

Decision Notice



Decision 160/2011 Ms Jane Mercer and Fife NHS Board

Notes taken at a meeting

Reference No: 201100782

Decision Date: 12 August 2011

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
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Summary

Ms Jane Mercer requested from Fife NHS Board (the Board) copies of documentary evidence showing how the decision to keep a post at a particular band was reached following the Agenda for Change process. The Board responded by providing Ms Mercer with copies of the job audit report and matched job report. Following a review, Ms Mercer remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Board had partially failed to deal with Ms Mercer's request for information in accordance with Part 1 and section 1(1) of FOISA, by disclosing some information to Ms Mercer, but withholding other information (to which it had not applied any of the exemptions allowed for in FOISA). He required the Board to disclose the withheld information to Ms Mercer. The Commissioner also noted that the Board had failed to comply with several technical requirements set out in Part 1 of FOISA.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 16(1), (2), (3) and (6) (Refusal of request); 19 (Content of certain notices) and 21(1), (4), (5) and (10) (Review by Scottish public authority)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 22 September 2010, Ms Mercer wrote to Fife NHS Board (the Board) requesting the following information relating to the review of her post under the Agenda for Change:

the documentary evidence (including electronic) which was presented by the Review Panel [set up under the Agenda for Change] for 'consistency checking and sign off' along with documentation (including electronic) showing how the decision to keep the post graded a 4 was reached.



2. The Board responded on 13 October 2010. It indicated that it was enclosing “information agreed in partnership that NHS Fife will provide”. The enclosed documents were the Job Audit Report and the Matched Job Report. This response made no reference to FOISA, and did not indicate that any information had been withheld.
3. On 13 October 2010, Ms Mercer wrote to the Board, requesting a review of its decision. Ms Mercer drew the Board’s attention to the fact it had not provided her with copies of the notes taking during the Review Meeting. Having noted the wording of the Board’s response to her request, she highlighted that the Board was under an obligation to provide all information requested, unless this was exempt from disclosure under FOISA.
4. The Board notified Ms Mercer of the outcome of its review on 22 March 2011. In this letter, the Board advised Ms Mercer that it would not be providing any further information in relation to the relevant review process in response to her request under FOISA. The Board indicated that it had received advice that the outstanding information she was seeking was not covered by FOISA as it comprised the personal notes of the review panel members. The Board indicated that these notes were specific to her post and were not specific to Ms Mercer herself. The Board still applied no exemptions to the information it was withholding.
5. On 27 April 2011, Ms Mercer wrote to the Commissioner, stating that she was dissatisfied with the outcome of the Board’s review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Ms Mercer had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 3 May 2011, the Board was notified in writing that an application had been received from Ms Mercer and was asked to provide the Commissioner with any information withheld from her. The Board responded with the information requested and a covering letter explaining (in general terms and with no reference to FOISA) why it believed that the information should be withheld. The case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Board giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Board was asked for details of any exemptions in FOISA that it wished to apply to the withheld information, and was also asked why it had so far failed to apply any exemptions to the withheld information.



9. In response to this letter, the Board referred the investigating officer to the covering letter it had supplied along with the withheld information. The investigating officer contacted the Board, advising it that this covering letter did not refer to any of the exemptions provided for in FOISA, and noted that if the Board did not apply any exemptions to the withheld information, the investigating officer would have little option but to recommend to the Commissioner that the information should be disclosed to Ms Mercer.
10. On 27 June 2011, the Board responded to the investigating officer's letter. Further reference is made to the letter in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Ms Mercer and the Board and is satisfied that no matter of relevance has been overlooked.

Section 1(1) – General entitlement

12. 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 certain restrictions which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to
 - a. withhold information if it is exempt information as defined by the provisions in Part 2,
 - b. charge for the provision of that information in certain circumstances, or
 - c. refuse to respond a request in certain other provisions in Part 1 of FOISA applies.
13. There is no restriction on the types of information which can be requested, and the information to be given is that held by the authority at the time the request is received, as defined in section 1(4).
14. In this case, the Board provided Ms Mercer with some of the information falling within the scope of her request, but it withheld other information (the notes from the review meeting) without applying any of the exemptions in Part 2 of FOISA. Neither did the Board seek to charge a fee for this information, or claim in terms of any provision in Part 1 of FOISA that it was not obliged to respond to the request or provide the information.
15. The Board was asked to comment on why the meeting notes were not identified in response to Ms Mercer's initial request, but no comments or explanation were forthcoming. The Board was also asked, on several occasions, for details of any exemptions it was seeking to rely upon to withhold the information from Ms Mercer, and again nothing was forthcoming.



