



# Decision Notice 120/2022

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## Litter pick-up

**Applicant:**

**Authority: Lothian Health Board**

**Case Ref: 202101360**

## Summary

The Applicant asked the Authority for information regarding litter pick-up within two metres of the hospital. The Authority notified the Applicant that it held no recorded information which would fulfil the request. Following an investigation, the Commissioner was satisfied that the Authority did not hold the information requested.

## Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (4) and (6) (General entitlement); 17(1) (Notice that information is not held); 47(1) and (2) (Application for decision by Commissioner)

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 2021, the Applicant made a request for information to the Authority. She asked how many staff from those responsible for cleaning within two metres of the hospital had advised their senior staff members (a) of the litter surrounding the site being something they were not able to pick up and (b) that the litter should not be on the ground. She also asked how many companies had held responsibility for the litter pick up at the Edinburgh Bioquarter in the last 277 days.
2. The Authority responded on 1 October 2021. It explained that the information was not recorded in a centrally extractable format. Any information held would not be collated or held

in aggregate form, and it would be necessary to review all case files relating to staff over the period covered by the request to assemble the information sought. It refused the request under section 12(1) of FOISA (Excessive cost of compliance) but also submitted that it would be unable to respond to the request in full.

3. The Authority went on to explain that there had been no change to the responsibility for litter pick-up in the 20-plus years that the Royal Infirmary of Edinburgh (RIE) had been operational; this had always been, and still was, the responsibility of Consort Healthcare (the PFI service provider) and their contractor.
4. On 1 October 2021, the Applicant wrote to the Authority, requesting a review of its decision. The Applicant stated that she was dissatisfied with the decision because she had no way of knowing who had reported litter to their senior managers, and this would be unlikely to be formally noted anywhere. A similar review was requested a number of years ago, she noted, and the response was helpful.
5. The Authority asked the Applicant what matters she required reviewing, on 5 October 2021. The Applicant submitted that the answer provided was not specific enough: it was either formally noted or it was not.
6. The Authority notified the Applicant of the outcome of its review on 29 October 2021. It reiterated its previous response, that the information was not held in a centrally extractable format and had not been noted formally within meeting minutes. The Authority explained that this was an outsourced service and the actual actions from such a request would be transferred via the provider's help desk. It had checked and confirmed there were no such requests recorded and nothing had been minuted within meeting notes. In addition, litter picking was not restricted to within two metres.
7. On 29 October 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 the Authority's review because she considered that the information was being withheld. The information might be held in individual department records.

## **Investigation**

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
9. On 15 December 2021, the Authority was notified in writing that the Applicant had made a valid application and the case was subsequently allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These focused on the searches and enquiries undertaken by the Authority to establish what information it held falling within the scope of the Applicant's request.
11. The Authority provided submissions to the Commissioner. These are considered below.

## Commissioner's analysis and findings

12. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

### ***Section 17 - Notice that information not held***

13. 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.
14. "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).

### *The Authority's submissions*

15. In its submissions to the Commissioner, the Authority explained that litter pick-up was the responsibility of the PFI service provider (Consort), which employed a contractor to pick up the litter. The Authority confirmed that it does not have a contract with the contractor, only with Consort. It went on to explain the contractual arrangements in greater detail.
16. The Authority expanded on its review response, in which it stated that the litter pick issues as requested by the Applicant had not been formally noted within meeting minutes. It explained that there was no reason to address this with the contractor on a formal basis: if there had been, it would likely have been discussed at internal meeting and then with the contractor. This had not occurred.
17. The Authority also confirmed that, as this issue had not been raised at any stage leading to discussion with the contractor, it was not included within any minutes. There are no relevant minutes to search. Staff were asked and email searches were carried out.
18. In relation to the searches undertaken by the Authority to identify whether it held any relevant information, the Authority explained that relevant staff were asked, and email searches were carried out. As this issue has not been raised at any stage leading to discussion with the contractor, it was not included within any minutes. There were no relevant minutes to search.

### *The Applicant's submissions*

19. In her application to the Commissioner, the Applicant argued that the Authority failed to ensure the "supposed smoke-free site littered with cigarette butts" was not so littered. There was no way of knowing who has reported litter to their senior managers as this would be unlikely to be formally noted anywhere.

### *The Commissioner's conclusions on whether the requested information is held or not*

20. 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.

21. Having considered all the relevant submissions, the Commissioner is satisfied that the Authority 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 the Authority would not hold the requested information, given the contractual responsibilities for litter pick-up.

## **Decision**

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

## **Appeal**

Should either the Applicant or the Authority 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**

**7 November 2022**

## **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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (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.

#### **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.
- ...

#### **47 Application for decision by Commissioner**

- (1) A person who is dissatisfied with -
  - (a) a notice under section 21(5) or (9); or
  - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.
- (2) An application under subsection (1) must -

- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
- (b) state the name of the applicant and an address for correspondence; and
- (c) specify –
  - (i) the request for information to which the requirement for review relates;
  - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);  
and
  - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

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