

# Decision Notice

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**Decision 137/2017: Mr R and Dumfries and Galloway Health Board**

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**Letters containing threatening language**

Reference No: 201700858

Decision Date: 29 August 2017



Scottish Information  
Commissioner

## Summary

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NHS Dumfries and Galloway was asked for information regarding letters containing “threatening language”. NHS Dumfries and Galloway provided copies of some letters and stated that the remaining information was accessible to the applicant without requesting it under FOISA.

Following an investigation, the Commissioner found that the specific information requested was not held by NHS Dumfries and Galloway.

## 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); 25(1) (Information otherwise accessible)

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.

All references in this decision to “the Commissioner” are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

## Background

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1. In November 2016, Mr R received a copy of a form recording that Dumfries and Galloway Health Board (NHS Dumfries and Galloway) had referred him to its Occupational Health Service. The form noted that Mr R had been advised that it was not appropriate for him to correspond so frequently in writing using threatening language at times.
2. On 20 December 2016, Mr R made the following request for information:  
“Does NHS Dumfries and Galloway [possess] the following
  1. The letter(s) that management claims uses “threatening language at times”.
  2. If so how many of these letters are there and what are they dated.
  3. Please provide full copies of all the letters involved, with the “threatening language” highlighted.”
3. On 22 December 2016, NHS Dumfries and Galloway provided Mr R with copies of four letters, described as examples.
4. NHS Dumfries and Galloway responded formally to Mr R’s information request on 10 January 2017. It confirmed that it did hold the correspondence in question, identified four letters and gave their dates, and stated that, as the letters had previously been provided to Mr R, he could reasonably access them other than by requesting them under FOISA. NHS Dumfries and Galloway therefore withheld the letters under section 25(1) of FOISA.
5. On 29 January 2017, Mr R wrote to NHS Dumfries and Galloway requesting a review of its decision. He did not consider that he had been provided with any documents containing threatening language or where threatening language was highlighted.

6. NHS Dumfries and Galloway notified Mr R of the outcome of its review on 24 February 2017. It confirmed that the letters were exempt from disclosure under section 25(1) of FOISA, as Mr R had already received copies. However, it confirmed that the author of the referral form would be asked to re-issue the letters to him, after highlighting the “threatening language”.
7. On 12 May 2017, Mr R applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr R stated that he had not been provided with the information he asked for, in the form he requested.

## Investigation

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8. The application was accepted as valid. The Commissioner confirmed that Mr R made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
9. On 5 June 2017, NHS Dumfries and Galloway was notified in writing that Mr R had made a valid application and the case was 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. NHS Dumfries and Galloway was invited to comment on this application and answer specific questions. These questions focused on the searches carried out to identify information covered by the request and whether the information was otherwise accessible to Mr R (in line with section 25(1) of FOISA). NHS Dumfries and Galloway responded on 18 July 2017.

## Commissioner’s analysis and findings

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11. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both Mr R and NHS Dumfries and Galloway. She is satisfied that no matter of relevance has been overlooked.

### Information held by NHS Dumfries and Galloway

12. 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, 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.
13. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes the authority *should* hold, although the applicant’s reasons may be relevant to the investigation of what is actually held. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.

### Letters

14. NHS Dumfries and Galloway provided the Commissioner with copies of four letters it considered to fall within scope of Mr R’s request, and another letter sent to Mr R dated 22 December 2016, with which the four letters had been enclosed.
15. NHS Dumfries and Galloway explained why it was satisfied that the four letters provided were the relevant ones that fell within scope of Mr R’s request, providing the Commissioner with copies of the letters containing what was considered to be “threatening language”. It

explained that, following receipt of Mr R's request, the referral form author was asked for details of the letters that were referred to within the referral form. The author confirmed that the four letters sent to Mr R on 22 December 2016 were the letters he was considering as examples of "threatening language".

