



Scottish Information
Commissioner
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Decision Notice 156/2025

Private GP referrals to NHS

Authority: NHS Fife
Case Ref: 202401356

Summary

The Applicant asked the Authority for information relating to private GP referrals. The Authority advised the Applicant that it did not hold the information. The Commissioner investigated and found that the Authority had failed to provide adequate submissions to justify its position. The Commissioner required the Authority to carry out further searches and issue the Applicant with a new review outcome.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (3), and (6) (General entitlement); 10(1) (Time for compliance); 15(1) (Duty to provide advice and assistance); 17(1) (Information not held); 21(1) (Review by Scottish public authority); 47(1) and (2) (Application for decision by Commissioner).

Background

1. On 26 July 2024, the Applicant made a request for information to the Authority. He asked for:

Recorded information regarding private GP referrals held by two named individuals between 01 April 2024 and 26 July 2024.

He clarified that he was looking for information regarding policy/ies, decision-making, etc. rather than, for example, notes relating to individual patients taken at a multidisciplinary team (MDT) meeting.

2. The Authority did not respond to the Applicant's request for information.
3. On 30 August 2024, the Applicant wrote to the Authority requiring a review in respect of its failure to respond.
4. The Authority notified the Applicant of the outcome of its review on 23 September 2024 (although it appears the Applicant did not receive this review outcome). It apologised for its failure to meet the statutory timeframe and informed him that it had applied section 17(1) (Information not held) of FOISA to his request.
5. On 9 October 2024, 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 Authority's review because he was unhappy with the Authority's handling of the request, including its failure to respond to his initial request. The Applicant later confirmed that he was also dissatisfied with the Authority's reliance on section 17(1) of FOISA.

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 27 November 2024, the Authority 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. The Authority was invited to comment on this application and to answer specific questions. These related to how the Authority interpreted and handled the Applicant's request and the searches it carried out.

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. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4) of FOISA. 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 lies, the Commissioner must first of all consider the interpretation and scope of the request and thereafter the quality, thoroughness and results of the searches carried out by the public authority.
13. The Commissioner will consider, where appropriate, any reason offered by the public authority to explain why it does not hold the information. Ultimately, however, the Commissioner's role is to determine what relevant recorded information is actually held by the public authority (or was, at the time it received the request).

The Applicant's comments on section 17(1)

14. In his application to the Commissioner, the Applicant set out his dissatisfaction with the Authority's interpretation of the request. He argued that the Authority had narrowed the scope of the request (in terms of both subject matter and the form in which the information was held) and that, as a result of doing so, it had provided an incomplete response to his request on the basis that searches were too narrow. The Applicant stated that:
 - (i) The review outcome gave the impression that he had requested information only concerning emails. However, the Applicant had not specifically mentioned emails but had requested "recorded information" which, he argued, included many elements beyond emails and he was dissatisfied that the Authority had apparently decided to narrow his request to include emails only.
 - (ii) None of the Authority's responses stated whether a search was made regarding minutes of meetings, notes made or taken, etc. The Applicant contended that the authority had narrowed the subject of the request to any policy/decision making information within their emails (i.e. that it had discounted the "etc." which made clear that the request went beyond just policy or decision making).
 - (iii) This suggested that the Authority misinterpreted the request and/or interpreted it too narrowly and in so doing, it had provided an incomplete response to the request. (The Applicant referenced previous decisions of the Commissioner, including [Decision 236/2024](#)¹, as relevant to this appeal.)

The Authority's comments on section 17(1)

15. In its review outcome of 23 September 2024, the Authority advised the Applicant that the two named individuals had confirmed that they did not hold the information requested.
16. The Authority explained that when a policy was introduced it was first published internally and then externally, where appropriate. It stated that it had contacted the relevant staff member within primary care and asked whether there were any policies or procedures regarding the processing of private GP referrals. The outcome of this query was confirmation that no such policies existed.
17. The Authority commented that further investigation had established that when private GP referrals were received by the Authority it was in one of two ways:
 - (i) The private GP emailed the referral directly to the relevant department after requesting the appropriate email from the department secretary; or

¹ <https://www.foi.scot/decision-2362024>

(ii) The private GP provided the patient with a paper copy (of the referral).

