

## Notes to Editors

### 1. About the Decision

- 1.1 The decision – Decision 064/2014 – concerns a request made by Mr John Pentland MSP to the Scottish Ministers.
- Mr Pentland wrote to the Ministers on 9 January 2013 to request:  
"...all correspondence since 1 May 2012, which you hold in the form of paper and electronic records including emails, involving any of the undernoted people, regarding the review of NHS Lanarkshire mental health services."
    - Nicola Sturgeon MSP and others acting on her behalf,
    - Alex Neil MSP and others acting on his behalf,
    - Michael Matheson MSP and others acting on his behalf,
    - Five named officers and any other members of the Health Workforce and Performance team dealing with this matter."
  - The Ministers acknowledged receipt of the request, but did not respond.
  - On 14 February 2013 Mr Pentland requested a review of the Ministers' failure to respond.
  - Ministers provided Mr Pentland with a response to the request for review on 5 March 2013. They disclosed some information and withheld the remainder.
  - On 14 March 2013 Mr Pentland made an application to the Commissioner.
  - In coming to her decision, the Commissioner was required to consider the position at the time the Ministers carried out their review of the original request – i.e., the position during February 2013.
  - The Commissioner's decision was issued to the Scottish Ministers and Mr Pentland on 19 March 2014.

### 2. Introduction and background to the application

- 2.1 **(Please note, this summary is provided to aid reading of this particularly detailed and complex decision. It should not be relied upon as a substitute for the decision itself).**
- 2.2 NHS Lanarkshire undertook an extensive review of provision of Mental Health Services services between 2004 and 2012, concluding that acute adult mental health inpatient facilities should be concentrated at Wishaw General Hospital (rather than Monklands Hospital) and that inpatient beds for South Lanarkshire should be retained at Hairmyres Hospital. While these proposals were publically supported by then Cabinet Secretary for Health and Well-Being, Nicola Sturgeon, the local constituency MSP, Alex Neil, had expressed concern.

- 2.3 In September 2012, the Cabinet portfolio for Health and Well-Being transferred to Mr Neil who, shortly after this appointment, ordered a review of the health authority's proposals. There was debate, both in the Parliament and in the press, about whether Mr Neil's actions were compliant with the Ministerial Code.
- 2.4 During the course of the Commissioner's investigation, the Ministers released further information that had previously been withheld by them.
- 2.5 The body of the decision contains the Commissioner's reasoning and the findings for information in each document are set out in an appendix. A summary of the findings of this decision is provided below.

### 3. Summary of findings

- 3.1 This summary is set out by the relevant Freedom of Information (Scotland) Act 2002 (the Act) in the same order as the points appear in the decision.
- 3.2 The exemption in **section 30(c)** of the Act can be applied to information where its release would, or would be likely to, substantially prejudice the "effective conduct of public affairs". It was applied to correspondence about the Ministerial Code. Despite weak arguments for the use of this exemption, the Commissioner found that Mr Pentland's public interest in this information had already been satisfied by the information given to him, and did not require further information disclosure.
- 3.3 Where the exemption had been applied by the Ministers to letters from MPs and MSPs, the Commissioner's finding was there is no provision to treat this correspondence differently from other correspondence and so it should be disclosed.
- 3.4 The exemption in **section 30(a)** of the Act can be applied to information where disclosure would, or would be likely to, substantially prejudice the convention of collective cabinet responsibility. The Commissioner found that although some of the withheld information reflects divergent views between the Cabinet Secretaries, the gist of this was already known and the disclosure of the content would not undermine the convention of collective responsibility to the extent that would justify withholding it.
- 3.5 The exemptions in **section 30(b)(i) and (ii)** of the Act can be applied to information where its disclosure would, or would be likely to, substantially inhibit the free and frank provision of advice or the exchange of views for the purpose of deliberation. The Commissioner found that there was insufficient evidence to support the Ministers' submission that disclosing the content of the information withheld from Mr Pentland would damage free and frank advice. Also, it was not shown that the withheld correspondence concerned a significant policy change.
- 3.6 The Commissioner also found that the exemptions could be applied to some of the withheld information about the Ministerial Code and collective responsibility. In these instances she found the public interest to be in favour of withholding the information.

3.7 The exemption in **section 29(1)(a)** of the Act can be applied to information where it relates to the formulation or development of government policy. The Commissioner's decision found that the exemption applied to the withheld information, but that the public interest lay in its disclosure. There should be transparency about a change in policy where significant public resources have already been invested in reaching a decision. The length of the period of NHS Lanarkshire's review was also a factor.

#### **4. Appeal provisions**

4.1 The Decision Notice sets out the appeal provisions. Should either Mr John Pentland MSP or the Scottish Ministers wish to appeal against the 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 the decision (issued on 19 March 2014).

#### **5. About the Scottish Information Commissioner**

5.1 The Scottish Information Commissioner is responsible for enforcing and promoting the Freedom of Information (Scotland) Act 2002 (FOISA), the Environmental Information (Scotland) Regulations 2004 (EIRS), and the INSPIRE (Scotland) Regulations 2009. FOISA and the EIRs came into force on 1 January 2005, giving anyone, anywhere in the world, important rights to access the information held by more than 10,000 public authorities in Scotland. The Commissioner's duties are set out in FOISA.

5.2 In summary, the Scottish Information Commissioner:

- investigates appeals made to her when people are dissatisfied with how a public authority dealt with a request for information
- issues legally enforceable decisions in relation to these appeals
- promotes good practice amongst public authorities and
- provides the public and public authorities with information about their rights and obligations under FOI laws.

5.3 The current Scottish Information Commissioner is Rosemary Agnew. Rosemary took up office on 1 May 2012, for a fixed period of six years.