



# Decision Notice 195/2024

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## End of life care plans, treatments or protocols including euthanasia plans

**Authority: Borders Health Board**  
**Case Ref: 202300011**

### Summary

The Applicant asked the Authority for information about any “end of life care” plans, treatments or protocols including euthanasia plans. The Authority provided information relating to end of life care and confirmed it did not hold any information relating to euthanasia. The Commissioner investigated and was satisfied that the Authority did not hold any information relating to euthanasia.

### Relevant statutory provisions

[Freedom of Information \(Scotland\) Act 2002](#)<sup>1</sup> (FOISA) sections 1(1), (2) and (4) (General entitlement); 15 (Duty to provide advice and assistance); 17(1) (Notice that information is not held); 47(1) and (2) (Application for decision by Commissioner)

### Background

1. On 23 September 2022, the Applicant made the following request for information to the Authority:

*Please provide all and any recorded information pertaining to any "End of life care" plan(s) or treatment(s) or protocol(s) including details of voluntary, none-voluntary and involuntary Euthanasia plans, if held, by [the Authority] for members of the British public - particularly those who are deemed disabled, elderly or nurses of [the Authority] itself.*

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<sup>1</sup> <https://www.legislation.gov.uk/asp/2002/13/contents>

2. The Authority wrote to the Applicant on 28 September 2022 seeking clarification of the request. It explained that, as the data was not held electronically, a manual trawl of patients' notes would be required, which would likely exceed the cost limit prescribed in FOISA. In addition, the Authority stated that, under section 38 (Personal information) of FOISA, it would not be able to provide copies of a patient's end of life care plan as this contained personal information which was protected by section 1(1) of the Data Protection Act 2018. The Authority stated it could provide copies of end of life care plan documentation to be completed by clinicians and asked the Applicant to confirm if this would be suitable in responding to the request. In relation to euthanasia, the Authority informed the Applicant, in terms of section 17 of FOISA, that it did not have such a policy or make plans with patients for euthanasia, as this would be against the law.
3. On 28 September 2022, the Applicant clarified that they were not seeking individual patients' records, but were seeking plans to accommodate voluntary euthanasia requests by patients, execute non-voluntary euthanasia judgments made by other aware people upon other unaware patients and to enforce involuntary euthanasia against the explicit prior will of patients. The Applicant did not believe that the resources required to extract information on these plans would exceed the cost limit in FOISA. The Applicant asked the Authority to provide all copies of all plans held for "end of life care" issued to clinicians for patients since 2018 which included instructions to carry out voluntary, non-voluntary and involuntary euthanasia, such as, but not limited to, the Liverpool Care Plan (LCP).
4. The Authority responded on 20 October 2022. It provided the Applicant with a copy of its Care Record for End of Life (CREOL) document that supported the documentation of care at the end of a patient's life which, it explained, had been in place since 2018 to present, along with an explanation of the background which led to the creation of that document. The Authority also provided the Applicant with a number of links to publicly available information on national guidelines, national policy and processes that were pertinent to end of life care which, it stated, it also followed.
5. In addition, the Authority provided the Applicant with its definitions of euthanasia, voluntary euthanasia and non-voluntary euthanasia. It confirmed, in terms of section 17 of FOISA, that it did not have a policy or make plans with a patient for euthanasia as it would not, in any circumstance, deliberately end a person's life and to do so would be against the law.
6. On 25 November 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that they were dissatisfied with the decision because they believed the Authority may hold further information which had not been disclosed, and asked the Authority to provide that information. [The Applicant's request for review also contained a number of requests for additional information and explanations that were not requested in their original request, and therefore do not fall within the scope of the Commissioner's investigation in this case.]
7. The Authority notified the Applicant of the outcome of its review on 22 December 2022. It confirmed that it had not used the LCP since 2013 which was phased out, in line with national guidance. It explained that the CREOL documentation, used to support the care of patients at their end of life, was developed in 2015/16 and implemented in 2018. The Authority confirmed that all CREOL documentation and links to national guidance, relevant to the Applicant's original request, were provided in its initial response. It further confirmed that it did not practice, and did not make plans for, euthanasia (involuntary, non-voluntary or voluntary).