18. The Authority provided the Applicant with copies of email discussions between staff members that demonstrated that there was no policy or process in place beyond that which had been outlined. The Authority also commented that it planned to arrange a meeting to try and resolve this issue.
19. In its submissions to the Commissioner, the Authority stated that a previous request (5373) had already established that there were no emails between the two named persons regarding policy or decision making in relation to private GP referrals. It argued that it would be against its own organisational policy to have a policy or organisational decision that was held solely by two individuals and not published internally or externally.
20. It submitted that it was for this reason that it made the efforts detailed in the review outcome to search for and confirm whether there was a relevant documented policy or procedure held at an organisational level.
21. The Authority also commented that it was rare for a private GP to refer (a patient) to NHS secondary care and they would usually refer on to private secondary care facilities.
22. The Authority provided the Commissioner with evidence of the searches it had carried out when it conducted its review.

The Commissioner's view on section 17(1)

23. The Commissioner notes the Authority's efforts, which have been documented above, to ascertain whether information was held at an organisational level, as well as its comments explaining that the Authority would not allow organisational policies to be held solely by two individuals.
24. He acknowledges that the Authority has consulted a number of staff (and evidenced these discussions) and he accepts that these staff would be expected to know if such policies were held.
25. However, the Commissioner considers that it does appear that the Authority narrowed the scope of the request, both in terms of the information it considered to be within scope and in terms of limiting the information to emails, when the Applicant did not make that specification.
26. The Commissioner notes that the request was made in relation to "information" held by two named members of staff (not emails) and that no evidence appears to have been submitted of the searches these individuals carried out, such as which terms they used and which records (paper or digital) were searched. The Commissioner acknowledges that emails are one type of information that should be searched, but he does not accept that the searches in this case should be limited to emails.
27. The Commissioner finds that the Authority has not provided sufficient evidence to justify its position that the information is not held and he requires further searches to be carried out for any information held by the named members of staff.
28. He notes that the Authority, in its submissions, argued that a previous request had already confirmed that there was no information held by or recorded within emails or by the two people mentioned.

29. However, it appears that in its response to the previous request (5373) the Authority did not apply section 17(1) (Information not held) of FOISA but instead it relied on sections 12(1) (Excessive cost of compliance) and 38(1)(b) (Personal information) of FOISA. It was after receiving this response to request (5373) that the Applicant asked the Authority if he could streamline the request to be more specific and subsequently submitted a new request which is the subject of this appeal.
30. The Commissioner considers that while the Authority's position now is that the information is not held, it appears that this was not its position previously. (The Commissioner will not be considering the Authority's handling of request 5373 in this decision, but he must note that while the Authority previously suggested to the Applicant that many of its services did not hold this type of information, it also suggested that if they did hold it, exemptions would have to be applied and/or redactions made, due to the nature of the information held. The Commissioner therefore considers that the Authority did not previously confirm to the Applicant that no information was held.)
31. In all of the circumstances, the Commissioner considers that the Authority has taken an unduly narrow interpretation of the Applicant's request. The Commissioner considers that it is possible that the Authority has failed to identify all of the information falling within scope of the Applicant's request and that it breached Part 1 of FOISA, and in particular section 1(1) of FOISA, by narrowing the scope of the request and incorrectly giving the Applicant notice, under section 17(1) of FOISA, that the information was not held.
32. In cases where a request may be open to interpretation, section 1(3) of FOISA allows a public authority to seek clarification from an applicant, to enable it to identify and locate the information being requested. Depending on the circumstances, particularly where there is a risk of the request being misinterpreted (and the applicant thus being disadvantaged in the exercise of his or her rights under FOISA), there may also be a duty to seek such clarification, in line with section 15(1).
33. The Commissioner cannot stress enough how important it is that Scottish public authorities clearly understand the terms of any information request before they provide a response. He would urge the Authority, and indeed all Scottish public authorities, to take steps to clarify with applicants any matter which is open to interpretation, prior to proceeding with a request.
34. The Commissioner requires that any and all records held by the two named individuals are searched for information falling within scope of the request and that the scope of the searches should include information held in all forms, not just emails.

