

Decision Notice 014/2020

Payments for unsocial hours

The Applicant

Public authority: Dumfries and Galloway Health Board

Case Refs: 201901204 and 201902146



Scottish Information
Commissioner

Summary

NHS Dumfries and Galloway was asked how many of its weekly paid staff had had their regular unsocial/night hours payments cut or reduced during specified months. It told the Applicant it did not hold the information as it was not held in a reportable format and responding would require the creation of new data.

The Commissioner investigated and accepted that NHS Dumfries and Galloway did not hold the requested 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); 73 (Interpretation) (definition of “information”)

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 14 April 2019 and 24 April 2019, the Applicant made requests for information to Dumfries and Galloway Health Board (NHS Dumfries and Galloway). The information requested was as follows:

Request 1 on 14 April 2019 – *For the months of May/June 2018 how many weekly paid staff were employed by NHS Dumfries and Galloway? Of those weekly paid staff how many had their unsocial hours cut/reduced? This includes unsocial, night, Saturday, Sunday and public holiday hours.*

Request 2 on 24 April 2019 – *For July/August 2018 how many weekly paid staff did NHS Dumfries and Galloway employ? Of those weekly paid staff how many had their unsocial hours cut/reduced during that same period? By unsocial hours I include night, Saturday, Sunday and public holiday hours.*

2. NHS Dumfries and Galloway responded as follows:

Request 1 – On 10 May 2019, information was disclosed on the numbers of staff employed. Notice was given under section 17(1) of FOISA that the information was not held in respect of staff that had had their hours cut/reduced.

Request 2 – On 19 June 2019, information was disclosed on the numbers of staff employed. Notice was given under section 17(1) of FOISA that the information was not held in respect of staff that had had their hours cut/reduced.

3. On 27 May 2019 (request 1) and on 9 July 2019 (request 2), the Applicant wrote to NHS Dumfries and Galloway requesting a review of its decisions. He did not accept that NHS Dumfries and Galloway did not hold the information falling within the scope of these parts of his requests.

4. NHS Dumfries and Galloway notified the Applicant of the outcome of its reviews on 13 June 2019 (request 1) and 11 July 2019 (request 2). NHS Dumfries and Galloway upheld its application of section 17(1) of FOISA in the case of both requests.
5. On 15 July 2019 (request 1) and 22 November 2019 (request 2), the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA in respect of both of his requests. The Applicant stated he was dissatisfied with the outcome of NHS Dumfries and Galloway's reviews because he did not accept that section 17(1) applied in either of the cases.

Investigation

6. The applications were 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 responses to those requests before applying to him for a decision.
7. On 23 September 2019 (request 1) and 2 December 2019 (request 2), NHS Dumfries and Galloway was notified in writing that the Applicant had made valid applications and the cases were 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 the applications and to answer specific questions. These related to its reliance on section 17(1) of FOISA.
9. Submissions were received from NHS Dumfries and Galloway in respect of request 1. In respect of request 2, NHS Dumfries and Galloway asked that the Commissioner refer to the submissions in respect of request 1 as NHS Dumfries and Galloway was of the view that the principle underlying its application of section 17(1) of FOISA had remained unchanged since its previous submissions had been made.

Commissioner's analysis and findings

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

Section 17(1) – Information not held

11. 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. This is subject to qualifications, but these are not applicable here. 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.
12. "Information" is defined in section 73 of FOISA as "information recorded in any form". Given this definition, it is clear that FOISA does not 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. about a person's intentions or opinions).
13. NHS Dumfries and Galloway confirmed that it wished to rely on section 17(1) of FOISA as the information the Applicant had asked for would require to be created.

Submissions from NHS Dumfries and Galloway

14. NHS Dumfries and Galloway made reference to a previous decision of the Commissioner in a related application made by the Applicant which had upheld the application of section 17(1) of FOISA. Paragraphs 17 to 23 of that decision outline the problems that NHS Dumfries and Galloway encountered when attempting to interrogate its systems for the information required by the Applicant. The Commissioner will not repeat them here.
15. The investigating officer asked whether, in the period between the issuing of *Decision 033/2019* and the receipt of the Applicant's requests under consideration here, there had been any functional changes made to NHS Dumfries and Galloway's operating systems for information retrieval. NHS Dumfries and Galloway stated that there had been no changes made. NHS Dumfries and Galloway advised that its operating systems were still unable to retrieve the type of information that the Applicant was seeking in a recorded format. NHS Dumfries and Galloway confirmed that its operating systems could not pull together the information for analysis.
16. NHS Dumfries and Galloway went on to state that several discussions were held with the Deputy Director of Finance and the HR Manager/Head of Service to look at ways in which they might be able to access the information, but on each occasion they were blocked by the system itself.
17. NHS Dumfries and Galloway submitted that the Deputy Director of Finance was continuing to review the system to look at ways in which the information might be gathered, but no satisfactory solution had been reached as of yet.
18. As things stood at the times of the Applicant's requests (and at the time of writing this decision), NHS Dumfries and Galloway confirmed that no searches could physically be carried out because it was impossible to pull the information from the current payroll systems.

Submissions from the Applicant

19. The Applicant was of the view that no cross referencing was required to source the information and that no new data needed to be created. He did not believe that any particular skills were required to locate the information which he maintained could be easily sourced in a recorded format by NHS Dumfries and Galloway.
20. He believed that the information could be found by checking pay spreadsheets of the staff in question and searching records which he asserted should be held by the payroll department.

The Commissioner's conclusions

21. The Commissioner has recently issued another decision (subsequent to the decision mentioned in paragraph 14) which considers the same points as those raised by both parties involved in these current cases (*Decision 179/2019*¹). The Commissioner is satisfied that the requests under consideration here encompass the same information as that considered in the earlier requests. His conclusions, as set out in paragraphs 40 to 47 of that decision, remain unchanged and therefore he will not repeat them here.
22. NHS Dumfries and Galloway confirmed that there has been no functional change in the intervening period in relation to the systems used to collate this type of information.

¹ <https://www.itspublicknowledge.info/uploadedFiles/Decision179-2019.pdf>

23. For the reasons outlined in those previous conclusions, the Commissioner finds, taking all relevant submissions into account, that the information requested by the Applicant is not held by NHS Dumfries and Galloway in relation to both his requests of 14 and 24 April 2019.

Decision

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

Appeal

Should either the Applicant 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

28 January 2020

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.

...

73 Interpretation

In this Act, unless the context requires a different interpretation –

...

“information” (subject to sections 50(9) and 64(2)) means information recorded in any form;

...

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