

Decision Notice



Decision 157/2013 Dr Joseph Reddington and Borders Health Board

Augmentative and alternative communications devices

Reference No: 201300929

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Rosemary Agnew

Scottish Information Commissioner

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Summary

On 11 February 2013, Dr Reddington asked Borders Health Board (NHS Borders) for information regarding augmentative and alternative communication devices. NHS Borders supplied some information to Dr Reddington and stated that it did not hold anything further (a position it upheld on review). During the investigation, NHS Borders acknowledged that it did hold further information, but submitted that it would cost more than the £600 to provide it (and therefore it was not required to comply with the request).

The Commissioner agreed with this conclusion, but found that NHS Borders should have notified Dr Reddington accordingly. She required NHS Borders to provide Dr Reddington with advice and assistance as to what relevant information could be supplied within the cost limit.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 15 (Duty to provide advice and assistance)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs) and 5 (Excessive cost prescribed amount)

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 11 February 2013, Dr Reddington, an academic researcher, wrote to NHS Borders requesting details of augmentative and alternative communication devices supplied or purchased by NHS Borders between 31 March 2006 and 1 April 2012, broken down by both product name and year and for both children and adults.



2. NHS Borders responded on 8 March 2013, stating that it did not hold information about when specific items were purchased and so could not provide a breakdown by the year of purchase. It explained that the department which purchased this type of equipment did not maintain a record of purchases and that its procurement records system did not record sufficient detail to be able to identify individual devices. NHS Borders did, however, provide Dr Reddington with a list of those augmentative and alternative communication aids which were currently available within the authority.
3. On 10 March 2013, Dr Reddington wrote to NHS Borders requesting a review. He was of the view that further information should be held by NHS Borders.
4. NHS Borders notified Dr Reddington of the outcome of its review on 5 April 2013, upholding its original decision and providing further explanation.
5. On 14 April 2013, Dr Reddington wrote to the Commissioner's office, stating that he was dissatisfied with the outcome of NHS Borders'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 Dr Reddington made a request for information to a Scottish public authority and 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

7. The investigating officer subsequently contacted NHS Borders, 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 Borders was asked to provide a detailed breakdown of all searches it had carried out to identify and locate the information, along with other questions on the relevant records.
8. NHS Borders responded that the only way for it to extract the information would be to carry out a manual trawl through several thousand order forms. On this basis, it confirmed that it wished to rely on section 12 of FOISA (Excessive cost of compliance). NHS Borders provided a costing in support of this claim.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner has considered the relevant submissions, or parts of submissions, made to her by both Dr Reddington and NHS Borders. She is satisfied that no matter of relevance has been overlooked.



Information held by NHS Borders

10. In response to Dr Reddington's request and review requirement, NHS Borders advised him that it held no further information in addition to that provided to him on 8 March 2013. Subsequently, NHS Borders accepted that it did in fact hold further information, but argued that this information was not held in an easily retrievable format.
11. The Commissioner must therefore find that NHS Borders breached section 1(1) of FOISA, as it held further relevant information when it received Dr Reddington's request and incorrectly notified him that it did not.

Section 12(1) - excessive cost of compliance

12. Section 12(1) of FOISA provides that a Scottish public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request will exceed the amount set out in the Fees Regulations for that purpose (currently £600). The Commissioner has no power to require the disclosure of information should she find that the cost of responding to a request exceeds this amount.
13. The costs the public authority can take into account for these purposes are, according to regulation 3 of the Fees Regulations, the total costs (whether direct or indirect) which the authority reasonably estimates it will incur in locating, retrieving and providing the information requested in accordance with Part 1 of FOISA. The public authority may not charge for the cost of determining (i) whether it actually holds the information or (ii) whether or not it should provide the information. The maximum hourly rate a public authority can charge for staff time is £15 an hour.

Submissions from NHS Borders

14. NHS Borders submitted that its electronic finance system did not record the individual items purchased, but only the category of the purchase, the supplier and the department the item was purchased for. For this reason, NHS Borders stated, it was unable to identify specific items by extracting a routine report from its system.
15. The only way to retrieve information on specific items, NHS Borders submitted, would be to extract a wider report from the electronic finance system, itemising every purchase made by the Speech and Language Therapy Department under the range of categories which might have been used to record this type of equipment purchase. This report could then be used to retrieve the electronically archived invoices. NHS Borders noted that not all of the invoices checked would contain information falling within the scope of Dr Reddington's request.



16. NHS Borders explained that (because this type of information was not currently collected) a Finance Officer would have to create a specific protocol to interrogate the system and extract the report described in the previous paragraph. NHS Borders explained that the lowest grade of employee able to perform this function would be a Grade 6 Finance Officer (at the £15 maximum hourly rate). NHS Borders explained that retrieval of the invoices, as described above, could then be carried out by a Grade 4 Finance Clerk (at an hourly rate of £12.64), the lowest grade of employee able to operate the system.
17. NHS Borders submitted that a Speech and Language Therapist would also be required to assist the Finance Clerk in finding those items not readily identifiable from the invoices, and to confirm those identified by the Finance Clerk, with Grade 6 (at the £15 maximum hourly rate) being the lowest grade for a Speech and Language Therapist.
18. NHS Borders' costing was based on an average estimate of the number of such invoices it received annually, i.e. 1,350 invoices per year (8,100 invoices in total over six years). The costing included:
 - 5 hours of Finance Officer time @ £15 per hour = £75
 - 40 hours of Finance Clerk time @ £12.64 per hour = £505.60
 - 10 hours of Speech and Language Therapist time @ £15 per hour = £150giving a total cost of £730.60 for checking through approximately 8,100 invoices. In addition, at 11p a sheet, printing costs were estimated at £650.
19. The Commissioner notes that NHS Borders sought to include the cost incurred for employing a locum to cover the duties of the assisting Speech and Language therapist. However, she cannot accept this as a cost reasonably incurred in locating, retrieving and providing of the information.
20. In order to bring the cost within the £600 cost threshold, NHS Borders estimated that it would need to restrict the retrieval to 12-18 months' worth of invoices. It could not guarantee how much of the information sought by Dr Reddington would be captured in these invoices.

