



Scottish Information  
Commissioner  
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# Decision Notice 144/2024

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## Response submitted to national stoma survey

**Authority: NHS Tayside**

**Case Ref: 202200698**

### Summary

The Applicant asked the Authority for information relating to a response it had submitted to a data survey that had been circulated to stoma nurses via the Scottish Stoma Nurse Group (SSNG). The Authority informed the Applicant it did not hold the information. The Commissioner investigated and was satisfied that the Authority did not hold the information requested.

### 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 12 May 2022, the Applicant made a request for information to the Authority. Among other things, the Applicant requested the response submitted by the Authority's Board Area to a data survey circulated to stoma nurses via the chair of SSNG in around 2018-2019.
2. The Authority responded on 24 May 2022 stating that it did not hold a copy of the response submitted to the data survey.

3. On 24 June 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that the Authority had clearly responded to the data survey and, as the response was highly likely to have been by email, it would be held on the Authority's systems.
4. The Authority notified the Applicant of the outcome of its review on 13 June 2022, fully upholding its original decision. The Authority confirmed that it no longer held the information requested and explained why.
5. On 17 June 2022, the Applicant wrote to the Commissioner applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the review because:
  - he was in possession of information which stated the Authority had submitted a return to the survey
  - the Authority had not provided him with advice and assistance in relation to his request
  - he did not accept that the email migration in 2020 prevented emails from before that date being accessed and searched
  - he did not accept that the information requested was not held by the Authority.

## **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 25 August 2022 and in line with section 49(3)(a) FOISA, the Commissioner gave the Authority notice of the application in writing and invited its comments. The Authority provided comments.
8. The case was subsequently allocated to an investigating officer.

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

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

### ***Section 17(1) – Notice that information is 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. 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. 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 where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.
13. The Commissioner 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 expectation about what 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 authority.

#### *The Authority's submissions*

14. The Authority explained that at the time of the original request the staff member who took the lead on completing the requested survey checked her emails and electronic storage space. The staff member confirmed that she did not recall saving the email at the time as it was not a submission she was required to retain.
15. The Authority noted that in addition to searches of emails and electronic storage, the member of staff undertook a search of her paper records and no copy of the information was found. The Authority explained that the staff member was certain she had not retained a paper record as she recalled destroying it.
16. The Authority reiterated that, as a result of (and in advance of) it moving email systems in November 2020, staff members were asked to reduce the size of their email mailboxes by 1 September 2020. The Authority stated that staff members were specifically asked to delete sent items and to empty deleted items folders as they counted toward the size of mailboxes.
17. The Authority explained that emails held in subfolders or inboxes were mapped across to the new email accounts. However, all other emails, including those not marked for retention, were deleted. If the information requested was held in one of the existing email accounts, prior to migration, it would have been deleted as part of the migration exercise.
18. The Authority confirmed that there is no access to decommissioned email accounts, and that the applicable servers have, given the passage of time, been turned off.

#### *The Applicant's submissions*

19. The Applicant explained that he considered that the Authority did hold the information existed.
20. The Applicant submitted that it was "ludicrous" that the Authority had no access to emails prior to the email migration. The Applicant also stated that he believed that the Authority would hold a photocopy of the data survey response.
21. The Applicant explained that the Authority had a small "stoma team" and that it was standard practice to copy team managers into data survey responses and for the response to be discussed at team meetings, which are typically minuted. The Applicant considered that the Authority would, at the very least, hold information relating to data survey response.
22. The Applicant stated that he thought the Authority did not want to admit what the data survey response said or disclose that the response did not involve all stakeholders and was instead completed by a single staff member without appropriate consultation.

#### *The Commissioner's view*

23. Given the explanations and submissions provided, the Commissioner accepts that the Authority took adequate and proportionate steps in the circumstances to establish if the information was held and he is satisfied, on balance, that it does not (and did not, on receipt of the request) hold the information requested by the Applicant.
24. The Commissioner considers that the Authority's searches were reasonable in the sense of who it asked to carry out the searches and the locations searched; he finds that they would be capable of locating the information requested.
25. 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.
26. The Commissioner notes that the Authority accepted that it did submit a response to the data survey, but that it did not retain a copy.
27. Whether a public authority should hold information which it does not hold is not a matter for the Commissioner to decide.
28. The Commissioner notes that the Applicant considered information relating to the data survey response would be held by the Authority. The terms of the Applicant's request were clear; he specifically asked for the "response submitted" by the Authority's Board Area in response to a data survey circulated via the chair of the SSNG.
29. 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 information requested.

***Section 15 – Duty to advise and assist***

30. Section 15(1) of FOISA requires a Scottish public authority, so far as reasonable to expect it to do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it.
31. In this case, the Applicant expressed general dissatisfaction that the Authority had not provided him with appropriate advice and assistance.
32. The Authority did not provide the Applicant with any advice or assistance, in either its initial response or review outcome, on where the information requested might otherwise be obtained.
33. As the Authority acknowledged that it did submit a response to the data survey, the Commissioner considers that the Authority should have advised the Applicant where he might otherwise be able to obtain the information requested.
34. While the Applicant appeared to have been aware of some public authorities that might be in possession of the Authority's data survey response, the Commissioner nevertheless considers that the Authority should have directed him to those authorities itself (and to any others that might hold the information requested).
35. The Commissioner therefore finds that the Authority failed to comply with the duty under section 15(1) of FOISA to provide advice and assistance.
36. During the investigation, the Applicant confirmed (as part of a separate application regarding an information request to a different public authority for the data survey response it had submitted) that he had made requests to other relevant public authorities for that information.

37. Given that the Applicant is aware of other public authorities that may hold information relevant to his request, the Commissioner does not, in the circumstances, require the Authority to take further action in respect of its failure to comply with its duty under section 15(1) of FOISA.

## **Decision**

The Commissioner finds that the Authority 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 the Authority was correct to notify the Applicant that it did not hold the requested information, but that it failed to comply with its duty under section 15(1) of FOISA to provide him with advice and assistance.

However, as rehearsed earlier, the Commissioner does not, in the circumstances, require the Authority to take any action in respect of this failure.

## **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**

**01 July 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 be made before the information is given.
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

#### **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.
- ...

#### **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).