

Decision Notice

Decision 033/2019: Mr Colin Kerr and Dumfries and Galloway Health Board

Unsocial/night hour payments

Reference No: 201801852

Decision Date: 6 March 2019



Scottish Information
Commissioner

Summary

NHS Dumfries and Galloway was asked how many support staff had their regular unsocial/night hour payments cut or reduced for a period of annual leave during May, June and July 2018. NHS Dumfries and Galloway gave notice that it did not hold the information: the information was not held in a reportable format and responding would require the creation of new data.

The Commissioner investigated and found that NHS Dumfries and Galloway complied with FOISA in responding to the request. He 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 23 August 2018, Mr Kerr made a request for information to Dumfries and Galloway Health Board (NHS Dumfries and Galloway). He asked:
 - (i) as of 1 May 2018, how many staff did NHS Dumfries and Galloway employ within Support Services?
 - (ii) of those, how many received unsocial hours (also known as night hours) payments?
 - (iii) in May, June and July 2018, how many of those staff had their regular unsocial/night hour payments cut/reduced for a period of annual leave?
2. Mr Kerr did not receive a response. On 15 October 2018, Mr Kerr wrote to NHS Dumfries and Galloway requesting a review of its decision on the basis that it had not responded to his request.
3. NHS Dumfries and Galloway notified Mr Kerr of the outcome of its review on 18 October 2018. It provided information for the first two parts of his request, but for the third request (number of staff whose payments were cut/reduced), replied that the information was not held “in reportable format”: providing the information would involve a manual search and analysis of individual records, creating new data. NHS Dumfries and Galloway therefore gave notice, in terms of section 17 of FOISA, that it did not hold the information.
4. On 22 October 2018, Mr Kerr applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He was dissatisfied with the outcome of NHS Dumfries and Galloway’s review because he believed it did hold the information he had requested.

Investigation

5. The application was accepted as valid. The Commissioner confirmed that Mr Kerr made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
6. 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 to answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.
7. NHS Dumfries and Galloway explained that the information Mr Kerr had asked for in the third part of his request was not held within its payroll system. To produce the figure would mean pulling information from the payroll system; a review of individual leave cards; and analysis by specialist payroll officers to review the information and payments to determine whether a reduction had been made and whether this was due to annual leave.
8. On 18 January 2019, the Commissioner asked NHS Dumfries and Galloway to explain precisely the process that would be required to extract the information.
9. On 9 February 2019, NHS Dumfries and Galloway informed the Commissioner that the process described in its previous submission was incorrect, and related to an old process. NHS Dumfries and Galloway provided a briefing which explained the new process and what happens when staff are on annual leave, with reference to Scottish Government guidance on "Pay as if at Work". NHS Dumfries and Galloway explained that the new system looked at the annual leave taken over the past 52 weeks and the shift pattern that staff were due to work and "averages the enhancement for staff equally over the next 52 weeks".
10. NHS Dumfries and Galloway said that, while the process it had initially described was incorrect for the period being asked for, it was confident that it was correct to rely on section 17 of FOISA in relation to the third part of Mr Kerr's request.
11. On 18 February 2019, the Commissioner again asked NHS Dumfries and Galloway to explain in detail the process it would have to follow, under its new system, to provide the information required by Mr Kerr. NHS Dumfries and Galloway provided more explanation on 21 February 2019, summarised below.

Commissioner's analysis and findings

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

Section 17(1) - Notice that information is not held

13. 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.

14. "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).
15. NHS Dumfries and Galloway confirmed it wished to rely on section 17(1) of FOISA for Mr Kerr's request as the information he had asked for would have to be created.
16. NHS Dumfries and Galloway referred to the Commissioner's guidance on "Information not held"¹, which states that Scottish public authorities are not required to create information in order to answer a request. The guidance also says:

