

# Decision Notice 179/2019

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## Unsocial/Night hours' payments

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**Applicant: The Applicant**

**Public authority: Dumfries and Galloway Health Board**

**Case Ref: 201901011**



Scottish Information  
Commissioner



## Summary

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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 August, September and October 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

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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); 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

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1. On 29 October 2018, the Applicant made a request for information to Dumfries and Galloway Health Board (NHS Dumfries and Galloway). The information requested was:
  - (i) For the 3 months of August, September and October 2018, how many Support Services staff received regular unsocial/night hours payments?
  - (ii) Of those that received regular payments, how many had their wages cut/reduced for any period(s) of annual leave during those same 3 months?
2. NHS Dumfries and Galloway responded on 9 November 2018. It provided the Applicant with information falling within the scope of request (i) and it gave him notice, under section 17(1) of FOISA, that it did not hold information falling within the scope of request (ii).
3. On 18 November 2018, the Applicant wrote to NHS Dumfries and Galloway requesting a review of its decision on the basis that he did not accept it did not hold information falling within the scope of request (ii) and he questioned the figures provided in response to request (i).
4. NHS Dumfries and Galloway notified the Applicant of the outcome of its review on 18 December 2018. It provided the Applicant with a different set of figures for request (i) (explaining how his request had been interpreted originally) and it upheld its previous reliance on section 17(1) for request (ii).
5. On 17 June 2019, the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of NHS Dumfries and Galloway’s review because he did not accept section 17(1) applied to request (ii) and he disputed the figures provided in request (i).

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that the Applicant 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 30 July 2019, NHS Dumfries and Galloway was notified in writing that the Applicant had made a valid application.
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. These related to its reliance on section 17(1) of FOISA.

## Commissioner's analysis and findings

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9. 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 the Applicant and NHS Dumfries and Galloway. He is satisfied that no matter of relevance has been overlooked.

### Interpretation of request (i)

10. In request (i), the Applicant asked for the number of Support Services staff who received regular unsocial/night hours payments in August, September and October 2018.
11. NHS Dumfries and Galloway provided the Applicant with this information, notifying him that the figures for each month were 461 (for August), 470 (for September) and 488 (for October). In his request for review, the Applicant queried these figures, noting that the total figure he had been provided for the previous three months (in a separate information request) was 73. The Applicant argued that it could not now be more than 400 per month if the total number of individuals in receipt of such payments for the previous three months was only 73.
12. In its review outcome, NHS Dumfries and Galloway explained that this current request was seeking the number of individuals who received unsocial/night hours payments in August, September and October 2018, whereas the previous request referred to by the Applicant only sought the total number of staff who received regular unsocial payments; it did not ask for the number of staff who received night hours payments.
13. In submissions to the Commissioner, the Applicant argued that he was not seeking individual figures for each month, but rather he was seeking a total figure for the three month period. He argued that his reason for seeking a global figure was to allow for each member of staff to probably have at least one period of annual leave during that time.
14. NHS Dumfries and Galloway explained that its interpretation of request (i) was that the Applicant was seeking the monthly figures for August, September and October 2018. It contended that there was nothing in the request to infer that the Applicant was looking for the total number for all three months combined; therefore, it did not feel clarification of the request was required.
15. NHS Dumfries and Galloway argued that the Applicant did not question its approach in his requirement for review, and if he had it would have disclosed the total figure to him in the review response (rather than figures for each separate month).

