



Scottish Information  
Commissioner  
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# Decision Notice 275/2025

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## Independent Healthcare Stakeholder Group meetings

Authority: Healthcare Improvement Scotland  
Case Ref: 202500588

### Summary

The Applicant asked the Authority for information relating to Independent Healthcare Stakeholder Group meetings. The Authority informed the Applicant that it did not hold some of the information requested. The Commissioner investigated and was satisfied that the Authority partially complied with FOISA in responding to the Applicant's request.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (4) and (6) (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 7 February 2025, the Applicant made a request for information to the Authority in relation to Independent Healthcare Stakeholder Group (the Group) meetings. He asked for "recorded information (if held) or advice and assistance (if not held)" in relation to the following questions:
  - (1) Why the March 2024 meeting was not rescheduled?
  - (2) How did [the Authority] communicate to the other members of the Group ([the Authority] being the Chair of the Group) that the March 2024 meeting would not be rescheduled?
  - (3) Why the July and November 2024 meetings did not take place?

- (4) How did [the Authority] communicate to the other members of the Group that the July and November 2024 meetings would not be taking place?
- (5) Is the Group still extant?
- (6) If yes, why have there been no meetings?
- (7) If no, how was this communicated to the Group?
- (8) Any correspondence sent by [the Authority] to the members between 03 May 2024 and 31 December 2024 (if not already covered by Parts 1-7 of the request).
- (9) Any correspondence sent by the members to [the Authority] between 03 May 2024 and 31 December 2024 (if not already covered by Parts 1-8 of the request)."
2. On 11 February 2025, the Authority asked the Applicant whether the reference to "any correspondence sent" in his request meant information between the Authority and members in relation to the business of the Group. The Applicant confirmed that it did.
3. The Authority notified the Applicant of the outcome of its review on 10 March 2025 in the following terms:
  - for part (5) of the request, it confirmed that the Group still existed but said that no meetings of the Group had been held since 8 November 2023. (It did not specifically respond to part (7) of the request, which was conditional on the Group not existing.)
  - for all other parts of the request, it issued the Applicant with a notice, in terms of section 17 of FOISA, that it did not hold the information requested.
4. On 13 March 2025, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision because:
  - despite specifically asking the Authority to provide him with advice and assistance in line with section 15 of FOISA, it had had provided him with only minimal such advice and assistance
  - while he appreciated that the Authority said that it did not hold most of the information requested, it could have, in line with its duty under section 15 of FOISA, provided an explanation as to why
  - he was not satisfied that adequate and appropriate searches had been undertaken of both official and unofficial channels (including but not limited to WhatsApp groups).
5. The Authority notified the Applicant of the outcome of its review on 2 April 2024, which fully upheld its original response.
6. On 18 April 2025, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. He stated he was dissatisfied with the outcome of the Authority's review for the same reasons specified in his requirement for review.

## Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

8. On 13 May 2025, the Authority was notified in writing that the Applicant had made a valid application. The case was subsequently 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 Authority was invited to comment on this application and to answer specific questions regarding the searches it carried out and the advice and assistance it provided to the Applicant.

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

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

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

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 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.
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 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.
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.
14. 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 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) held by the public authority.

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

15. The Applicant considered that the Authority's review outcome was unclear on what searches it had undertaken in response to his request, especially in relation to "unofficial channels". He noted that the Authority's initial response gave no detail on what searches were undertaken, while the review outcome only stated that searches were "revisited".
16. The Applicant said that the Authority's review outcome neither confirmed nor denied that the Authority utilised "unofficial channels" for communication (including but not limited to WhatsApp). He noted that he could not compel the Authority to expand on the searches it had undertaken – only the Commissioner could.
17. Although the Applicant noted that the Authority stated that it did not hold the information requested, he found it difficult to understand the "underlying basis or decision-making

process” as to why the Authority had not been meeting, engaging or communicating with the Group.

#### *The Authority’s submissions*

18. The Authority confirmed that it did not hold the information requested, that the information had never existed and that there was no legal or practical reason for the information to exist. It said that the Applicant had hypothesised that a specific decision had been made and had made assumptions on the information held by the Authority on that basis. However, it reiterated that the information requested did not exist in any form.
19. The Authority explained that the Independent Healthcare Regulation Team had conducted searches of their document stores and emails. These were the colleagues actively involved in the issues around stakeholder engagement in the sector and were well placed to know what, if any, recorded information was held.
20. The Authority confirmed that the following colleagues from the Independent Healthcare Regulation Team were consulted in response to the Applicant’s request and had carried out searches of their mailboxes and devices: Chief Inspector, Programme Manager, Head of NHS Inspections, Head of Regulation, two Senior Inspectors and a Project Officer.
21. The Authority confirmed that SharePoint folders for the Independent Healthcare Regulation Team had been searched (using relevant search terms), as were the mailboxes, OneDrive folders and devices of the relevant team members (set out above). It said that it had also conducted searches of Microsoft Teams messages, but no results were returned.
22. The Commissioner asked the Authority whether it had carried out searches of other relevant digital messaging platforms (e.g. WhatsApp). The Authority responded that Microsoft Teams was the only messaging tool approved for use by the Authority and that there was no reason to believe that any unauthorised tools were used by the relevant team members. It stated that it did not operate a “Bring Your Own Device” policy and that only authorised applications were permitted for download to business devices.
23. The Authority said that, as officers carrying out a statutory regulatory role, the Independent Healthcare Regulation Team were particularly conscious of their record-keeping responsibilities and careful in their use of appropriate communication and productivity tools.

