

# Decision Notice

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**Decision 114/2014 Mr Rab Wilson and NHS National Services Scotland**

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**Compromise agreements**

Reference No: 201400374

Decision Date: 27 May 2014



Scottish Information  
Commissioner

## Summary

On 13 December 2013, Mr Wilson asked NHS National Services Scotland (NHSNSS) for information relating to compromise agreements with staff leaving the NHS. In relation to part 1 of the request, NHSNSS informed Mr Wilson that it did not hold the information. NHSNSS informed Mr Wilson that complying with the other parts of his request would cost in excess of the £600 limit set by the relevant Fees Regulations and, therefore, it was not obliged to comply with them.

Following an investigation, the Commissioner found that NHSNSS had complied with FOISA in dealing with Mr Wilson's request.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 15 (Duty to provide advice and assistance); 17(1) (Notice that information is not held)

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

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1. On 13 December 2013, Mr Wilson emailed NHSNSS requesting the following information:
  - 1 I wish to know how many of the 697 compromise agreements given to staff who left the service of the NHS between the years 2007 to 2013 inclusive had confidentiality clauses attached to them?
  - 2 The CLO (Central Legal Office) states that it was 'not involved in the drafting of all 697 compromise agreements'. Therefore, if they know that they were not involved in all of the agreements then ergo they must know the ones that they were directly involved in? How many of the 697 compromise agreements I refer to between the years 2007 to 2013 involved direct approaches from NHS boards to the CLO and were drafted with the involvement and assistance of the CLO?
  - 3 How many of these compromise agreements, that the CLO were directly involved in, contained confidentiality clauses?
  - 4 How many of these did not contain confidentiality clauses?
2. NHSNSS responded on 13 January 2014. In relation to part 1, NHSNSS gave notice in terms of section 17 of FOISA that it did not hold the information that Mr Wilson had requested. In relation to parts 2-4, NHSNSS informed Mr Wilson that it would cost in excess of £600 to fulfil these parts of his request and, by virtue of section 12 of FOISA, it was not required to comply with these parts of the request.

3. On 16 January 2014, Mr Wilson emailed NHSNSS requesting a review of its decision. Mr Wilson considered that the information ought to be held by NHSNSS and believed that its response was a deliberate attempt to evade answering a reasonable request.
4. NHSNSS notified Mr Wilson of the outcome of its review on 31 January 2014. It upheld its application of sections 12 and 17 of FOISA in respect of the requested information.
5. On 19 February 2014, Mr Wilson wrote to the Commissioner, stating that he was dissatisfied with the outcome of NHSNSS'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 Mr Wilson 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**

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7. The investigating officer subsequently contacted NHSNSS, 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. NHSNSS was asked to explain why it did not hold any information falling within the scope of part 1 of Mr Wilson's request. In relation to parts 2-4, NHSNSS was asked to provide submissions justifying its reliance on section 12(1) of FOISA.
8. NHSNSS responded on 1 April 2014, providing submissions on its application of sections 12(1) and 17(1) of FOISA.

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

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

### **Section 17 – Notice that information is not held**

10. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received, subject to qualifications which are not applicable in this case. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give an applicant notice in writing to that effect.
11. In its initial response of 13 January 2014 and in its review response of 31 January 2014, NHSNSS informed Mr Wilson that, in relation to part 1 of his request, it did not hold the information he had asked for.
12. NHSNSS stated that it had not been involved in the drafting of all of the compromise agreements to which Mr Wilson had referred. NHSNSS stated that it had not collated the figure of 697 agreements referred to by Mr Wilson.
13. NHSNSS explained that there is no obligation on NHS Boards to use the CLO exclusively for employment law advice. As an example, it stated that the Scottish Ambulance Service had previously instructed private legal firms for employment law advice.