### *Commissioner's conclusions*

16. The Commissioner has considered the particular terms of the Applicant's information request, along with the response made by NHS Dumfries and Galloway and the submissions from both parties.
17. Firstly, the Commissioner is satisfied that the figures provided to the Applicant in its response of 9 November 2018 were correct, as this request was seeking the number of staff who received unsocial or night hours payments. The Commissioner has not seen the earlier request referred to by the Applicant and, therefore, cannot comment on its scope. However, given the submissions made by NHS Dumfries and Galloway in this case, he has no reason to doubt the veracity of the figures it provided to the Applicant.
18. Secondly, he finds that it was reasonable for NHS Dumfries and Galloway to interpret the Applicant's request to be seeking an individual figure for each of the three months he specified. The Commissioner notes the Applicant's dissatisfaction with this approach, but he has also taken account of the fact that the Applicant did not raise this as a point of dissatisfaction in his requirement for review. The Commissioner considers that the Applicant's request was worded in a way that meant there were two possible interpretations; he may have been seeking a single figure for the three month period or a figure for each of the three months.
19. While it is good practice to seek clarification when there is any dubiety about the scope of an information request, the Commissioner understands that NHS Dumfries and Galloway had dealt with previous requests from the Applicant regarding figures for specific months, which led it to conclude that its interpretation of the request was correct and that no clarification was required.
20. If an applicant is dissatisfied with an authority's interpretation of their request, they need to raise it in their requirement for review. The Applicant did not do this in this case. The Applicant did question the veracity of the figures provided to him, but he did not raise concerns about the interpretation of the request until he made his application to the Commissioner.
21. The Commissioner notes that, during the investigation, NHS Dumfries and Galloway provided the Applicant with a single global figure for the three months, even although it was not obliged to do so.
22. Overall, the Commissioner is satisfied that NHS Dumfries and Galloway took a reasonable interpretation of request (i) and it provided the Applicant with the information that fell within the scope of that request.

### **Section 17(1) – Information not held**

23. 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.
24. "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).

25. NHS Dumfries and Galloway confirmed that it wished to rely on section 17(1) of FOISA in relation to request (ii) as the information the Applicant had asked for would have to be created.

*Submissions from the Applicant*

26. The Applicant provided the Commissioner with three spreadsheets that covered his pay from April to July and August to October 2018. He also provided an annual leave sheet covering the related period and two documents he obtained from Ayrshire and Arran Health Board (NHS Ayrshire and Arran) in response to a separate information request.
27. The Applicant explained the hours he works. He notes that NHS Dumfries and Galloway claim to pay staff "as at work" but that did not apply to him for most of 2018. He noted that while NHS Dumfries and Galloway claim the information he has asked for is not held, NHS Ayrshire and Arran were able to comply with his request using the same pay system. He argues that this proves the request can be complied with, but that the desire to do so is lacking.
28. The Applicant submitted that he had provided the annual leave sheet to show how decisions are initiated / cleared by management. He noted that he was unable to obtain the equivalent payroll documents from NHS Dumfries and Galloway, just as he was denied access to his own pay records. The Applicant submitted the "average" payment he received while on annual leave was incorrect and explained why.
29. The Applicant questioned the reliability of the system that is being used to calculate his pay while on annual leave. He suggested that NHS Dumfries and Galloway may be deliberately underpaying him. The Applicant noted that he began the process of requesting information with a genuine feeling that these pay reductions were widespread and lots of staff would be involved, but now he considers that he may be the only staff member being treated this way.

*Submissions from NHS Dumfries and Galloway*

30. NHS Dumfries and Galloway referred to the Commissioner's guidance on "Information not held"<sup>1</sup>, which states that Scottish public authorities are not required to create information in order to answer a request. The guidance also says:
- "There's a distinction between creating new information, and compiling information. Where a request can be answered by compiling information from readily-available resources held by the public authority, this is not the same as creating new information. However, if collation of the information would require skill and complex judgement, the information is not held."*
31. NHS Dumfries and Galloway also referred the Commissioner to submissions it had made in a previous case and asked him to review the information it had provided in that case.
32. In its submissions in that case, NHS Dumfries and Galloway explained that an electronic system was now used to calculate salary enhancements: previously, managers had to input the intended shift that the person would have worked. The electronic system now 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.

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

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.

