

Decision Notice 033/2021

Performance of emergency baptism or the last rites to a patient dying of COVID-19

Applicant: The Applicant

Public authority: Borders Health Board

Case Ref: 202000736



Scottish Information
Commissioner

Summary

NHS Borders was asked for information about the provisions it had in place to perform emergency Christian baptism or supply a priest ordained by the Roman Catholic Church for the last rites to a patient dying of COVID-19.

NHS Borders provided some information in response to the request, but notified the Applicant that other information was not held.

During the investigation, further information was disclosed to the Applicant. The Commissioner was satisfied that NHS Borders had, by the end of the investigation, disclosed all the information it held to the Applicant.

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).

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 March 2020, the Applicant made a request for information to Borders Health Board (NHS Borders). The information requested was:
Any and all information that would detail what provisions the service have to perform emergency Christian Baptism or supply a priest ordained by the Roman Catholic Church for the last rites to a patient dying of Severe acute respiratory syndrome coronavirus 2 (COVID19) (nCoV2019) (Coronavirus Disease) upon that patient's insistence within the jurisdiction of NHS Borders.
2. NHS Borders responded on 10 April 2020. It explained that the provision of Spiritual Care is made in accordance with its Spiritual Care Policy and that a patient's successfully transmitted request for a Christian rite will always be responded to. NHS Borders also commented that requests for the rites of the Roman Catholic Church are usually referred through the Spiritual Care department to a local priest. The lead Chaplain is, NHS Borders explained, an ordained Church of Scotland Minister who can provide the sacrament of adult or infant baptism. Should the Chaplain be unavailable, NHS Borders advised that the responsibility would devolve to a willing member of the local clergy – or, should another member of the Clergy be the preferred choice for administering the rite, NHS Borders explained that this decision of the patient would be respected.
3. On 26 April 2020, the Applicant wrote to NHS Borders, requesting a review of its decision as it was not clear what NHS Borders meant by what would constitute successful or unsuccessful transmission by a patient. The Applicant noted that there had been no overt expression within its response as to what measures would be in place for a patient infected with Coronavirus in hospital isolation. The Applicant also commented that, according to the laws of the Catholic Church, any person of any religion or none, in any position, can carry out an emergency baptism to a dying person if requested. However, it must be done in a certain way, at a certain time and within certain conditions for it to be valid. The Applicant asked

whether there was any information within the service detailing how this could and should be done by a non-Christian layman.

4. NHS Borders notified the Applicant of the outcome of its review on 28 May 2020. It explained that the phrase “successfully transmitted” was used to describe a communication clearly expressing a patient’s wishes either verbally or by written word. Therefore, if a person’s wishes were not clear this would constitute an unsuccessful transmission.
5. NHS Borders notified the Applicant that it did not currently hold any recorded data in respect of what measures would be in place for a patient infected by COVID-19 (Coronavirus) to access the services mentioned in their request. It also explained that it did not currently hold any recorded data in respect of the services mentioned by the Applicant. NHS Borders was therefore notifying the Applicant, in line with section 17(1) of FOISA, that no recorded information was held in relation to these elements of their request for review.
6. On 7 July 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated they were dissatisfied with the outcome of NHS Borders review for the following reasons:
 - (i) The response did not give any official guidance on what is to be considered “clearly” (or “not clear”) in terms of communication, or what provisions are in place for those who cannot speak or write by way of disability or who cannot speak or write in English.
 - (ii) The response stated that there was no recorded data on the provisions in place for persons infected with COVID-19 who may wish to receive the sacrament. The Applicant believed this information should be held.
 - (iii) The response also stated that there was no current instruction given to staff of any religion or none to impart this sacrament if requested. The Applicant believed this information should be held.

Investigation

7. 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.
8. On 20 August 2020, NHS Borders was notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. NHS Borders was invited to comment on this application and to answer specific questions. These related to the actions and searches undertaken by NHS Borders to ascertain what recorded information it held falling within scope of the Applicant’s request.
10. Further submissions were sought from NHS Borders during the investigation in relation to information held by NHS Borders and falling within scope of the request.
11. During the investigation, NHS Borders acknowledged that it did hold some information falling within scope of the Applicant’s request and disclosed this to them, subject to the redaction of information it considered to be third party personal data exempt from disclosure under section 38(1)(b) of FOISA.
12. The Applicant confirmed that they received this information and were satisfied with it.

13. As the Applicant is not concerned about NHS Borders' decision to redact some information from what has been disclosed, the Commissioner will not consider its application of the exemption in section 38(1)(b) of FOISA in this case.

Commissioner's analysis and findings

14. 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 Borders. He is satisfied that no matter of relevance has been overlooked.
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, 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.
16. 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 notice in writing to that effect.

