

Decision Notice 134/2021

Cost of litter collection

Applicant: The Applicant

Public authority: Lothian Health Board

Case Refs: 202001400 and 202100204



Scottish Information
Commissioner

Summary

NHS Lothian was asked about litter collection at the Royal Infirmary of Edinburgh (RIE). NHS Lothian supplied some information, but said that it did not hold information on the costs for litter pick-up at certain locations at the RIE.

The Commissioner investigated and found that NHS Lothian had complied with FOISA in responding to the request. He accepted that NHS Lothian did not hold the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 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 30 September 2020, the Applicant made a request for information to Lothian Health Board (NHS Lothian). The information requested was:
 - Who is responsible for the litter pickup on the site 2 meters diameter all the way round of the building operating as Edinburgh Royal Infirmary (the ERI)
 - Who is responsible for the litter pickup on the QMRI (the Queen's Medical Research Institute) site Little France Crescent
 - Who is responsible for the litter pickup around Chancellor Building Little France Crescent
 - Please advise the total cost of litter pick up from 2016 to 2020.
2. NHS Lothian responded on 27 October 2020. It explained that this service is provided by Consort Healthcare (Consort) and delivered through their service provider, Engie. However, detail in relation to the costs was not held by NHS Lothian, and therefore NHS Lothian refused part of the request in terms of section 17 of FOISA.
3. NHS Lothian also told the Applicant that Consort had advised it that, as this was a commercial contract and Consort is a private provider, Consort was not obliged to divulge cost information. NHS Lothian therefore considered the information to be exempt from disclosure under section 33(1)(b) (Commercial interests and the economy) of FOISA.
4. On 12 December 2020, the Applicant wrote to NHS Lothian requesting a review of its decision on the basis that she did not agree that NHS Lothian did not hold the information or that section 33(1)(b) of FOISA applied.
5. NHS Lothian notified the Applicant of the outcome of its review on 14 January 2021. NHS Lothian stated that "this is not a cost that NHS Lothian have any visibility of as it would form part of the overall facilities service payment made to Consort, which covers a wide range of services." NHS Lothian added that "it would be very unlikely that Consort or Engie would be able to separate out the cost from other Facilities Management activity in any case". NHS Lothian confirmed its initial response that section 17 of FOISA applied, as it did not hold this information.

6. On 11 February 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of NHS Lothian's review because she did not agree that NHS Lothian did not hold the information she had requested. Furthermore, she did not agree that exemption under section 33(1)(b) applied in this case.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that the Applicant made requests for information to a Scottish public authority and asked the authority to review its response to those requests before applying to him for a decision.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. NHS Lothian was invited to comment on these applications and to answer specific questions. These related to how it had established if it held information falling within the Applicant's requests.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both the Applicant and NHS Lothian. He is satisfied that no matter of relevance has been overlooked.

Section 17 - Notice that information 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 certain 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. "Information" is defined in section 73 of FOISA as "information recorded in any form". Given this definition, it is clear that FOISA does not usually require a public authority to create recorded information in order to respond to a request, or to provide information which is not held in a recorded form (e.g. from a person's memory).
12. NHS Lothian was asked how it had established that it did not hold any information covered by this request. NHS Lothian replied that the cost of litter pick-up was "not a cost that NHS Lothian have any visibility of as it would form part of the overall facilities service payment made to Consort, which covers a wide range of services". No searches were carried out as there was no separate cost. NHS Lothian explained, by way of background, that this was a service change introduced as part of its No Smoking Policy. The cost for the service was "wrapped into a consolidated agreement under SA2, 2008" and NHS Lothian has "no knowledge of a robust cost for these services". Furthermore, NHS Lothian explained that, as this was an output specification, Consort can alter the resource at their discretion, as long as they maintain the key performance indicator set up for these tasks.
13. Although it was not able to confirm the cost, NHS Lothian stated that it did give a formal instruction to Consort to do additional cleans to principal entry points to the hospital. This was to address rubbish and the significant amounts of cigarettes discarded by patients and visitors. This was instructed in 2008.

14. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
15. Having considered all the relevant submissions, the Commissioner is satisfied that the NHS Lothian took adequate and proportionate steps to establish whether it held recorded information falling within the scope of the Applicant's request. The staff involved in assessing what information was held by the authority had experience and knowledge of the subject matter of the request, reducing the likelihood of error and misunderstanding in locating the information requested. Similarly, the Commissioner accepts it is reasonable to accept that NHS Lothian does not hold figures that indicate a breakdown of the costs for litter pick-up in the period specified to the level that the Applicant wants.
16. As the Commissioner is satisfied that the information is not held by NHS Lothian, he is not required to go on to consider the application of section 33(1)(b).

Decision

The Commissioner finds that Lothian Health Board complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information requests made by the Applicant.

Appeal

Should either the Applicant or NHS Lothian 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

3 September 2021

Appendix 1: 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.

...

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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