#### *The Commissioner’s view*

24. The Commissioner has taken account of all of the relevant submissions provided by both the Applicant and the Authority.
25. Given the explanations and submissions provided, the Commissioner considers that the Authority has taken adequate and proportionate steps in the circumstances to establish if the information was held. In his view, the Authority’s searches were reasonable in the sense of who it asked to carry out the searches (given their knowledge and roles) and the locations searched. He is satisfied, on balance, that the information requested by the Applicant was capable of being identified by the searches carried out by the Authority.
26. In conclusion, the Commissioner is satisfied, on balance, that the Authority has provided sufficient evidence to show that it does not (and did not, on receipt of the request) hold the information requested by the Applicant.
27. While the Applicant believed and expected the information requested 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.

28. The Commissioner therefore finds that 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 of FOISA – Duty to provide advice and assistance***

29. Section 15(1) of FOISA requires a Scottish public authority, so far as is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
30. 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<sup>1</sup>](#)).

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

31. In his requirement for review, the Applicant acknowledged that the Authority had stated that it did not hold the information requested. However, he considered that the Authority could have provided an explanation as to why. For example, it could have informed him that the decision not to hold further meetings, engage or communicate with the Group was taken at an unminuted or offline meeting/conversation.
32. In his application to the Commissioner, the Applicant reiterated that he was dissatisfied that the Authority failed to explain why it did not hold the information requested. Specifically, he considered that the Authority had failed to take account of paragraphs 9.2.1 and 9.3.1 of the Section 60 Code which state:
- “The obligation to provide advice and assistance continues at the point of issuing a response.” (9.2.1)
  - “Where an authority issues a response informing the applicant that it does not hold the requested information, it is good practice for an authority to explain to the applicant why it does not hold the information.” (9.3.1)

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

33. In its review outcome, the Authority noted that the Applicant had said that it could provide a “further explanation on why no further communication is held”. However, it stated that FOISA did not oblige public authorities to create new information to answer a question.
34. In its submissions to the Commissioner, the Authority reiterated that FOISA did not require public authorities to create new information to respond to assertions made - which it considered to be the case here. It explained that it understood that the duty to advise and assist was intended to ensure that public authorities supported applicants in formulating their requests to be able to access recorded information.

### ***The Commissioner's view***

35. The Commissioner has carefully considered the submissions from both parties.

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<sup>1</sup> <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

36. Section 15(1) of FOISA does not require public authorities to create new information in order to comply with its duty to provide advice and assistance. However, as the Applicant identified, paragraph 9.3.1 of the Section 60 Code states that it is good practice for a public authority, where it is issuing a response informing the applicant that it does not hold the information requested, to explain why it does not hold the information.
37. As part of its submissions to the Commissioner, the Authority said that “there was no documented decision-making process” regarding why the Group had not met recently but that the Independent Healthcare Regulation Team had “continued to engage stakeholders in a flexible and responsive manner through a range of approached, including newsletters and meetings convened by stakeholders themselves”. It stated that it was “simply a matter of fact that the formal [Group] has not met recently”.
38. The Commissioner notes that the Authority had advised the Applicant in its initial response that no meetings of the Group had been held since 8 November 2023. However, in the circumstances and given the dissatisfaction expressed by the Applicant in his requirement for review, the Commissioner considers that the Authority should have provided the explanation (or a summary of it) set out in the preceding paragraph to the Applicant in line with its duty, under section 15 of FOISA, to provide advice and assistance. He does not consider that the provision of this explanation would have required the Authority to create new information – it would simply help to further explain why it did not hold the information requested.
39. The Commissioner therefore finds that the Authority did not fulfil its duty, under section 15 of FOISA, to advise and assist the Applicant. Given that the advice and assistance the Authority should have provided to the Applicant is now contained within his decision notice, he does not require the Authority to take any action in response to its failure to comply with its duty under section 15 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 inform the Applicant, in terms of section 17(1) of FOISA, that it did not hold the information requested.

However, the Commissioner finds that the Authority did not fulfil its duty, under section 15 of FOISA, to advise and assist the Applicant.

Given that the advice and assistance the Authority should have provided to the Applicant is now contained within his decision notice, he does not require the Authority to take any action in response to its failure to comply with its duty under section 15 of FOISA.

## **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**

**11 November 2025**