



# Decision Notice 109/2023

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## Complaints of deliberate deprivation of medical devices to disabled patients with suspected COVID-19

**Authority: Borders Health Board**  
**Case Ref: 202200604**

### Summary

The Applicant asked the Authority for information about complaints or incidences of the deliberate deprivation of medical devices to disabled patients with suspected COVID-19, who were in isolation within Borders General Hospital. The Authority stated that it did not hold the information requested. The Commissioner investigated and was satisfied that the Authority did not hold the information requested.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (4) (General entitlement); 17(1) (Notice that information is not held); 47(1) and (2) (Application for decision by Commissioner)

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 10 February 2022, the Applicant made a request for information to the Authority: They asked for:

*Based on an account from a witness of various concerns within the BGH, I request the following information under HM Freedom of Information (Scotland) Act of 2002:*

*A) Please provide any and all complaints or incidences of the deliberate attempted (or actual) deprivation of much needed medical devices of suspected covid patients in isolation within Borders General Hospital who are disabled.*

*Between 10/1/2022 - 10/2/2022*

2. On 16 February 2022, the Authority wrote to the Applicant seeking clarification of certain of the phrases in the request, which the Applicant provided that same day.
3. The Authority responded on 9 March 2022 and informed the Applicant that no such incidences had occurred and no such complaints had been received during the period stated in the request.
4. On 12 March 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that, while there may be no recorded incidences or complaints, it was in the public interest (and that of the Health Board) to double check to ascertain that for certain.
5. The Authority notified the Applicant of the outcome of its review on 6 April 2022, fully upholding its original decision. It explained that, following further searches of its Complaints and Adverse Event systems for the time period specified, no results for complaints or incidents of that type were identified. The Authority informed the Applicant, in terms of section 17 of FOISA, that it did not hold the information requested.
6. On 25 May 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that they were dissatisfied with the outcome of the Authority's review because, without having access to its systems, they could not be certain whether or not the Authority held the information requested.

## **Investigation**

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 29 August 2022, the Authority was notified in writing that the Applicant had made a valid application and the case was subsequently 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. The Authority was invited to comment on this application and to answer specific questions. These focused on the searches undertaken by the Authority to establish whether it held any information falling within the scope of the request.

## **Commissioner's analysis and findings**

10. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

### ***Does the Authority hold any relevant information?***

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 public 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 by section 1(4). This is not necessarily to be equated with information that an applicant believes the public authority should hold. If no such information is held by the public authority, section 17(1) of FOISA requires the authority to give the applicant notice in writing to that effect.
13. 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 of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.
14. The Commissioner has taken account of the arguments in both the Applicant's requirement for review and their application, in which they provide reasons why they consider the Authority may hold the information requested.
15. In its submissions to the Commissioner, the Authority explained and provided evidence of the searches carried out at review stage, in support of its position that it held no relevant information.
16. The Authority explained that, during the investigation, it had carried out further searches of these systems for the time period set out in the request:
  - For the Complaints system, all complaints recorded for that period were reviewed; however, none met the terms of the request.
  - Searches of its Adverse Event system identified all events for the time period stated in the request, that had occurred on the COVID-19 ward, regardless of event type. A separate search of this system identified all medical equipment adverse events, regardless of person affected, ward etc. The Authority confirmed that it had examined the description of each event returned; however, none of these met the criteria set out in the request.
17. The Authority stated that the staff involved in these searches, to locate and provide any relevant data held, were the Patient Experience Administrator, the Director of Quality and Improvement, the Risk Manager and the Quality Improvement Facilitator (Person Centred Care), all of whom were employed within its Clinical Governance and Quality Department.
18. In conclusion, the Authority confirmed that it held no information falling within the scope of the request, and that no information had been withheld in this case.

#### *The Commissioner's views*

19. Having considered all relevant submissions and the terms of the request, the Commissioner is satisfied that the Authority took adequate, proportionate steps in the circumstances to establish whether it held any information that fell within the scope of the request.

20. The Commissioner notes that the Applicant believes the Authority may have held the information requested. The Authority has explained why it does not hold that information.
21. Given the nature of the information requested, together with the explanations and supporting evidence of searches provided by the Authority, the Commissioner is satisfied that the arguments put forward by the Authority sufficiently explained why it did not hold the information requested.
22. In the circumstances, therefore, the Commissioner is satisfied, on the balance of probabilities, that the Authority does not (and did not, on receipt of the request) hold any information falling within the scope of the Applicant's request. He finds that the Authority was therefore correct to give notice, in terms of section 17(1) of FOISA, that it did not hold the information requested.

## **Decision**

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

## **Appeal**

Should either the Applicant or the Authority 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.

**Euan McCulloch**  
**Head of Enforcement**

**9 November 2023**

## 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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (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.
- ...

#### 47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
  - (a) a notice under section 21(5) or (9); or
  - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.
- (2) An application under subsection (1) must -

- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
- (b) state the name of the applicant and an address for correspondence; and
- (c) specify –
  - (i) the request for information to which the requirement for review relates;
  - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);  
and
  - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).