



Decision Notice 060/2023

Pay rises given to employees for resuscitating or supplying life-saving equipment to patients

Authority: Borders Health Board
Case Ref: 202200107

Summary

The Applicant asked the Authority about pay rises given to employees for resuscitating or supplying life-saving equipment to patients. The Authority stated that it did not hold the information requested. The Commissioner investigated and 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 3 November 2021, the Applicant made a request for information to the Authority. They asked for:

A full disclosure of all recorded incidences of employees given a pay rise for resuscitating or supplying life saving equipment to a patient, irregardless of them being a hospital director, temporarily ill or middle aged – without their consent.

2. The Applicant asked information covering the period 3 November 2018 to 3 November 2021.

3. The Authority responded on 30 November 2021 and informed the Applicant, in terms of section 17 of FOISA, that it did not hold the information requested. It explained that it paid staff in line with the Scottish Government agreed NHS Scotland pay scales, and so there were no recorded incidents of “employees given a pay rise for resuscitating or supplying life saving equipment to a patient irregardless of them being a hospital director, temporarily ill or middle aged - without their consent” at any time and more specifically during the period set out in the request.
4. On 3 December 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant noted the position regarding the negotiation and awarding of pay increases, but considered that funding in the form of pay rises should be distributed to particular NHS personnel on the basis of their ability to keep alive the three groups of persons mentioned in the request. The Applicant believed that this could still be the case and, on that basis, believed the Authority may still hold the information requested.
5. The Authority notified the Applicant of the outcome of its review on 23 December 2021, fully upholding its original decision. It explained that nationally agreed pay awards (pay rises) were made to employees as a standard process in line with Scottish Government Pay Policy, employee terms and conditions, and employee contracts of employment. It confirmed that there was no link between payments made and duties performed by employees, and it was not practice to distribute funding to particular NHS personnel on the basis set out in the Applicant’s request for review. The Authority explained that pay rises were made to employees due to their contracts of employment being based on a pay scale which has been uplifted to a new level following agreement with the Scottish Government’s Pay Policy Directorate, and not because of any specific work carried out by an employee.
6. On 24 January 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated they were dissatisfied with the outcome of the Authority’s review because they believed the Authority may still hold the information requested.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 4 March 2022, the Authority was notified in writing that the Applicant had made a valid application.
9. 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 focussed on the searches undertaken by the Authority to establish whether it held any information falling within the scope of the request.

Commissioner’s analysis and findings

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

Does the Authority hold any relevant information?

11. 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 public 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. The qualifications contained in section 1(6) are not applicable in this case.
12. The information to be given is that held by the Authority at the time the request is received, as defined by section 1(4). This is not necessarily to be equated with information that an applicant believes the public authority should hold. If no such information is held by the public authority, section 17(1) of FOISA requires the authority to give the applicant notice in writing to that effect.
13. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.
14. The Commissioner has taken account of the arguments in both the Applicant's requirement for review and their application, in which they provide reasons why they consider the Authority may hold the information requested.
15. In its submissions to the Commissioner, the Authority confirmed that it held no information falling within scope of the Applicant's request.
16. The Authority described the enquiries it had undertaken to establish whether it held any information falling within the scope of the request and provided copies of emails in support of those carried out at initial response and review stages.
17. The Authority stated that the request had been sent to its Payroll team, which was deemed to be the most pertinent area to be searched for the information requested. It explained that its Deputy Director of Finance (who was also the Authority's Payroll Manager) operationally managed the implementation of pay awards to all staff in line with their individual pay and conditions. The Deputy Director of Finance had confirmed that that pay awards were not linked to specific elements of care provided in the delivery of patient care, the pay process was totally separate to the delivery of clinical care, and the Payroll Team processed payment of pay awards and any associated pay arrears to every member of staff in line with the Pay Award Circular issued by the Scottish Government.
18. The Authority was satisfied that, given the Deputy Director of Finance's knowledge in this area, there was no requirement to carry out searches for the information requested. It concluded that it held no information linking the payment of pay awards to individuals in the circumstances described in the request.

The Commissioner's views

19. Having considered all relevant submissions and the terms of the request, the Commissioner is satisfied that the Authority took adequate, proportionate steps in the circumstances to establish whether it held any information that fell within the scope of the request.
20. The Commissioner notes that the Applicant believes the Authority may hold the information requested. The Authority has explained why it does not hold that information.
21. Given the nature of the information requested, and the explanations provided by the Authority, the Commissioner is satisfied that the arguments provided by the Authority sufficiently explained why it would not expect to hold the information requested.
22. In the circumstances, the Commissioner is therefore satisfied, on the balance of probabilities, that the Authority does not (and did not, on receipt of the request) hold any information falling within the scope of the Applicant's request. He finds that the Authority was therefore correct to give notice, in terms of section 17(1) of FOISA, that it did not hold the information requested.

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

12 June 2023

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).