

# Decision Notice



Decision 153/2013 Dr Simon Harding and Tayside NHS Board

Information about a pilot scheme

Reference No: 201202398  
Decision Date: 29 July 2013

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**Rosemary Agnew**  
Scottish Information Commissioner

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## Summary

On 20 October 2012, Dr Harding asked Tayside NHS Board (NHS Tayside) for information about a particular pilot scheme. Although NHS Tayside responded to other points in Dr Harding's correspondence by means of a separate complaints process, it did not specifically address his request for information. Following a review, Dr Harding remained dissatisfied that no information had been supplied to him and applied to the Commissioner for a decision.

During the Commissioner's investigation, NHS Tayside told the Commissioner that it did not hold the information Dr Harding had asked for. The Commissioner accepted that this was the case, but found that NHS Tayside had failed to give Dr Harding the appropriate notice to this effect.

## Relevant statutory provisions

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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 the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. On 20 October 2012 Dr Harding sent a complaint letter to NHS Tayside which also contained an information request for:  
“...the full set of details regarding the pilot scheme, its evaluation and your organisational learning following this pilot”  
  
and  
  
“...all correspondence re this work with the Public Partnership Group including all emails and correspondence of the pilot scheme and ... your ‘future plans’”.
2. NHS Tayside responded to the complaint on 24 October 2012, without commenting on, or responding to, the information request in Dr Harding's letter of 20 October 2012.



3. On 27 October 2012, Dr Harding wrote to NHS Tayside drawing attention to its failure to provide the information he requested.
4. NHS Tayside responded on 31 October 2012, informing him that the pilot scheme was “a test of change”, which was ongoing and, as such, would be reported on through the appropriate NHS Tayside route. It stated that it would not provide the information Dr Harding had requested.
5. On 5 November 2013, Dr Harding wrote to NHS Tayside requesting a review of its refusal to provide the information he requested.
6. NHS Tayside responded to Dr Harding on 7 November 2012, upholding its previous decision.
7. Dr Harding wrote to the Commissioner on 18 November 2012, stating that he was dissatisfied with the outcome of NHS Tayside’s review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Dr Harding 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

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9. The investigating officer subsequently contacted NHS Tayside on 14 January 2013, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. NHS Tayside was asked to explain why it had failed to identify and respond to Dr Harding’s request for information in line with the requirements of FOISA. It was also asked to provide reasons for its refusal to supply the information Dr Harding requested and to explain the searches that had been undertaken to identify, locate and retrieve any information falling within the scope of Dr Harding’s request.
10. NHS Tayside responded on 8 February 2013, commenting on its handling of Dr Harding’s request and stating that the searches carried out thus far had failed to identify any information within scope (although some further checks were still to be completed).
11. Dr Harding provided additional comments to the investigating officer with supporting evidence to demonstrate he had been informed of the existence of the pilot scheme, contending that it was reasonable to expect that the information he sought would be held by NHS Tayside.



12. The investigating officer required NHS Tayside to conduct additional searches and to further explain why it did not hold any information falling within the scope of Dr Harding's information request, given it had initially indicated that it held information, but that it was not willing to provide it. Evidence of searches undertaken by staff, including examples of email correspondence, was submitted to the Commissioner with further explanations of NHS Tayside's position.
13. On 6 June 2013, staff from the Commissioner's office met with NHS Tayside's Head of Information Governance to discuss issues relating to its submissions.

### **Commissioner's analysis and findings**

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14. In coming to a decision on this matter, the Commissioner has considered all of the relevant submissions, and parts of submissions, made to her by both Dr Harding and NHS Tayside and is satisfied that no matter of relevance has been overlooked.

#### **Whether NHS Tayside holds relevant information**

15. 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 authority. This is subject to certain qualifying provisions which do not apply here. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). If the authority does not hold any information covered by the request, it is required to give the applicant notice in writing to that effect, under section 17(1) of FOISA.
16. The Commissioner notes the submissions provided by Dr Harding, in which he explained why he believed that NHS Tayside should hold the information described in his request. Dr Harding drew attention to the correspondence he had received from various staff at NHS Tayside, which appeared to confirm the existence of a pilot partnership project which would feed into future improvement work. Given this correspondence, Dr Harding expected the information he described in his request to be held by NHS Tayside.
17. NHS Tayside explained the pilot scheme referred to in Dr Harding's request involved a service level agreement between Perth and Kinross Council and the WRVS (to provide certain social care services) and that this pilot had ended before March 2011. NHS Tayside provided a leaflet about this scheme to demonstrate that it had not been a partner in the project.