The Handling of the request

35. In his application to the Commissioner the Applicant stated that the Authority had:
- (i) failed to respond to his request for information within the statutory timeframe;
 - (ii) held back a response and, therefore, failed to respond to a request for review within the statutory timeframe, which led to the Applicant being unable to request a review for a separate request due to being over the 40 working day time limit;
 - (iii) misleadingly stated that it sought clarification regarding a request for information, when it did not;
 - (iv) failed to provide advice and assistance in relation to the request;

- (v) only sought information on policies relating to private GPs after a request for review and not as part of any initial request; and
- (vi) after its review response made no attempt at resolution (following communication from the Applicant) and did not comment on any of the issues the Applicant raised.

Timescales

36. In points (i) and (ii) of his dissatisfaction, the Applicant challenged the Authority's failure to comply with the timescales specified in FOISA.

Section 10(1) of FOISA

37. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.
38. It is a matter of fact that the Authority did not provide a response to the Applicant's request for information within 20 working days, so the Commissioner must find that it failed to comply with section 10(1) of FOISA.

Section 21(1) of FOISA

39. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review. This is subject to qualifications which are not relevant in this case.
40. The Applicant submitted that he received the review response on 30 September 2024, which was outwith the statutory timeframe and commented that, in his view, the Authority had "held back" its review response.
41. During the investigation, the Authority provided screenshot evidence to the Commissioner that the review response was sent to the Applicant on 23 September 2024 at 11:57 (which was within the statutory timescale).
42. While the Authority did not request delivery or read receipts, and while the Applicant does not appear to have received the review response, the Commissioner is satisfied, on balance, that the Authority sent the review response within the statutory timescale. He has therefore concluded that the Authority did not breach section 21(1) of FOISA.
43. Moreover, the Commissioner considers that point (v) of the Applicant's dissatisfaction is also encompassed by paragraphs 37 and 38 above, as it relates to his dissatisfaction that the Authority failed to respond to the request initially, and only considered the policy aspects of the request after he had made his requirement for review.

Clarification of the Applicant's response

44. In relation to point (iii) of the Applicant's dissatisfaction (set out above) the Commissioner notes that in its review outcome the Authority stated that it had investigated its failure to respond to his request and that it had sought clarity on the request from the Applicant, which he had provided.
45. However, in its submissions to the Commissioner, the Authority confirmed that no clarification had been sought in relation to the request. It explained that clarification had been sought in relation to the previous, related, request (5373) and that the two requests had been (mistakenly) conflated. It apologised for any confusion caused to the Applicant and the Commissioner.

46. The Commissioner acknowledges the Authority's explanation of this point and its apology for conflating both requests and for making an inaccurate claim that it had sought clarification of the request, when in fact, it had not.
47. The Commissioner would urge all authorities to be careful when handling requests, particularly where the same requester has made more than one request for information, to ensure that the responses they provide are accurate. It is incumbent upon authorities to take steps to ensure that they do not conflate multiple requests and that they issue clear and accurate responses.

Section 15(1) - Duty to provide advice and assistance

48. In relation to point (iv) above, the Applicant argued that the Authority had failed to offer him advice and assistance. Section 15(1) of FOISA requires a Scottish public authority, so far as is reasonable to expect it to do so, to provide advice or assistance to a person who proposes to make, or has made, a request for information to it. Section 15(2) states that a Scottish public authority shall be taken to have complied with this duty where (in relation to the provision of advice and assistance in a particular case) it conforms with [the Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information \(Scotland\) Regulations 2004 \(the Section 60 Code\)](#)².
49. The Section 60 Code states, at section 5.1 in Part 2 (under "Authorities should offer advice at all stages of a request"):
- "Authorities have a duty to provide advice and assistance at all stages of a request. It can be given either before a request is made, or to clarify what information an applicant wants after a request has been made, whilst the authority is handling the request, or after it has responded." (Paragraph 5.1.1)
50. It further states, in section 5.3 in Part 2 (under "Authorities must provide appropriate advice and assistance to enable applicants to describe clearly the information they require"):
- "If an authority is unclear about what information the applicant wants, it should obtain clarification by performing its duty to provide reasonable advice and assistance to the applicant. Where a request is not reasonably clear, advice and assistance could include: providing an outline of the different kinds of information which might meet the terms of the request; providing access to detailed catalogues and indexes, where available, to help the applicant ascertain the nature and extent of the information held by the authority; providing a general response to the request setting out options for further information which could be provided on request; contacting the applicant to discuss what information the applicant wants." (Paragraph 5.3.3)
 - "The aim of providing advice and assistance is to give the applicant an opportunity to discuss their application with the authority, with the aim of helping the applicant describe the information being sought reasonably clearly, so that the authority is able to identify and locate it." (Paragraph 5.3.4).