Submissions from Dr Reddington

21. On being advised of the costs breakdown provided by NHS Borders, Dr Reddington submitted that he would be satisfied if NHS Borders simply saved all of the invoices onto a computer disk or other electronic medium and provided that to him, thereby allowing him to go through all the invoices in his own time and pick out those which were relevant to him.



22. NHS Borders submitted that before an electronic file of all the invoices could be disclosed to anyone, a member of staff would have to check through all the invoices. Dr Reddington did not accept that this was necessary. NHS Borders confirmed that it would be normal practice to check for and redact any commercially sensitive information contained in any contracts, invoices or other financial and procurement documents (i.e. information exempt under section 33(1)(b) of FOISA) before disclosing them to anyone. To do otherwise, NHS Borders submitted, would be damaging to its own and to NHS Scotland's reputation among suppliers and could result in a legal challenge of their processes. The only alternative, it argued, would be to redact the unit price information from every invoice (which would, of course, still require a degree of checking and redaction of each invoice).
23. The Commissioner accepts that the costs described in the previous paragraph would be costs reasonably incurred in providing the information.
24. Dr Reddington went on to argue that the costings provided by NHS Borders were over-estimated. He stated that he was in the process of seeking corroboration of this by contacting the manufacturer of the relevant computer system, from which he hoped to obtain testimony that would show that the information could be retrieved more easily. Although he referred to discussions with the manufacturer to this general effect, no direct communication from them was provided.
25. Dr Reddington also submitted that he had received similar breakdowns of information from other public authorities at no cost. It does not necessarily follow, of course, that NHS Borders is capable of providing the information within the cost limit (or, indeed, that the other authorities did so – application of section 12 is not mandatory).
26. Finally, Dr Reddington stated that, if he could not obtain all of the information he was seeking, he would accept whatever amount of information that NHS Borders could locate and provide to him for under the £600 cost threshold.

The Commissioner's findings

27. In the absence of adequate evidence to the contrary, the Commissioner has no reason to disbelieve the submissions put forward by NHS Borders as to the capacities of its electronic finance system. Even if she were to accept as applicable to these systems the comments Dr Reddington states he obtained from the manufacturer, she does not believe it follows that the specific information Dr Reddington is seeking could be identified and extracted without the checks described by NHS Borders. On balance, having considered all relevant submissions, the Commissioner accepts that the necessary work (which, as she has accepted above, would involve the extraction or redaction of information and could not be achieved simply by providing the relevant invoices) would cost, on a reasonable estimate, in excess of £600.
28. In the circumstances, therefore, the Commissioner accepts that NHS Borders was entitled to rely upon section 12(1) of FOISA in relation to Dr Reddington's request for information.



Section 15 - the duty to advise and assist

29. Section 15(1) of FOISA requires a Scottish public authority, so far as it is reasonable to expect it do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it. The *Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the Environmental Information Scotland Regulations 2004* includes guidance that, where section 12(1) applies, public authorities may "consider what information could be provided below the cost limit, and suggest how the applicant may wish to narrow the scope of their request accordingly."¹
30. The Commissioner notes that NHS Borders did not rely on section 12 of FOISA until after her investigation was underway, and therefore the question of how much information could be provided within the cost limit was not a matter that NHS Borders raised with Dr Reddington in dealing with his request.
31. Once it had sought to rely of section 12 of FOISA, NHS Borders did, however, suggest that approximately 12-18 months' worth of invoices might be checked within the £600 cost threshold. In the Commissioner's view, advice and assistance of this kind should have been provided to Dr Reddington, had NHS Borders identified (as it should), that it held additional information falling within the scope of his request.
32. The Commissioner now requires NHS Borders to provide Dr Reddington with advice on how he might frame a reduced information request, with a view to avoiding the application of section 12(1). This should include a more robust estimate of what could be provided within the cost limit.

DECISION

The Commissioner finds that Borders Health Board (NHS Borders) was not obliged to comply with Dr Reddington's information request, given that section 12(1) of the Freedom of Information (Scotland) Act 2002 (FOISA) applied.

However, the Commissioner also finds that, by wrongly advising Dr Reddington that it did not hold any further information, NHS Borders failed to comply with Part 1 (and in particular section 1(1)) of FOISA.

The Commissioner now requires NHS Borders, in accordance with section 15(1) of FOISA, to advise Dr Reddington as to what relevant information could be located, retrieved and provided (subject to such exemptions under FOISA as might be applicable) within the cost limit, by 15 September 2013

¹ See paragraph 1.9 in Part 2 of the Code at <http://www.scotland.gov.uk/Resource/Doc/933/0109425.pdf>



Appeal

Should either Dr Reddington or Borders Health 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.

Margaret Keyse
Head of Enforcement
1 August 2013



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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.

...

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.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).



Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

3 Projected costs

- (1) In these Regulations, "projected costs" in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.
- (2) In estimating projected costs-
 - (a) no account shall be taken of costs incurred in determining-
 - (i) whether the authority holds the information specified in the request; or
 - (ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and
 - (b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

5 Excessive cost - prescribed amount

The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.