted items unless they had been saved. The Authority explained that there was no reason why the email referred to in the request would have been retained, so it would have been deleted as per normal process.

21. The Authority stated that there was no recorded evidence that any emails or documents relevant to the request had been identified as a corporate record, nor that any relevant information had been destroyed in line with its Document Storage, Retention & Disposal Policy.

### ***The Applicant's submissions***

22. The Applicant provided a document to the Commissioner, which the Authority had previously disclosed, which referenced the communication between the Authority and the then Cabinet Secretary for Health and who had been copied into it. The Applicant stated that “any person receiving this information from [the Authority] would reasonably assume this was documentation showing a communication with the Health Secretary”.
23. The Applicant did not accept the Authority’s explanation that it no longer had access to the accounts of Alice Macleod and Martin Street. The Applicant submitted that “the actual data” would be “retained” within the Authority’s servers, back-up servers and storage facilities. The Applicant noted the Authority’s data retention policy, but considered that “the actual reality and facts for data storage are somewhat different.”
24. For part (iii) of his request, the Applicant said that the Authority had not actually answered the question of whether the communication referenced was actually copied to or received by Paul Hornby.
25. The Applicant also highlighted that Paul Hornby still worked for the Authority and, as the communication at issue was dated 2018, the Authority could check their email “three months either side of the date of the communication in question”. The Applicant said that he had asked a question of fact that could be answered (and checked) by looking at the Authority’s email system.
26. The Applicant explained further that he had received information from the Scottish Ministers, again through an information request, that the Scottish Government had not received the communication referred to in his request of 29 July 2022.
27. The Applicant wanted to ensure that this communication had been sent by the Authority, and he suggested that, if it had, the Authority would be at:  
  
“risk of being accused of acting ultra vires, and actually instigating cuts to patient services that needed sighted by Scottish Government and the Health Secretary. [The Authority’s] communication clearly states they believed this needed to happen before the next stage of the process (which did happen and did result in cuts).”
28. The Applicant submitted that there was a clear public interest in holding the Authority to account and in the Commissioner seeking the information requested in this case, which the Authority had failed to provide.

### ***The Commissioner's conclusions***

29. The Commissioner accepts that the Authority has taken adequate and proportionate steps to establish whether it held any recorded information that fell within the scope of the Applicant’s request.
30. In reaching this conclusion, the Commissioner has taken into account that the information falling within the request would, if it were held, be readily identifiable, given that the request names specific individuals, there is a specific date of communication and it relates to a potential communication to a senior member of the Scottish Government.

31. Having considered in detail the Authority's submissions, and all the circumstances of the case, the Commissioner is satisfied on the balance of probabilities that the Authority took adequate and proportionate steps to establish whether it held any information falling within the scope of the Applicant's request.
32. The Commissioner considers that the Authority's searches were reasonable and would be capable of locating the information requested.
33. Given the explanations and submissions provided, the Commissioner is satisfied, on balance, that the Authority does not (and did not, on receipt of the request) hold the information requested by the Applicant.
34. While the Applicant believed and expected the specified information to be held by the Authority, the Commissioner is satisfied that this was not the case. Whether a public authority should hold information which it does not hold is not a matter for the Commissioner to decide.
35. The Authority may hold information from which it may be inferred that draft memorandum was sent to the then Cabinet Secretary for Health with the persons named by the Applicant in his request copied in, but this is not the same as holding the information the Applicant has requested.
36. The Commissioner therefore concludes that the Authority was correct to give the Applicant notice, in terms of section 17(1) of FOISA, that it did not hold the requested information.

## **Decision**

The Commissioner finds that the Authority 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 Authority 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.

**Cal Richardson**  
**Deputy Head of Enforcement**

**1 May 2024**

## 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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (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 not be made before the information is given.
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

#### 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.

...

#### 47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
  - (a) a notice under section 21(5) or (9); or
  - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.
- (2) An application under subsection (1) must -

- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
- (b) state the name of the applicant and an address for correspondence; and
- (c) specify –
  - (i) the request for information to which the requirement for review relates;
  - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);  
and
  - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).