8. On 23 December 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant wished to verify whether there was any recorded information held falling within the scope of the request and, if so, they wished that information to be disclosed. [The Applicant also raised dissatisfaction with the Authority's responses to their requests for the additional information and explanations submitted at review stage. As these were not included in the Applicant's original request, they do not fall within the scope of the Commissioner's investigation in this case.]

## **Investigation**

9. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
10. On 21 February 2023, 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.
11. The Authority provided its initial comments on 31 March 2023 in which it maintained that there was no change to its position.
12. The case was subsequently allocated to an investigating officer.

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

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

### ***Does the Authority hold any relevant information?***

14. 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 public 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.
15. 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 that an applicant believes the public authority should hold. If no such information is held by the public authority, section 17(1) of FOISA requires the authority to give the applicant notice in writing to that effect.
16. 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.

17. The Commissioner has taken account of the arguments in both the Applicant's requirement for review and their application, in which they provide reasons why they consider the Authority may hold the information requested.
18. In its submissions to the Commissioner, the Authority stated that it had clearly indicated, in both its initial response and review outcome, that it did not have a policy or make plans with a patient for euthanasia as it would not, under any circumstance, deliberately end a person's life, and to do so would be against the law. Therefore, as defined in section 17 of FOISA, this information would not be held.
19. The Authority explained that it did not hold a copy of the original LCP as that guidance was withdrawn from use in 2013. It confirmed that, at review stage, it had retrieved (and disclosed to the Applicant) a copy of an Authority-specific document dating from 2011 that was based on the LCP pathway, but this pathway was no longer in use by the Authority. The Authority confirmed that the CREOL documentation provided to the Applicant in its initial response was the current documentation in use by the Authority.
20. The Authority provided details of the searches it had carried out to establish what relevant information was held. It described the search terms and timeframe applied, which members of staff had carried out the searches and why they were considered best placed to do so, along with details of the sets of records/data searched. These searches, the Authority explained, identified the documentation that had already been disclosed to the Applicant. The Authority confirmed that no further documents had been withheld.

#### *The Commissioner's views*

21. Having considered all relevant submissions and the terms of the request, the Commissioner is satisfied that the Authority took adequate, proportionate steps in the circumstances to establish whether it held any information that fell within the scope of the request.
22. The Commissioner notes that the Applicant believes the Authority may have held the information requested. The Authority has explained why it does not hold that information.
23. The Commissioner has considered the information disclosed by the Authority to the Applicant in its initial response and its review outcome. He notes that the Authority-specific document based on the LCP was withdrawn from use in 2013, and therefore does not fall within the timeframe set out in the Applicant's request. He further notes that, while the CREOL plan was developed in 2015/16 and implemented in 2018, it contains no information on euthanasia. As such, neither of these documents fall within the scope of the original request. In the Commissioner's view, the Authority appears to have disclosed these to the Applicant under the duty to provide advice and assistance set out in section 15 of FOISA.
24. The Commissioner also notes that euthanasia is illegal in Scotland and, as such, he considers it is highly unlikely that the Authority (or indeed any health authority in Scotland for that matter) would hold end of life care plans which included plans for euthanasia in any of the circumstances described in the Applicant's request. Given the nature of the information requested, together with the explanation of the searches carried out by the Authority which, the Commissioner considers, would have been capable of identifying any relevant information, the Commissioner is satisfied that the submissions put forward by the Authority sufficiently explained why it did not hold the information requested.

25. In the circumstances, therefore, the Commissioner is satisfied, on the balance of probabilities, that the Authority does not (and did not, on receipt of the request) hold any information falling within the scope of the Applicant's request. He finds that the Authority was therefore correct to give notice, in terms of section 17(1) of FOISA, that it did not hold the information requested.

## **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.

**Jill Walker**  
**Deputy Head of Enforcement**

**9 September 2024**