14. NHSNSS also stated it was aware anecdotally that some NHS Boards had used style compromise agreements for non-contentious settlements and did not seek specific advice from the CLO on these cases. NHSNSS stated that some NHS Boards had run voluntary severance schemes and had asked it periodically for advice about the style agreement which was used where such termination had been agreed. NHSNSS also stated that it was aware that some NHS Boards had “recycled” previous compromise agreement terms and had used those terms when negotiating an exit with an employee without any input from the CLO.
15. The Commissioner has considered NHSNSS’s submissions and its explanation of why it does not hold the information specified in part 1 of Mr Wilson’s request. Having done so, she is satisfied that it was reasonable for NHSNSS to give notice that it did not hold the information falling within the scope of part 1 of the request. The Commissioner accepts that there was no obligation on NHS Boards to use the CLO in order to create individual compromise agreements and, consequently, there was no reason why NHSNSS would hold the requested information.

### **Section 12(1) – Excessive cost of compliance**

16. Under section 12(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information where the estimated cost of complying would exceed the amount prescribed in the relevant Fees Regulations. This amount is currently £600 (regulation 5 of the Fees Regulations). Consequently, the Commissioner has no power to order a public authority to disclose information should she find that the cost of responding to a request for that information exceeds this sum.
17. The projected costs the public authority can take into account in relation to a request for information are, according to regulation 3 of the Fees Regulations, the total costs, whether direct or indirect, the authority reasonably estimates it is likely to incur in:
  - (i) locating
  - (ii) retrieving, and
  - (iii) providingthe information requested in accordance with Part 1 of FOISA. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.
18. The public authority may not charge for the cost of determining;
  - (i) whether it actually holds the information requested, or
  - (ii) whether or not it should provide the information.
19. NHSNSS explained that it would have to review 1,100 employment files in order to ascertain to what the individual files related, whether a compromise agreement had been reached in each case and how many compromise agreements the CLO had therefore been involved in. NHSNSS stated that it was not possible to tell from the title of a file to what it related and all files would have to be reviewed. NHSNSS explained that the employment files can relate to a wide range of advisory work. It provided additional submissions clarifying the work that it would have to carry out in order to review the contents of each file and the time involved in such checking.
20. NHSNSS also explained that 984 of the relevant employment files were held by an external contractor in an offsite storage facility. The cost of retrieval was £1.20 per file. As such, the cost of retrieving all 984 files would be £1,180.80. NHSNSS provided the Commissioner with evidence of the cost of such retrieval from the external contractor.

21. Having taken account of the above submissions, the Commissioner is satisfied that the costs of retrieval alone identified in this case would exceed the £600 cost limit. Therefore, parts 2-4 of the request could not have been dealt with within the £600 cost limit.
22. Consequently, the Commissioner is satisfied that NHSNSS was entitled to rely on section 12(1) of FOISA, and was under no obligation to comply with parts 2-4 of Mr Wilson's request.

### **Section 15 – Duty to advise and assist**

23. Section 15(1) of FOISA requires a Scottish public authority, so far as reasonable to expect it to do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it.
24. The Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA (the Section 60 code)<sup>1</sup> provides (at Part 2, paragraph 1.9):  
*Where the cost of responding to a request made under FOISA will exceed the upper cost limit of £600 ... the authority may again 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.*
25. Section 15(2) of FOISA states that a Scottish public authority which, in relation to the provision of advice and assistance in any case, conforms with the section 60 code, is taken to comply with the duty to provide reasonable advice and assistance in section 15(1).
26. In its initial response to Mr Wilson's request and in its response to his requirement for review, NHSNSS offered him an opportunity to discuss whether the scope of his request could be narrowed in order to bring it within the £600 cost limit. The Commissioner accepts that, in making this offer, NHSNSS complied with its duty under section 15(1) of FOISA to provide advice and assistance to Mr Wilson.

## **Decision**

The Commissioner finds that NHS National Services Scotland complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Wilson.

## **Appeal**

Should either Mr Wilson or NHS National Services Scotland 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.

**Margaret Keyse**  
**Head of Enforcement**  
**27 May 2014**

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<sup>1</sup> <http://www.scotland.gov.uk/Resource/Doc/933/0109425.pdf>

## 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.
- ...
- (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).

#### 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.
- ...

## **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.





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