"...if collation of the information would require skill and complex judgement, the information is not held".
17. The submission provided by NHS Dumfries and Galloway on 21 February 2019 explained in detail the process it now uses for calculating enhancements, to support its argument that it would have to create new information in order to satisfy Mr Kerr's request.
18. NHS Dumfries and Galloway explained that an electronic system is now used to calculate enhancements: previously, managers had to input the intended shift that the person would have worked. The electronic system requires managers to record the actual days the staff member is on annual leave, but not to determine whether that person should be paid an enhancement for unsocial/night hours. The electronic system then reviews the shifts that the person has physically worked in the 52-week reference period and calculates the percentage of those shifts that were enhanced. This calculated percentage is applied to the annual leave taken. The effect is that a person gets the average of the last 52 weeks enhanced hours, not the enhanced hours for the specific day that the person has taken annual leave for.
19. Under the old system, the manager would grant the holidays and, if the shift rota had not yet been produced, would determine whether the employee would have been on a day-, night-, Saturday- or Sunday-shift. If day shift, then no enhancement would be included in the annual leave pay. If any other shift, then an enhancement for the annual leave day would be included, though based on rates for different grades of staff and shift type.
20. Under the new system, the system finds the actual shift patterns for the last 52 week period and determines the number and type of shifts worked by the employee during that period. If the employee worked 50 shifts during the 52 week period, and 30 were night shifts and 20 were day shifts, the employee would be paid a percentage enhancement for the period of annual leave based on this mix.
21. NHS Dumfries and Galloway said that, in relation to the period specified in Mr Kerr's request, some staff may have seen a different enhancement payment made when on periods of annual leave to what they previously would have seen. However, there is no reason to consider that the electronic system is generating an incorrect payment: it is simply a different methodology used to pay staff while on annual leave.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Informationnoheld/InformationnoheldFOISA.aspx>

22. NHS Dumfries and Galloway explained that, at present:
- “the electronic system does not have the appropriate level of reporting mechanisms for staff to interrogate the calculations that have been made to staff in relation to % enhancements while on annual leave to the level of detail required to give a definitive answer around whether incorrect payments have been made or not. There is no reason to consider that the electronic system is generating an incorrect payment, it is simply a different methodology used to pay staff while on annual leave.”
23. NHS Dumfries and Galloway submitted that to obtain the information required would need someone with good knowledge and understanding of the “Pay as if at work” guidance from Scottish Government, the Payroll system, the electronic calculation methodology and the ability to interrogate the data that can be pulled off the systems.
24. Mr Kerr’s application made clear why he expected the information to be held: broadly, he expected a public authority to be able to account for the way it calculates pay for its employees. He supplied the Commissioner with a reply he had received from another NHS Board to the same question, in which the information was provided. He believed that this indicated that NHS Dumfries and Galloway would also hold the number asked for.

The Commissioner’s conclusions

25. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why it does not hold the information.
26. The Commissioner is disappointed that NHS Dumfries and Galloway’s initial assessment of whether it held the information was based on a wrong understanding of its own process. This happened when it first dealt with Mr Kerr’s request, and was not picked up during the review of its response and even at the beginning of the Commissioner’s investigation.
27. Despite this, having considered all the relevant submissions, the Commissioner accepts that NHS Dumfries and Galloway has provided sufficient evidence to show that it does not hold the information requested by Mr Kerr.
28. NHS Dumfries and Galloway submitted that the provision of the information (by interrogating the electronic system) would require some expert knowledge. It has not provided detailed submissions on the potential difficulties of “interrogating” the system and whether this can be done by its own staff. Nonetheless, in this context, it is clear to the Commissioner that in assessing whether it holds the information the authority has consulted staff with experience of the subject, reducing the likelihood of relevant information being overlooked.
29. The fact that Mr Kerr received similar information from another NHS Board may suggest the information NHS Dumfries and Galloway should hold the information he asked for. In this context, however, it is difficult to generalise: there may be reasons why another health board can provide the information for its workforce. The Commissioner has therefore taken account of Mr Kerr obtaining information from another health board to a similar request, but he cannot draw the conclusion from that fact that NHS Dumfries and Galloway holds the requested information.

30. From the circumstances of this case, and the submissions and responses, the Commissioner is satisfied, on the balance of probabilities, that NHS Dumfries and Galloway does not hold the recorded information which Mr Kerr asked for.
31. As stated in many previous decisions, the Commissioner's remit extends only to the consideration of whether a Scottish public authority actually holds the requested information and whether it has complied with Part 1 of FOISA in responding to a request. The Commissioner cannot comment on whether a public authority should retain, record or hold more information about a particular event or process.

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 the information request made by Mr Kerr.

Appeal

Should either Mr Kerr 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

6 March 2019

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.

...

- (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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