33. NHS Dumfries and Galloway submitted that obtaining the information requested by the Applicant would need someone with good knowledge and understanding of the "Pay as if at work" guidance from Scottish Government, along with the Payroll system, the electronic calculation methodology and the ability to interrogate the data that can be pulled off the systems, and it submitted that it does not have anyone in-house with sufficient expertise in all areas.
34. In submissions in this current case, NHS Dumfries and Galloway stated that;  
*"The issue at the moment is that due to the way the system calculates the payments on an average basis we are not able to identify any individual who may have had a [wage] reduction."*
35. NHS Dumfries and Galloway argued that, in order for it to identify and provide the information to the Applicant, NHS Dumfries and Galloway would have to employ a team of staff to create a manual system to extract pieces of data from various sources, both paper based and electronic, to then analyse the data and pull it into a reportable format. However, such a system was not in place at the time of the Applicant's request and is not in place now. Therefore, if it wanted to comply with the current request, it would have to create new information.
36. NHS Dumfries and Galloway was asked to comment on the arguments put forward by the Applicant, particularly his view that NHS Ayrshire and Arran (who used the same pay system) had complied with a similar request for information.
37. NHS Dumfries and Galloway confirmed that all health boards use the Scottish Standard Payroll System, which is administered through ATOS, and that it therefore uses the same pay system as NHS Ayrshire and Arran. It reiterated its view that the reporting mechanisms within the payroll system do not enable NHS Boards to identify any staff who have had a reduction in pay.
38. NHS Dumfries and Galloway submitted that it understood that NHS Ayrshire and Arran undertook a manual search through all payroll records, taking three people approximately 18 months to complete the tasks, and that it does not have the capacity to undertake a similar exercise. NHS Dumfries and Galloway indicated that it was only because NHS Ayrshire and Arran had completed this manual task that it was able to comply with the request submitted by the Applicant.
39. It explained that its Deputy Director of Finance is still looking at ways to gather the electronic information that is needed to be able to identify any staff members that may have been incorrectly paid for these hours. However, at the moment, it cannot pull the information off of the electronic system and it does not have the resources to undertake a manual review.

#### *Commissioner's conclusions*

40. In coming to a decision on this matter, the Commissioner has considered the Information Tribunal case *Michael Leo Johnson v the Information Commissioner and the Ministry of Justice*<sup>2</sup> (EA/2006/0085 13 July 2007), which involved a request relating to the number of

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<sup>2</sup> <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i90/Johnson.pdf>

cases dismissed in the High Court. (The Information Tribunal deals with appeals against decisions of the (UK) Information Commissioner made under the Freedom of Information Act 2000.)

41. In that case, the public authority had not collated the information at the time of the request. Although the Tribunal eventually concluded that the Ministry of Justice did hold the information, it commented that the degree of skill and judgement that must be applied may well have a bearing on whether the information is held or not. The Commissioner agrees with the approach taken by the Information Tribunal: a public authority will hold information if it holds the building blocks to generate the information and no complex judgement is required to produce it.
42. This means that, in considering this application, the Commissioner will consider whether the information requested by the Applicant (i.e. the number of staff who had their wages reduced whilst on annual leave in a three month period) can be collated without the need for any complex judgement on the part of NHS Dumfries and Galloway. If complex judgement is required, then he will conclude that the information is not held by the NHS Dumfries and Galloway. On the other hand, if he is satisfied that no complex judgement is required, he will order NHS Dumfries and Galloway to identify and provide the information to the Applicant.
43. NHS Dumfries and Galloway has not commented on whether it holds the “building blocks” of the information requested by the Applicant, but it is clear that, as an employer, it will hold information relating to its employees’ salaries, hours worked, annual leave and unsocial/night hour payments. The Applicant has provided us with information that indicates that this is the case. As indicated above, the Commissioner must consider whether NHS Dumfries and Galloway is required to use complex skills and judgement in order to collate the information requested by the Applicant or whether the “building blocks” permit the authority to easily generate the information requested.
44. Having considered the explanations put forward by NHS Dumfries and Galloway, the Commissioner must conclude that the authority could not provide the Applicant with the information requested, without undertaking tasks that require considerable complex judgement and skills; the Commissioner is satisfied the information is not easily retrievable.
45. The Commissioner has some sympathy with the Applicant; he has taken account of his views that the information must be held and that section 17(1) cannot apply, and he has considered the evidence he provided in relation to the authority holding a record of his own annual leave, payments and hours worked.
46. However, as noted above, while the Commissioner considers that the basic “building blocks” of the information will be held by NHS Dumfries and Galloway (individual records of employee payments, hours worked and annual leave taken) in order to produce the information requested by the Applicant, NHS Dumfries and Galloway would have to undertake such complex tasks and analysis that it would essentially be creating new information.
47. It is for these reasons that the Commissioner must find that, as far as the application of section 17(1) of FOISA is concerned, the information requested by the Applicant is not held by NHS Dumfries and Galloway.



## **Decision**

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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 the Applicant.

## **Appeal**

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Should either the Applicant 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**

**10 December 2019**

## 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.

...

- (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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