16. The Board has corresponded with the Commissioner's office, but the submissions it has provided have been generally expressed, with no reference to FOISA or any of the exemptions contained in Part 2 of FOISA. In a letter dated 27 June 2011, the Board made reference to the Data Protection Act 1998 (the DPA), stating that the requested information contains the names of individuals who were involved in the process of evaluation.
17. In this letter, the Board also acknowledged that it did not consider this information to fall within an exemption as per section 10 of the DPA, but that it gave assurances to staff participating in review panels that no decision (of the review panels) would be linked to any of the staff members participating in the panels. The Board further submits that this was to prevent any employee from being held responsible for any of the decisions reached through the agenda for change process. The Board advises that it is happy to confirm to Ms Mercer the basis on which this exemption was applied.
18. The Commissioner has several concerns about the submissions provided by the Board, the first being that, after having carefully reviewed the withheld information in this case, it is clear to the Commissioner that no individual is named or referred to. The Commissioner acknowledges that Ms Mercer may know the names of the individuals who attended the panel meeting, but the withheld information itself does not disclose such information. He is therefore curious as to why the Board has argued that it does. He can only presume that it has failed to fully review the withheld information before providing submissions on the matter.
19. The second problem the Commissioner has encountered with the Board's submissions is the complete lack of reference to FOISA or any of the exemptions provided for in FOISA. The Board has made arguments in general terms as to why the information should not be disclosed (although, as noted above, the arguments have little relevance given the content of the withheld information), but it has failed to make any case for non-disclosure in terms of FOISA.
20. The Commissioner notes that the Board has also made some references to the DPA and has suggested that disclosure under FOISA may breach the terms of the DPA. In these circumstances, it might have wished to consider whether the exemption in section 38(1)(b) was applicable.
21. The Commissioner would highlight that it is not appropriate, when considering a request made in terms of FOISA, to simply refer to the DPA as justification to withhold information. In this case, the Board appears (despite prompting from the Commissioner's staff) to have simply failed to consider Ms Mercer's request in line with its obligations under FOISA.



22. Given that FOISA has been in force since 1 January 2005, that the letters sent to the Board by the investigating officer make clear what information is required by the Commissioner and that the Commissioner has published guidance on the standard of submissions that public authorities need to produce (the guidance was specifically referred to in correspondence with the Board), it is the Commissioner's view that the Board has been given sufficient notice of the arguments and evidence it needs to produce in order to justify the withholding of information. It is clear that in this case the Board, for whatever reason, has failed to do so, even when notified by the investigating officer that if it did not apply any of the exemptions provided for in FOISA, she would have little choice but to recommend that the Commissioner require the disclosure of the withheld information.
23. Accordingly, after careful consideration of the withheld information (within which the Commissioner is unable to identify any personal data) and, having taking into account the poor quality of the submissions provided by the Board in this case, the Commissioner finds that the Board failed to comply with Part 1 and in particular section 1(1) of FOISA by wrongly withholding information from Ms Mercer. The Commissioner therefore requires the Board to disclose the withheld information to Ms Mercer.
24. Additionally, the Commissioner notes that the copy of the Job Audit Report provided to Ms Mercer in response to her initial request appears to have unfinished sentences and words missing in the final column which is entitled 'description'. The Commissioner therefore requires the Board to provide Ms Mercer with another copy of this document which includes all of the information contained in the 'description' field of the last column.
25. The Commissioner also notes that the Board's communications with Ms Mercer failed to comply with a number of the technical requirements of Part 1 of FOISA. He notes in particular that the Board failed to
 - a. issue a refusal notice indicating that it had decided to withhold some of the information requested by Ms Mercer, in compliance with sections 16(1), (2), (3) and (6);
 - b. notify Ms Mercer of the right to request a review of its response, and subsequently make an application for decision by the Commissioner, in line with section 19; and
 - c. notify Ms Mercer of the right to make an application for decision by the Commissioner, and subsequently make an appeal to the Court of Session in line with section 21(10) of FOISA.

The relevant provisions are set out in full within the appendix to this decision.

26. The Commissioner does not require any action to be taken in relation to these technical breaches in response to this decision. However, he has been concerned to note the Board's apparent failure to recognise and respond to Ms Mercer's information request in line with its obligations under Part 1 of FOISA, and he recommends that the Board takes steps to increase awareness of these obligations among relevant staff.



DECISION

The Commissioner finds that Fife NHS Board partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms Mercer.

The Commissioner finds that by providing Ms Mercer with two documents in response to her request for information, the Board complied with Part 1.

However, by failing to identify all of the information falling within the scope of Ms Mercer's request, and by withholding this information from Ms Mercer, to which it did not apply of the exemptions provided for in FOISA, the Board failed to comply with Part 1 of FOISA, particularly section 1(1).

The Commissioner also found that the Board had failed to comply with the technical requirements of FOISA, as set out in section sections 16(1), (2), (3) and (6), 19 and 21(10) of FOISA.

The Commissioner requires the Board to disclose the meeting notes to Ms Mercer by 27 September 2011.

Appeal

Should either Ms Mercer or Fife NHS Board wish to appeal against this decision, there is an 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 notice.

Margaret Keyse
Head of Enforcement
12 August 2011



Appendix

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.
...
- (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.

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-
 - (a) discloses that it holds the information;
 - (b) states that it so claims;
 - (c) specifies the exemption in question; and
 - (d) states (if not otherwise apparent) why the exemption applies.
- (2) Where the authority's claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.



- (3) The authority is not obliged to make a statement under subsection (1)(d) in so far as the statement would disclose information which would itself be exempt information.

...

- (6) Subsections (1), (4) and (5) are subject to section 19.

19 Content of certain notices

A notice under section 9(1) or 16(1), (4) or (5) (including a refusal notice given by virtue of section 18(1)) or 17(1) must contain particulars-

- (a) of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and
- (b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

- (4) The authority may, as respects the request for information to which the requirement relates-
- (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
 - (b) substitute for any such decision a different decision; or
 - (c) reach a decision, where the complaint is that no decision had been reached.
- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.
- ...
- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.