16. NHS Dumfries and Galloway could not provide any documentary evidence to support its position that these were the letters to which reference was made in relation to "threatening language".
17. NHS Dumfries and Galloway noted that Mr R should have been provided with copies of the letters, when he was given the referral form in November 2016.

#### *Threatening language highlighted*

18. From copies of the correspondence provided, it was unclear to the Commissioner whether, at the date of Mr R's request, NHS Dumfries and Galloway held any record of the language it considered to be threatening within the letters. NHS Dumfries and Galloway was asked to clarify its position.
19. NHS Dumfries and Galloway confirmed that when it received Mr R's request it did not hold versions of the letters which identified or highlighted the "threatening language". It explained that it was the tone of correspondence as well as the language that could be deemed "threatening language".

#### *The Commissioner's conclusions*

20. The Commissioner's decision is based on the information which NHS Dumfries and Galloway held, and circumstances that prevailed, at the date of Mr R's request.
21. In their correspondence during the investigation, both NHS Dumfries and Galloway and Mr R have provided their own views on the letters containing the "threatening language", the interpretation of the wording in the referral form, and whether or not the "threatening language" has been identified and recorded.
22. NHS Dumfries and Galloway has confirmed that the four letters sent to Mr R on 22 December 2016 are the letters containing "threatening language". The author of the referral form has confirmed this. It is fair to say that, to a third party, it would not be obvious without such confirmation that NHS Dumfries and Galloway has identified the information covered by Mr R's request. However, the Commissioner accepts that the perception of what may be "threatening language" is a subjective judgement.
23. On the basis of the submission from NHS Dumfries and Galloway, the Commissioner accepts that the author of the referral form was referring to the four letters sent to Mr R on 22 December 2016 when he used the phrase "threatening language". However, the Commissioner concludes that, at the date of the request, NHS Dumfries and Galloway did not actually hold any *recorded information* that identified which parts of Mr R's letters were considered to contain threatening language.
24. In his information request, Mr R asked for the threatening language to be highlighted. NHS Dumfries and Galloway confirmed that it did not make a copy of the letters or other record which would identify the language that it considered to be threatening.
25. The Commissioner cannot comment on whether NHS Dumfries and Galloway was correct to inform Mr R that his letters contained threatening language. She can only decide whether NHS Dumfries and Galloway held recorded information covered by his request.

26. As the Commissioner, has been provided with no evidence that NHS Dumfries and Galloway holds any *recorded* information in relation to Mr R's request as phrased, she has found that:
- In relation to parts 1 and 2 of the request, in which Mr R asked for details of the letters, NHS Dumfries and Galloway does not hold any recorded information which identifies the parts of Mr R's letters which are considered to contain threatening language. NHS Dumfries and Galloway failed to give Mr R notice of this in line with section 17(1) of FOISA, when providing him with a response based on unrecorded information.
  - In relation to part 3 of the request, NHS Dumfries and Galloway did not hold versions of the letters highlighting the language considered to be threatening, at the date of Mr R's request. NHS Dumfries and Galloway was wrong to inform Mr R that this information was otherwise accessible to him in line with section 25(1) of FOISA.

## Decision

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The Commissioner finds that NHS Dumfries and Galloway failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr R.

The Commissioner found that NHS Dumfries and Galloway was incorrect to inform Mr R that some of the information he asked for was exempt from disclosure under section 25(1) of FOISA, being otherwise accessible to him. NHS Dumfries and Galloway did not hold the recorded information requested by Mr R, and failed to give him notice of this under section 17(1) of FOISA.

Given that it is clear from the findings in this decision that NHS Dumfries and Galloway does not hold the requested information, the Commissioner does not require NHS Dumfries and Galloway to take any further action in response to this failure.

## Appeal

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Should either Mr R 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**  
**Acting Scottish Information Commissioner**

**29 August 2017**

## Appendix 1: Relevant statutory provisions

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### 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.

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- (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.

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#### 25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

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