The Applicant's submissions

17. In their application, the Applicant explained that they considered that NHS Borders should hold recorded information relating to the following points;
 - (i) Official guidance/information as to what is considered "clearly and successfully transmitted" in regards to the sacrament.
 - (ii) Official guidance/information as to providing the same means of communication to those who are deaf, unable to speak or who cannot speak English.
 - (iii) Official guidance/information on the provision for those in isolation or who are infected with COVID19 who may wish to receive the sacrament.
 - (iv) Official guidance/information on how a staff member of another faith or none can give this sacrament in emergency situations.
 - (v) Official guidance/information to staff on imparting the sacrament if a child requests it but their guardian refuses for them to receive it.
 - (vi) Official guidance/information regarding provisions for baptised Catholics of any age to receive the sacrament of the sick (Extreme Unction) when infected and dying of COVID19 within the jurisdiction of NHS Borders.
18. The Commissioner acknowledges that all of the above could fall within the scope of the request. NHS Borders was asked for comments on these points.

NHS Borders' submissions

19. In its submissions, NHS Borders commented that it did not hold official guidance or information which would cover points (i) and (ii) above: these were a matters for individual staff judgement.
20. As mentioned previously, during the course of the investigation, NHS Borders agreed that other information it held (its "Interpretation and Translation Guidelines") would fall within

scope of the Applicant's request, providing some information which would fulfil point (ii) above. This was subsequently disclosed to the Applicant.

21. With regard to the information covered at points (iii) and (vi) above, NHS Borders submitted that it held no specific guidance or information in relation to COVID-19. However, NHS Borders did explain that it had a standard pathway in place to be followed under the circumstances covered by points (iii) and (vi), in the absence of any specific guidance relating to COVID-19. NHS Borders disclosed information in this standard pathway to the Applicant during the investigation, subject to the redaction of information it considered to be personal data.
22. NHS Borders explained that it held no specific guidance which would cover points (iv) and (v) above. In response to a request for spiritual care, including the administration of sacrament, it explained that the staff member would contact the Spiritual Care team, who would make a judgement on what was appropriate and, if required, would contact the relevant faith group for advice and support. It believed the faith groups would hold the guidance/information pertaining to particular religious rites.

Searches

23. NHS Borders explained the nature of searches carried out, detailing the records searched and the search criteria, to determine what recorded information it held falling within scope of the request. It also provided details of which staff were involved in undertaking the searches and why they were the best individuals to do this.
24. The administration of religious rites is, NHS Borders submitted, a matter between the administering bodies (the relevant faith group) and the patient themselves. For that reason, NHS Borders submitted that it held no recorded data for these services.

The Commissioner's findings

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 where the balance lies, the Commissioner considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. Ultimately, the Commissioner's role is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).
26. Having considered the submissions from NHS Borders, the Commissioner acknowledges that what constitutes clear and successful transmission (or unclear and unsuccessful transmission) would be likely to come down to a judgement call by the member of staff treating the patient. The Commissioner accepts, from the submissions received, that NHS Borders has carried out adequate, proportionate searches, which would have identified relevant recorded information relating to this matter if it was held (at the time of the Applicant's request). The Commissioner is satisfied, on the balance of probabilities, that no recorded information is held on these matters (point (i)).
27. The Commissioner also accepts that adequate, proportionate searches were carried out by NHS Borders in responding to the Applicant's request, which should have identified any information covered by points (iv) and (v) detailed above. The Commissioner acknowledges that an appropriate faith group representative would be most likely to be responsible for administering these religious rites.

28. The Commissioner therefore agrees that NHS Borders was entitled to inform the Applicant, in line with section 17(1) of FOISA, that it did not hold any information which would address parts of their request.
29. However, given that NHS Borders has been able to provide the Applicant with a copy of its “Interpretation and Translation Guidelines”, which go some way to fulfilling point (ii) above, the Commissioner is not satisfied that NHS Borders responded fully to the request in this respect.
30. Similarly, the Commissioner does not agree that NHS Borders was entitled to inform the Applicant that it did not hold any information which would cover the guidance in place for those infected with COVID-19 who wish to receive sacraments, given the presence of the standard pathway document and its use in the absence of any specific guidance for patients suffering from COVID-19 (points (iii) and (xi)).
31. Given that NHS Borders has disclosed the information in the “Interpretation and Translation Guidelines” and certain of the information in the “Spiritual Care Standard Pathway” document to the Applicant, the Commissioner does not require it to take any action in this case.

Decision

The Commissioner finds that NHS Borders partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that NHS Borders was entitled to inform the Applicant, in line with section 17(1) of FOISA, that it did not hold information falling within points (i), (iv) and (v) (see paragraph 17).

However, the Commissioner finds that, by not disclosing some information falling within scope of points (ii), (iii) and (vi) (again, see paragraph 17) until the investigation, NHS Borders failed to comply with section 1(1) of FOISA.

Given that NHS Borders has disclosed information in its “Interpretation and Translation Guidelines” and “Spiritual Care Standard Pathway” to the Applicant, the Commissioner does not require NHS Borders to take any action in respect of this failure, in response to the Applicant’s application.

Appeal

Should either the Applicant or NHS Borders 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

11 March 2021

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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