18. NHS Tayside was asked whether it held any information about the introduction of the pilot scheme. It explained that the WRVS may well have been in touch with wards and nursing staff in NHS Tayside, but that it had found no trace of any written communication about this project during the searches carried out in relation to Dr Harding's request. NHS Tayside explained that it would not be required to provide permission for such a project (given it formed part of the ongoing co-operation over social care provisions which were the responsibility of Perth and Kinross Council) and would not expect to hold records showing the initial stages of the project.
19. Dr Harding's request covered correspondence held by NHS Tayside's "Public Partnership Group". NHS Tayside explained to the investigating officer that this group is essentially made up of lay people who volunteer to work with NHS Tayside by serving on the various NHS Committees. Consequently, it considered it unlikely that the Public Partnership Group would have included anyone involved with the WRVS pilot scheme, and believed it was unlikely that correspondence held by this group would contain information about the pilot in question, given that the reference to "further development" in a letter sent to Dr Harding is now understood to relate to supported discharge in general and not to the pilot scheme specified in his request.
20. NHS Tayside was asked by the investigating officer to explain the phrase "test of change" which appeared in the correspondence with Dr Harding and which might imply a piloted change in working practice, which would be initiated and monitored by NHS Tayside and which might have been documented. NHS Tayside accepted that this would be a reasonable interpretation; however, no evidence of any such activity has been discovered from the searches and enquiries carried out during the Commissioner's investigation.
21. In its submissions, NHS Tayside accepted that it should have been clearer in its explanations when corresponding with Dr Harding.
22. Having considered all relevant submissions, the Commissioner accepts that, by the end of her investigation, NHS Tayside had taken adequate, proportionate steps to establish what information it held falling within the scope of the request. She also accepts NHS Tayside's explanation that there was no requirement for it to hold information about the WRVS pilot scheme, given it was not a partner in the scheme.
23. On the balance of the evidence available to her, following investigation, the Commissioner is satisfied that NHS Tayside held no information falling within the scope of Dr Harding's request.
24. Given that NHS Tayside failed to notify Dr Harding to this effect, the Commissioner finds that NHS Tayside failed to comply with the requirements of section 17(1) of FOISA.
25. The Commissioner notes that her remit in carrying out this investigation extends to the consideration of whether NHS Tayside actually holds the relevant information requested by Dr Harding. She cannot comment on whether a public authority should have recorded any, or more, information about a particular event or process. Consequently, in this instance, she cannot comment on whether NHS Tayside ought to hold recorded information about the pilot scheme in question or about its learning from such a scheme.



26. That said, the Commissioner is concerned that NHS Tayside initially appeared to indicate to Dr Harding that it held information about a pilot project, and did not confirm that this was not so until Dr Harding applied to her for a decision. The Commissioner considers it was reasonable for Dr Harding to expect that NHS Tayside would hold the information he asked for, given the terms in which it responded to his letter of complaint.
27. While no useful purpose would be served by requiring NHS Tayside to take any specific action in this case, the Commissioner would urge NHS Tayside to ensure that, in response to future information requests, it takes reasonable steps to establish what relevant information it holds. If it does not hold the information, it should communicate that position clearly to the requester, in accordance with section 17(1) of FOISA.

#### **Other matters to consider**

28. In his application to the Commissioner, Dr Harding raised a concern as to NHS Tayside's grasp of the legal requirements (in FOISA) regarding information provision.
29. NHS Tayside recognised in its submissions to the Commissioner that Dr Harding's request should have been picked up from the outset as a request under FOISA, and acknowledged that it had failed to do so.
30. NHS Tayside may wish to review its current training procedures to ensure that all its staff can identify an information request, even where it is contained within correspondence on other matters.

## **DECISION**

The Commissioner finds that Tayside NHS Board (NHS Tayside) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) by failing to provide Dr Harding with a notice, in terms of section 17(1) of FOISA, making it clear that it did not hold the information he requested. Being satisfied that NHS Tayside does not (and did not, at the time it received the request) hold the information, the Commissioner does not require NHS Tayside to take any action in respect of this failure in response to Dr Harding's application.



## Appeal

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Should either Dr Harding or NHS Tayside 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**  
**29 July 2013**



## Appendix

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### 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.