

Decision Notice

Decision 141/2016: Scottish Parliament's Cross Party Group on Chronic Pain and Dumfries and Galloway Health Board

Waiting list numbers and times for Chronic Pain services

Reference No: 201600460

Decision Date: 29 June 2016



Scottish Information
Commissioner

Summary

On 25 November 2015, the Scottish Parliament's Cross Party Group on Chronic Pain (the CPG) asked Dumfries and Galloway Health Board (NHS Dumfries and Galloway) for 2015 data and statistics about patient waiting list numbers, and waiting times for appointments at the Chronic Pain services. It also asked for the 2015 Board Reports on Chronic Pain services, and any Progress Review information on Chronic Pain services.

NHS Dumfries and Galloway refused to disclose the information under FOISA, stating that Board Reports and Progress Review reports were available online. Following a review, the CPG remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated. She found that NHS Dumfries and Galloway had been wrong to conclude it did not hold information. Although the data was "unverified", it was covered by the request. NHS Dumfries and Galloway consequently failed to respond to the CPG's request for information in accordance with FOISA by informing the CPG that it did not hold information. It also failed to provide appropriate advice and assistance.

As the CPG had obtained the information from another public authority, and did not wish another copy, the Commissioner did not require NHS Dumfries and Galloway to provide the information which was wrongly withheld.

Relevant statutory provisions

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

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

1. On 25 November 2015, the Honorary Secretary of the CPG made a request for information to NHS Dumfries and Galloway. All references in this decision notice to the CPG should be read as the Secretary of the CPG acting on its behalf. The request was for:

"Data/statistics for patient waiting list numbers and waiting times for first and second appointments, etc. at your Chronic Pain services for 2015, (usually presented quarterly); Your Board Reports on Chronic Pain services 2015 and any Progress Review information on Chronic Pain services."

2. NHS Dumfries and Galloway responded on 6 January 2016. It apologised for the delay in replying, but refused to disclose the information, stating that it was exempt under section 25(1) of FOISA as it was otherwise accessible. NHS Dumfries and Galloway explained that its Board Reports are published on its website and the Progress Review reports are

published on the Chronic Pain Scotland website. NHS Dumfries and Galloway provided links for both websites¹².

3. On 7 January 2016, the CPG wrote to NHS Dumfries and Galloway requesting a review of its decision. The CPG said that the information was not located on the web pages to which it had been referred. It believed NHS Dumfries and Galloway was therefore incorrect to claim this information was "otherwise accessible". The CPG explained that, of the links sent, the Chronic Pain Scotland website does not give first and second appointment waiting times for Dumfries and Galloway. The CPG asked about the link to Board Reports and asked where precisely were the patients' waiting times figures for first and second appointments to be found in these documents. The CPG also referred to the delay in responding.
4. NHS Dumfries and Galloway notified the CPG of the outcome of its review on 18 January 2016. It stated that its original decision should have been to refer the CPG to Information Services Division (ISD) Scotland of NHS National Services Scotland, as they [ISD] had acknowledged that they collate the information covered by CPG's request. NHS Dumfries and Galloway supplied the email address of ISD to the CPG. NHS Dumfries and Galloway stated that it should have given notice under section 17 of FOISA that it did not hold the information.
5. On 18 January 2016, the CPG wrote to NHS Dumfries and Galloway stating that it must have had the information to provide it to ISD. The CPG asked NHS Dumfries and Galloway to clarify:
 - (i) whether NHS Dumfries and Galloway sent information on waiting lists for chronic pain to ISD;
 - (ii) if not, what was the source of waiting lists used by ISD, and
 - (iii) whether NHS Dumfries and Galloway kept no records of this, or whether any records have been destroyed?
6. NHS Dumfries and Galloway replied to the CPG on 20 January 2016 with the following:
 1. "NHS Dumfries and Galloway sought clarity from ISD, as they collate [statistics] on a national basis, and present reports were marked "management in confidence" due to being in development. ISD have agreed to take over FOI request.
 2. ISD have agreed to respond to request.
 3. No records have been destroyed. The waiting time reports are in development, and so we sought guidance from ISD. The other reports requested on NHS Dumfries and Galloway chronic pain services are on chronic pain website."
7. On 20 January 2016, the CPG wrote to the NHS's National Services Scotland (NSS), attaching its email exchanges with NHS Dumfries and Galloway. The CPG asked NHS NSS for the information it had originally requested from NHS Dumfries and Galloway, and

¹ http://www.nhsdg.scot.nhs.uk/About_Us/NHS_Board_Papers_and_Reports/NHS_Board_papers

² <http://chronicpainscotland.org/service-improvement-groups/dumfriesgalloway/>

asked how ISD could have obtained the information if NHS Dumfries and Galloway did not hold it.

