

# Decision Notice

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**Decision 195/2015: Mr C Kerr and Dumfries and Galloway Health Board**

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## **Audit information**

Reference No: 201501734

Decision Date: 16 December 2015



Scottish Information  
Commissioner

## Summary

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On 25 July 2015, Mr Kerr asked Dumfries and Galloway Health Board (NHS Dumfries and Galloway) for specific monitoring records and figures. NHS Dumfries and Galloway refused to provide the information as it considered it to be otherwise available. It also offered to meet Mr Kerr and discuss access to the documents.

The Commissioner investigated and found that whilst NHS Dumfries and Galloway had failed to identify which exemption it was relying upon, it was entitled to rely upon section 25(1) of FOISA, on the basis that the information was otherwise available to Mr Kerr, as a staff member.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(a) (Effect of exemptions); 16(1) (Refusal of request); 25(1) (Information otherwise accessible)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 5 July 2015, Mr Kerr made a request for information to NHS Dumfries and Galloway. The information request was for two specified monitoring documents for the Renal Department, together with monitoring figures for that department from May 2014 to May 2015.
2. NHS Dumfries and Galloway responded on 3 August 2015. It explained the documents had been available on an office notice board since June, and prior to that staff had been informed of their scores by supervisors. It refused to provide the documents, on the basis that the audit scores had already been provided to staff. It provided a copy of a sample monitoring form, as requested in other correspondence. It also offered to meet with Mr Kerr and discuss access to the documents.
3. On 9 August 2015, Mr Kerr wrote to NHS Dumfries and Galloway requiring a review of its decision. He submitted that he had been absent when the forms were posted on the notice board and, whilst he knew the audit scores, he required the actual documents to proceed with a grievance. He acknowledged the offer to meet as being considerate, but did not take it up.
4. NHS Dumfries and Galloway notified Mr Kerr of the outcome of its review on 26 August 2015. NHS Dumfries and Galloway upheld the decision not to provide the information and suggested it might still be helpful to take up the offer to meet the author of the original response.
5. On 20 September 2015, Mr Kerr wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Kerr submitted that NHS Dumfries and Galloway had not made a cogent argument for withholding the information.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr Kerr made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 8 October 2015, NHS Dumfries and Galloway was notified in writing that Mr Kerr had made a valid application. NHS Dumfries and Galloway was asked to send the Commissioner the information withheld from him. NHS Dumfries and Galloway provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. NHS Dumfries and Galloway was invited to comment on this application and answer specific questions, with particular reference to explaining how the information was otherwise accessible by Mr Kerr.
9. NHS Dumfries and Galloway responded with submissions to the effect that it wished to rely upon section 25(1) of FOISA. It explained why it considered this exemption to be applicable, and also argued that some of the information was exempt in terms of section 38(1) of FOISA (as personal data).
10. NHS Dumfries and Galloway later confirmed that it had further corresponded with Mr Kerr, explaining that section 25(1) of FOISA applied as he was entitled to receive the information as a staff member. It provided the information to Mr Kerr on that basis. Mr Kerr acknowledged receipt of the information requested, but wished a decision as to whether NHS Dumfries and Galloway was entitled to rely on section 25(1).

## Commissioner's analysis and findings

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11. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Kerr and NHS Dumfries and Galloway. She is satisfied that no matter of relevance has been overlooked.

### **Section 16(1) – Content of notices**

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 qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it.
13. Where information is held at the time a request is received, section 16(1) of FOISA requires the authority to give the applicant notice in writing to the effect that the information is held, and specify which exemption it considers applies to the information (with reasons).
14. In his application to the Commissioner, Mr Kerr stated that NHS Dumfries and Galloway had not made a cogent argument for withholding the information.
15. The Commissioner notes that in its initial response to Mr Kerr, NHS Dumfries and Galloway informed him that the information was not being provided as the audit scores were given to staff at the time of the audit. It also explained that the documents he sought had been available on the office notice board, and offered Mr Kerr the opportunity to meet with the author to discuss access. This offer was repeated within the review outcome.

