

Decision Notice

Decision 094/2019: Mr Colin Kerr and Dumfries and Galloway Health Board

Overtime payments

Reference No: 201900361
Decision Date: 20 June 2019



Scottish Information
Commissioner

Summary

NHS Dumfries and Galloway was asked about changes made to the payment of salaries and related payments, in particular backdated overtime payments.

NHS Dumfries and Galloway provided some information, advising that for parts of his request the relevant figure was nil.

The Commissioner investigated and found that NHS Dumfries and Galloway did not hold the information in question.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Information not held)

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 21 December 2018, Mr Kerr made a request for information to Dumfries and Galloway Health Board (NHS Dumfries and Galloway). The information requested related to the Scottish Government writing to health boards in Scotland regarding changes to the payment of salaries. Mr Kerr asked:
 - a) On which date and year was NHS Dumfries and Galloway informed of these rule changes introduced in 2008 with regard to pay “as at work” when on leave?
 - b) On which date and year did NHS Dumfries and Galloway implement these same rule changes introduced in 2008?
 - c) To date (to the nearest £500) how much backdated overtime related pay have staff received?
 - d) How many staff benefitted from these backdated overtime related payments (i.e. how many individuals received payments)?
 - e) To date (to the nearest £500) how much more backdated overtime related pay is due to be paid (acknowledging that only an estimate might be possible)?
 - f) How many staff, who as yet have received no backdated overtime related pay, are due or entitled to have some payments made to them?
2. On 18 February 2019, Mr Kerr wrote to NHS Dumfries and Galloway requesting a review in respect of its failure to respond to his request.
3. NHS Dumfries and Galloway notified Mr Kerr of the outcome of its review on 21 February 2019. It apologised for the delay in responding to his request and, in relation to parts a) and b), advised Mr Kerr that it had received notification from the Scottish Government on 3 September 2008, the changes being implemented in October 2008.

4. NHS Dumfries and Galloway further advised Mr Kerr, in relation to parts c) and e) of his request, that there had been no backdated payment of overtime, and explained why. As a result of this, for parts d) and f) of his request, the relevant figure was “nil”.
5. On 27 February 2019, Mr Kerr wrote to the Commissioner. Mr Kerr applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Kerr stated he was dissatisfied with the outcome of NHS Dumfries and Galloway’s review because he disagreed with the response provided and, in particular, believed that NHS Dumfries and Galloway should hold information falling within parts c) to f) of his request.

Investigation

6. 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.
7. On 28 March 2019, NHS Dumfries and Galloway was notified in writing that Mr Kerr had made a valid application. The case was 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 this application and to answer specific questions, in particular to explain the steps it had taken to identify and locate the information requested.
9. NHS Dumfries and Galloway responded, providing submissions in support of its position that it did not hold information falling within the scope of parts c) to f) of Mr Kerr’s request.

Commissioner’s analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of 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.

Information held by NHS Dumfries and Galloway

11. 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.
12. 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. 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.
13. The Commissioner notes the submissions provided by Mr Kerr, in which he provided reasons why he considered NHS Dumfries and Galloway should hold the requested information. He explained that he disagreed that NHS Dumfries and Galloway implemented the changes in 2008, and as such it would have made backdated overtime payments as referred to in his request. He also submitted that another health board had not made correct payments until 2015

14. In its submissions to the Commissioner, NHS Dumfries and Galloway provided some background information about the way overtime payments are processed and provided a copy of the relevant Scottish Government Circular, which clearly states that it was agreed that the changes in question would take effect on 1 October 2008. The Commissioner does not find it necessary to set out the full background detail here.
15. NHS Dumfries and Galloway confirmed that, from 1 October 2008, it implemented the rule changes, providing for staff to be paid “as if at work” during periods of annual leave. It provided evidence of the enquiries it had carried out to ascertain whether it held any information falling within the scope of parts c) to f) of Mr Kerr’s request, with explanation that since all payments were made from that date, there was no need to make backdated payments to anyone (as might have been the case with other health boards). Given that there were no backdated payments made, as sought at c) and e) of the request, then it followed that the answer to parts d) and f) of the request was “nil”.
16. Following further communication with the investigating officer, NHS Dumfries and Galloway accepted that as it did not have a report stating backdated overtime payments as “nil”, and as such accepted that it should have provided Mr Kerr with a response in terms of section 17(1) of FOISA, on the basis that it did not hold the information requested.
17. Having considered all relevant submissions and the terms of the request, the Commissioner accepts that NHS Dumfries and Galloway interpreted Mr Kerr’s request reasonably and that (during the investigation) it took adequate, proportionate steps to establish whether they held any information falling within the scope of the request. Consequently, in regard to this matter, the Commissioner is satisfied (on the balance of probabilities) that NHS Dumfries and Galloway did not hold any information falling within the scope of parts c) to f) of Mr Kerr’s request.
18. The Commissioner notes that Mr Kerr disputes the relevance of the 2008 Circular to his request, but it is clearly considered by NHS Dumfries and Galloway to be the basis of any relevant payments (and it appears to the Commissioner to be the relevant document).
19. Given that the Commissioner accepts that NHS Dumfries and Galloway did not hold any information falling within the scope of the request, it had a duty to issue a notice in writing to that effect, to comply with the terms of section 17(1) of FOISA.
20. While no useful purpose would be served by requiring NHS Dumfries and Galloway to take any specific action in this case, the Commissioner would urge it to ensure that, in response to future information requests, it takes reasonable steps to establish whether it actually holds any relevant information before responding to request for that information.

Decision

The Commissioner finds that NHS Dumfries and Galloway failed to comply with Part 1 (specifically section 17(1)) of the Freedom of Information (Scotland) Act 2002, by not providing Mr Kerr with a notice that they did not hold the information requested. Given the terms of this decision, he does not require NHS Dumfries and Galloway to take any action in this case, in response to Mr Kerr’s application.

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

20 June 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.

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