8. On 28 January 2016, ISD wrote to the CPG and disclosed the information it had requested. In its response, ISD made reference to the information request having been “transferred” to ISD on 20 January 2016. ISD informed the CPG that it planned to publish the Chronic Pain Waiting Times for quarter ending December 2015 on 8 March 2016, and this information would be available on its website³. ISD provided the CPG with a spreadsheet of the 2015 information in respect of first appointments for NHS Dumfries and Galloway pain clinic services.
9. On 28 January 2016, the CPG wrote to ISD asking if the information disclosed was the same as the information supplied to ISD by NHS Dumfries and Galloway. The CPG commented to ISD that the numbers were given only under the heading 0 – 18 weeks, with no breakdown of numbers during those weeks.
10. On 4 February 2016, ISD provided the information broken down into the weekly categories, as requested by the CPG. It confirmed that the spreadsheet attached to its initial reply was the format in which NHS Boards provide the data to ISD, and that ISD then summarised the information in the way originally provided to the CPG on 28 January 2016.
11. On 14 March 2016, the CPG applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The CPG stated it was dissatisfied with the outcome of NHS Dumfries and Galloway’s review because of the delay and because the request had been passed to another Scottish public authority.

Investigation

12. The application was accepted as valid. The Commissioner confirmed that the CPG made a request to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
13. 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, including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.
14. The CPG accepted that the Commissioner’s consideration of their application under section 47 would look only at NHS Dumfries and Galloway’s compliance with FOISA, after being told that the Commissioner would make separate enquiries in relation to ISD’s involvement with its request.
15. The issue of whether NHS Dumfries and Galloway transferred the CPG’s request to NHS NSS by has been examined by the Commissioner separately from the present application. Despite some references in the correspondence between NHS Dumfries and Galloway and ISD which appeared to indicate that the request had been transferred, after inquiries were made it was found that the request had not been transferred: ISD had responded

³ <http://www.isdscotland.org/Publications/index.asp>

separately to a request it had received from the CPG on 18 January 2016. This was communicated to all parties.

Commissioner's analysis and findings

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

Section 17 - information not held

17. In terms of section 1(4) of FOISA, the information to be given 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. This is subject to qualifications, but these are not applicable in this case. If no such information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice in writing to that effect.
18. The request was made 25 November 2015. The issue is therefore whether NHS Dumfries and Galloway held any information, at that date, which fell within the terms of the request and which should have been identified and considered by it in responding to the request.
19. After reviewing its response to the CPG's request, NHS Dumfries and Galloway stated that it did not hold the information and should have given notice of this under section 17 of FOISA.
20. The CPG argued that NHS Dumfries and Galloway must have held the information at the time of the request, as it had provided the information to ISD.
21. The CPG later obtained the information it required from an information request made to ISD, and confirmed this was the same information it had intended to obtain through its request to NHS Dumfries and Galloway. The CPG commented that it had had no difficulty in obtaining similar information from other NHS Boards.
22. NHS Dumfries and Galloway was invited to comment on this, and to explain why it was unable or unwilling to disclose such information when asked to do so.
23. In its submissions to the Commissioner, NHS Dumfries and Galloway explained that it provides raw data to ISD, who verify the accuracy of those data, undertake a process of further analysis and pull the statistics "into a reportable format". NHS Dumfries and Galloway said it had concerns around unverified data being issued to the public, but appreciated that FOISA does not exclude such information from being disclosed. It did not feel the information specifically answered the CPG's request and stated "if we felt the information would have been beneficial we would have been happy to issue the attached spreadsheets".
24. On 10 May 2016, NHS Dumfries and Galloway supplied the Commissioner with the information which it provided to ISD on a quarterly basis. On 12 May 2016, the CPG provided the Commissioner with the information it had obtained from ISD on 4 February 2016.
25. The Commissioner has examined both sets of data, which provide numbers and waiting times in respect of Chronic Pain services. The Commissioner can discern only a few differences between the data sets. The main difference is that, at the time of the request, no data were held by NHS Dumfries and Galloway for the last quarter of 2015 (ending 31

December 2015). This is to be expected as the data would not have been compiled at that date.