16. In its submissions to the Commissioner, NHS Dumfries and Galloway acknowledged that in responding to Mr Kerr, it had omitted to explain which exemption under FOISA it wished to rely upon. It went on to explain that in both letters, Mr Kerr was given the opportunity to meet with the Corporate Business Manager to explain how the information requested could be sourced, thus justifying the exemption in section 25(1).
17. The Commissioner accepts that it might have been inferred from NHS Dumfries and Galloway's responses to Mr Kerr that it was relying upon section 25(1) of FOISA. Its reasons for applying that exemption are clear from the responses, as is confirmation that the information is held, thus satisfying the rest of section 16(1). However, section 16(1)(c) requires the authority to specify which exemption it is relying upon and this was not done. Therefore, the Commissioner must find that NHS Dumfries and Galloway failed to comply fully with section 16(1) of FOISA in handling Mr Kerr's request.

### **Section 25(1) – information otherwise accessible**

18. Under section 25(1) of FOISA, information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt information. The exemption in section 25(1) is absolute, in that it is not subject to the public interest test set out in section 2(1)(b) of FOISA.
19. In its submissions to the Commissioner, NHS Dumfries and Galloway confirmed that Mr Kerr, as a staff member working within the area concerned, was entitled to all of the information requested. It stated that whilst the monthly monitoring figures were only displayed on the staff notice board for a short period of time, they could be accessed and provided to Mr Kerr, from his supervisors.
20. In relation to the specific monitoring and rectification forms requested by Mr Kerr, NHS Dumfries and Galloway explained that these were discussed with staff members within the area to which they related, at the time they were produced. It confirmed that these forms were retained and could be made available to Mr Kerr, as a staff member involved, on request.
21. Within his requirement for review, Mr Kerr acknowledged the offer to meet with the author of the initial response, but this offer (repeated within the review outcome as mentioned above, and highlighted again in NHS Dumfries and Galloway's submissions to the Commissioner) was not taken up by Mr Kerr.
22. In his submissions to the Commissioner, Mr Kerr outlined various reasons why he did not consider he had reasonable access to the information he had requested, explaining that he had asked his supervisor for the information and that this was refused on the basis that a photocopier was not working. He submitted that he believed the photocopier was working, stating the supervisor was using this as an excuse for not giving him with the information.
23. Whilst NHS Dumfries and Galloway could not confirm whether or not the photocopier was working at the time Mr Kerr made his request, it confirmed that repairs are normally carried out within a few days, at which time, Mr Kerr could have repeated his request, as a staff member.
24. During the investigation, on 27 November 2015, NHS Dumfries and Galloway wrote to Mr Kerr, further explaining that the information was obtainable from his supervisor. At this time, NHS Dumfries and Galloway provided Mr Kerr with a copy of the requested information. It confirmed that this was provided to him as a staff member, and not under FOISA. It provided

an explanation, maintaining that as the information was otherwise accessible by Mr Kerr, it was considered exempt in terms of section 25(1) of FOISA.

25. Having considered all of the circumstances of the case, including the submissions she has received from both parties, the Commissioner is satisfied (on balance) that the information sought by Mr Kerr was in fact reasonably obtainable by him, as an employee, other than by making a request for it under section 1(1) of FOISA. Therefore, NHS Dumfries and Galloway are entitled to apply section 25(1) of FOISA to Mr Kerr's request. That said, matters might have been resolved more quickly if the information had simply been given to him (whether as an employee or under FOISA) before an application was made to the Commissioner.
26. As the Commissioner has concluded that section 25(1) of FOISA could be applied to the request made by Mr Kerr, it is not necessary for her to consider the application of section 38(1) of FOISA in relation to any of the information.

## Decision

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The Commissioner finds that NHS Dumfries and Galloway partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Kerr.

The Commissioner finds that NHS Dumfries and Galloway was entitled to respond in terms of section 25(1) of FOISA. In responding in this way, it complied with section 1(1) of FOISA. By failing to specify this exemption in its response to Mr Kerr, however, NHS Dumfries and Galloway failed to comply with section 16(1) of FOISA.

The Commissioner does not require NHS Dumfries and Galloway to take any action in this case, in response to Mr Kerr's application.

## Appeal

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Should either Mr Kerr or NHS Dumfries and Galloway 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**

**16 December 2015**

### 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.

##### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and

...

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

- (a) section 25;

...

##### 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.

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##### 25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

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