

Decision Notice



Decision 129/2009 Mr William Stewart and Tayside NHS Board

Failure to respond to request for review

Reference No: 200901422

Decision Date: 12 November 2009

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Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

This decision considers whether Tayside NHS Board (NHS Tayside) complied with the technical requirements of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to an information request made by Mr Stewart.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections (1) (General entitlement); 15(1) (Duty to provide advice and assistance) and 21(1) (Review by Scottish public authority).

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 23 March 2009, Mr Stewart wrote to NHS Tayside requesting the following information:
"I shall be grateful if you will arrange for me to be supplied with a copy of the papers relating to the above item [Perth & Kinross Dental Treatment and Training Centre] that were placed before the recent meeting of the Strategic Policy and Resources Committee"
2. After some initial exchanges between NHS Tayside and Mr Stewart, NHS Tayside responded on 8 April 2009. In its response NHS Tayside withheld the information requested on the basis of section 33(1) of FOISA, stating that the information requested was commercially sensitive.
3. Following further exchanges between Mr Stewart and NHS Tayside, which resulted in Mr Stewart receiving a redacted version of the Full Business Case (FBC) for the Perth & Kinross Dental Treatment and Training Centre on 28 May 2009, Mr Stewart wrote to NHS Tayside on 4 June 2009 requesting a review of its decision to withhold the financial information from the FBC.
4. In response to the request for review, NHS Tayside wrote to Mr Stewart on 3 July 2009 (received by him on 6 July 2009), confirming that an assessment of the redacted information would be undertaken and that this assessment would be completed by close of business on 24 July 2009.



5. NHS Tayside notified Mr Stewart of the outcome of its review on 23 July 2009, confirming that after re-assessing the information previously redacted, it had decided to disclose the FBC in its entirety. A copy of the FBC was enclosed.
6. Mr Stewart wrote to the Commissioner's Office on 30 July 2009, stating that he was dissatisfied with NHS Tayside's failure to respond to his request for review within the required statutory timescales and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr Stewart had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

8. On 4 September 2009, NHS Tayside was notified in writing that an application had been received from Mr Stewart and was invited to comment on that application, as required by section 49(3) of FOISA. NHS Tayside responded on 18 September 2009, providing its reasons for the delay in responding to Mr Stewart's request for review.
9. NHS Tayside considered its letter dated 3 July 2009 to be a letter informing the applicant that action was being taken and providing a clear statement of when that action would be completed. NHS Tayside advised that the action referred to included discussions with its Capital Projects Team: it had recognised that the assessment of the redacted information would rely upon the progress of the relevant contract process and the availability of members of that team with adequate knowledge to assess the content of the redacted information. It pointed out that the action had been taken within the specified time.
10. NHS Tayside added that it understood the requirement to respond to a request for review within 20 working days, but it believed its efforts in the circumstances to provide Mr Stewart with information which it considered would have been exempt from disclosure earlier had been undertaken in the spirit of freedom of information (while maintaining the commercial interests of both NHS Tayside and the contractors involved and in compliance with issued guidance).



Commissioner's analysis and findings

Recent Court of Session Opinion

11. The Commissioner notes that the information request by Mr Stewart was for a copy of certain documents. In the case of *Glasgow City Council and Dundee City Council v Scottish Information Commissioner* [2009] CSIH 73, the Court of Session emphasised that FOISA gives a right to information, not documents. However, the Court also said, in paragraph 45 of its Opinion, that where a request refers to a document which may contain the relevant information, it may nonetheless be reasonably clear in the circumstances that it is the information recorded in the document that is relevant. The Court also said that if there is any doubt as to the information requested, or as to whether there is a valid request for information at all, the public authority can obtain clarification by performing its duty under section 15 of FOISA, which requires a public authority, so far as it is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
12. In this case, the Commissioner notes that there is no indication in the correspondence he has seen between Mr Stewart and NHS Tayside that it questioned the validity of the information request. In addition, there is nothing to suggest from correspondence which NHS Tayside has subsequently had with the Commissioner that it was unclear as to what the information request sought.
13. The Commissioner is satisfied that the request is reasonably clear and that the information request is therefore valid.

Handling of the request for review

14. Section 21(1) of FOISA gives authorities a maximum of 20 working days from receipt of the requirement to comply with a requirement for review, subject to exceptions which are not relevant in this case.
15. The Commissioner finds that NHS Tayside failed to respond to Mr Stewart's request for review made on 4 June 2009 within the 20 working days allowed under section 21(1) of FOISA. Based on the date Mr Stewart requested a review, NHS Tayside should have responded to him fully by 6 July 2009.
16. In failing to comply with the timescale specified in section 21(1), NHS Tayside failed to comply with Part 1 of FOISA.



17. The Commissioner notes the reasons put forward by NHS Tayside to explain why there was a delay in responding to Mr Stewart's request for review. The Commissioner further notes that the FBC was subsequently provided to Mr Stewart in full. However, as NHS Tayside acknowledges, the completion of a review within the 20 working day period specified in section 21(1) of FOISA was a statutory requirement with which it was required to comply in this case. Consequently, the Commissioner cannot accept the reasons put forward as valid justification for it failing to do so.

DECISION

The Commissioner finds that Tayside NHS Board failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with the information request made by Mr Stewart, by failing to respond to his requirement for review within the timescale laid down by section 21(1) of FOISA

Given that Mr Stewart has now received a response to his request for review, the Commissioner does not require Tayside NHS Board to take any action in response to this failure.

Appeal

Should either Mr Stewart or NHS Tayside wish to appeal against this decision, there is an 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 notice.

Euan McCulloch
Deputy Head of Enforcement
12 November 2009



Appendix

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.

...

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.

...

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

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