26. The Commissioner has concluded that the information which the CPG received from ISD originated with NHS Dumfries and Galloway and is essentially the same information that NHS Dumfries and Galloway held on 25 November 2015, when it received the CPG's request. The CPG has confirmed that the information disclosed by ISD was what it hoped to receive, when making its information requests to both ISD and NHS Dumfries and Galloway. The Commissioner has concluded that there is no doubt that NHS Dumfries and Galloway held information covered by the CPG's request at the time that request was made.
27. Having considered all the above submissions, the Commissioner is satisfied that NHS Dumfries and Galloway did hold recorded information falling within the scope of the CPG's request. NHS Dumfries and Galloway was wrong to cite section 17 at review and therefore failed to comply with Part 1 of FOISA.
28. The CPG has obtained the requested information from ISD and made clear that it did not wish the Commissioner to require NHS Dumfries and Galloway to locate and disclose the requested information. Accordingly, the Commissioner requires no action by NHS Dumfries and Galloway in respect of this failure.
29. The Commissioner notes NHS Dumfries and Galloway's concerns about the disclosure of unverified data, but would remind the authority that the accuracy of data is not of itself a reason to refuse to disclose it. When responding to an information request, the first question for a Scottish public authority is whether it holds any information covered by the request. NHS Dumfries and Galloway held such information and was under a duty to disclose it or withhold it because it was exempt. If NHS Dumfries and Galloway was concerned that the data would not be identical to the data finally published by ISD, it could have made this clear to the CPG when it disclosed the data, or have considered whether any of the exemptions in FOISA applied.

Section 15 - duty to provide advice and assistance

30. Section 15 of FOISA requires a public authority to provide reasonable advice and assistance to someone making an information request.
31. In its request for review of 7 January 2016, the CPG complained about the lack of helpfulness from NHS Dumfries and Galloway and pointed to a perceived lack of "willingness to assist the intentions of [FOISA]". The Commissioner invited NHS Dumfries and Galloway to explain how it discharged its duty to provide reasonable advice and assistance (section 15 of FOISA) in dealing with the CSG's request.
32. NHS Dumfries and Galloway acknowledged that, in its review of its initial response, it would have been more helpful to the CPG if it had provided a more in-depth explanation as to why it did not hold the data, and to confirm that the information could be obtained through ISD. NHS Dumfries and Galloway said it would ensure all future FOI responses included the appropriate level of advice and support to allow the requester to obtain the information from other sources, if possible.
33. The Commissioner considers this approach would have been inappropriate in this case, given that NHS Dumfries and Galloway held the information which the CPG asked for. (Had it given this response at review and an application subsequently been made to her,

the Commissioner would have reached the same conclusions about the application of section 15, but for different reasons.)

34. The Commissioner finds that NHS Dumfries and Galloway failed to comply with section 15 of FOISA in responding to the CPG's request. Its initial response directed the CPG to information online which did not answer its request. After review, NHS Dumfries and Galloway informed the CPG that it did not hold the information. At no point was the CPG told that the authority held unverified data covered by the request.
35. Given that the CPG now has the information it requested, and does not need to pursue this request, the Commissioner does not require any action by NHS Dumfries and Galloway in respect of this failure. However, she is critical of the way in which NHS Dumfries and Galloway handled the request from the CPG, and would urge it to consider whether practice could be improved.

Decision

The Commissioner finds that Dumfries and Galloway Health Board (NHS Dumfries and Galloway) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the request for information from the Scottish Parliament's Cross Party Group on Chronic Pain (the CPG).

The Commissioner finds that NHS Dumfries and Galloway failed to comply with Part 1 of FOISA by:

- (i) wrongly giving notice under section 17 of FOISA that it did not hold information which was held, and
- (ii) failing to give reasonable advice and assistance to the CPG under section 15 of FOISA.

Given that the CPG has now obtained the information requested (albeit from another Scottish public authority), the Commissioner does not require NHS Dumfries and Galloway to take any action in response to these failures in response to the CPG's application.

Appeal

Should either the CPG 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.

Rosemary Agnew
Scottish Information Commissioner

29 June 2016

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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