

# Decision Notice



Decision 183/2011 Mr R and Lothian NHS Board

Health disclosures to dentists

Reference No: 201100791

Decision Date: 6 September 2011

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**Kevin Dunion**

Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
Tel: 01334 464610



## Summary

Mr R requested from the Lothian NHS Board (NHS Lothian) specific information on what personal and medical information a patient was required to disclose to their NHS dentist, and clarification as to any legal basis for this. NHS Lothian responded by providing information. Following a review, Mr R remained dissatisfied that his request had been addressed in full and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that NHS Lothian had failed to deal with Mr R's request for information in accordance with Part 1 of FOISA (in the respects raised by his application to the Commissioner), by failing to advise him that it did not hold the relevant information and by failing to provide reasonable advice and assistance. Given NHS Lothian addressed the request during the investigation, the Commissioner did not require NHS Lothian to take further action.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 15(1) (Duty to provide advice and assistance) and 17(1) (Notice that information is not held)

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

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1. Mr R wrote to NHS Lothian (on 28 January 2011) requesting the following information:
  - a. what personal and medical information including data content does the NHS require a patient to disclose by compulsion prior to the provision of NHS dental treatment and who defines the data content?
  - b. what is the legal basis for this mandatory/compulsory disclosure?
  - c. what disclosure does the dentist make to NHS or what access does the NHS have to details about dental patient drinking/smoking habit even in a depersonalised form?
  - d. what fee is paid to the dentist for gathering information about patient drinking and smoking habits?



2. NHS Lothian responded to Mr R's request on 18 February 2011, commenting on each of the four parts of the request.
3. On 26 February 2011, Mr R wrote to NHS Lothian requesting a review of its decision. He did not consider his request to have been fully addressed.
4. NHS Lothian notified Mr R of the outcome of its review on 26 April 2011, providing with some additional explanations in response to his request.
5. On 26 April 2011 Mr R emailed the Commissioner, stating that he was dissatisfied with the outcome of NHS Lothian's review in respect of parts 1 and 2 of his request and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr R 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. The case was then allocated to an investigating officer.

## Investigation

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7. On 9 May 2011, the investigating officer contacted NHS Lothian, 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, NHS Lothian was asked to comment on the following:
  - with regard to part 1 of Mr R's request, who determined the data content (to be supplied by patients) and what was that content
  - with regard to part 2, the legal basis (if any) for requiring patients to supply their medical historyIt was also asked about relevant policies or guidance, and for clarification in respect of those aspects of its responses which Mr R considered contradictory.
8. During the investigation, Mr R further explained the points he did not believe had been addressed by NHS Lothian. The investigating officer passed on his comments to NHS Lothian, which provided Mr R with further explanations in response. Mr R remained dissatisfied with the response, specifically on the questions of compulsion and what medical history disclosure was appropriate for the provision of dental treatment.
9. Following the communications described in the previous paragraph, submissions were received from NHS Lothian in response to the investigating officer's letter of 9 May 2011.
10. The submissions received from both NHS Lothian and Mr R, insofar as relevant, will be considered further in the Commissioner's analysis and findings below.



## Commissioner's analysis and findings

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11. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mr R and NHS Lothian and is satisfied that no matter of relevance has been overlooked.
12. Mr R expressed dissatisfaction in his application that such information as he had been provided with was vague and conflicting. Certain of his concerns remained at the close of the investigation, following the provision of further information. The Commissioner must make clear, however, that (while such concerns may be relevant to his investigation) he can only consider whether Mr R was provided with all the information held by NHS Lothian and falling within the scope of his request.

### Information held by the authority

13. 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 withhold information or charge a fee for it. The restrictions referred in section 1(6) are not under consideration in this case. 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. The Commissioner has considered the submissions received from NHS Lothian on parts 1 and 2 of Mr R's request. Basically, NHS Lothian has confirmed that there is no defined "data content" for these purposes. The information the dentist requires for the purposes of treatment will depend on the circumstances and will not necessarily be susceptible to definition. It has also confirmed, having consulted its Clinical Director and its legal advisors (it would appear, for the purposes of this investigation), that there is no legal basis for dentists asking for medical history, but rather that this is a matter of good practice. In all the circumstances, he accepts this position as rational: consequently, he would consider the appropriate response to Mr R to have been that NHS Lothian did not hold any information falling within the scope of parts 1 and 2 – which, to all intents and purposes is what it has now said, both to the Commissioner and to Mr R.



15. Consequently, NHS Lothian's response to Mr R should have taken the form of a notice under section 17(1) of FOISA, to the effect that the requested information was not held. It did not do this, and while the explanations it did provide were no doubt intended to be helpful, the Commissioner considers that these could have made the authority's position clearer (and may, in fact, have created the impression that the authority did hold recorded information on the matters raised). On part 2 of the request, it would also have been helpful if the authority could have explained that a request under section 1 of FOISA will only capture any recorded information held on the question at the time the request is received: it cannot be used, for example, to elicit a legal opinion where no particular information on the relevant question of law is held at that time. Finally, NHS Lothian might have explained where questions of good practice in relation to dental treatment might more appropriately be raised: although its initial response referred to the General Dental Council (a public authority covered by the (United Kingdom) Freedom of Information Act 2000) in passing, this might have been made clearer.
16. In conclusion, therefore, the Commissioner finds that NHS Lothian failed to comply with section 17(1) of FOISA in dealing with Mr R's request. Given the lack of clarity in aspects of its responses (as outlined in the previous paragraph), he also finds that it failed to discharge its duty to provide reasonable advice and assistance under section 15(1) of FOISA. However, given the additional explanations provided to Mr R in the course of this investigation, he does not require the authority to take any further action.

## DECISION

The Commissioner finds that Lothian NHS Board (NHS Lothian) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr R, in the respects raised by his application to the Commissioner, specifically by failing to give the applicant notice that information was not held under section 17(1) of FOISA and failing to provide the applicant with reasonable advice and assistance under section 15(1) of FOISA.

Given the explanations provided by NHS Lothian during the investigation, the Commissioner does not require NHS Lothian to take any action in respect to these failures in response to Mr R's application.

Decision 183/2011  
Mr R  
and Lothian NHS Board



## Appeal

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Should either Mr R or Lothian 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**  
**6 September 2011**



## Appendix

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### 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.
- ...

##### 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.

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