² <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2016/12/foi-eir-section-60-code-of-practice/documents/foi-section-60-code-practice-pdf/foi-section-60-code-practice-pdf/govscot%3Adocument/FOI%2B-%2Bsection%2B60%2Bcode%2Bof%2Bpractice.pdf>

51. The Section 60 code also states, in section 9.7, paragraph 9.7.1 (under “Quality assurance measures”) that:
- “It is good practice for authorities to check responses for accuracy and quality before they are issued.”
52. The Authority did not provide submissions on whether it believed it had fulfilled its statutory duties under section 15 of FOISA.

The Commissioner’s view on section 15 (Duty to advise and assist)

53. The Commissioner has carefully considered the wording of the Applicant’s request. While he does not consider the wording was unclear, the Commissioner accepts that the Authority may have been unclear (given that it appears to have altered the terms of the Applicant’s request). It is a matter of fact, however, that the Authority did not seek clarification from the Applicant with regard to its understanding of the request.
54. The Commissioner’s view is that, if the Authority was not clear about any aspect of the request it should have asked the Applicant to clarify this (and he notes that the Applicant asked the Authority to seek any clarification needed when he made his request), in line with section 15, and as provided for in section 1(3) of FOISA.
55. If, on the other hand, the Authority was confident that it understood the terms of the request, the Commissioner considers this confidence was misplaced, as he has already found that the Authority’s interpretation of the request was too narrow.
56. Moreover, he considers that the Authority failed to meet its obligations under the Section 60 Code paragraph 9.7.1 in its erroneous reference to having sought clarification from the Applicant when it had not done so.
57. Given all of the above, the Commissioner considers that the Authority failed to provide adequate advice and assistance to the Applicant and therefore failed to comply with the requirements of section 15 of FOISA.

Resolution

58. In part (vi) of the Applicant’s dissatisfaction, he expressed concern that the Authority’s review outcome, had not attempted resolution. On 1 October 2024, the Applicant emailed the Authority, setting out his dissatisfaction with its handling of his request and requirement for review. On 8 October 2024, he contacted the Authority again to ask if he could expect an acknowledgement or a response.
59. On 10 October 2024, the Authority responded to the Applicant, advising him that if he remained unhappy with the response provided he should appeal to the Commissioner. The Applicant responded the same day asking whether the Authority could adopt a more resolution-based approach and suggesting it could conduct another review, as legislation did not limit it to one.
60. The Authority responded on 11 October 2024 to advise the Applicant that it had established that no further review was required, to acknowledge that the Applicant may not be satisfied with this, and that if that was the case the Applicant should contact the Commissioner.
61. The Commissioner notes that while he will attempt to resolve cases wherever possible, there is no requirement under FOISA for authorities to attempt resolution with applicants.

62. Moreover, as noted in paragraphs 52-53 of [Decision 098/2025](#)³, there is no provision in FOISA (or the EIRs) for authorities to issue a new review, unless otherwise instructed to do so by the Commissioner.
63. Given the points above, the Commissioner considers, on balance, that the Authority has not breached FOISA either in terms of resolution or of issuing a new review.

Decision

The Commissioner finds that the Authority partially failed to comply 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:

- failed to respond to the request within the timescales laid down by section 10(1) of FOISA;
- failed to satisfy him that it has identified all relevant information falling within the scope of the Applicant's request and that, as a result, the Authority failed to comply with section 1(1) when it applied section 17(1) of FOISA;
- failed to comply with part 1 of FOISA in terms of its duty to provide advice and assistance of section 15 of FOISA.

However, he finds that the Authority did comply with the statutory timescales set out in section 21(1) of FOISA.

The Commissioner requires the Authority to carry out further searches of information held by the two named individuals and to make it clear to the Applicant which records have been searched, by **8 August 2025**.

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.

³ <https://www.foi.scot/decision-0982025>

Enforcement

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

Jennifer Ross
Deputy Head of Enforcement

24 June 2025