

# Decision Notice

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**Decision 161/2018 Mr Colin Kerr and Dumfries and Galloway Health Board**

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## **Correspondence from the requester**

Reference No: 201801025

Decision Date: 12 October 2018



Scottish Information  
Commissioner

## Summary

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NHS Dumfries and Galloway was asked about any letters from the requester that were malicious, threatening or aggressive. NHS Dumfries and Galloway refused to confirm or deny whether it held the requested information. At review, NHS Dumfries and Galloway stated that certain information was not recorded. During the Commissioner's investigation NHS Dumfries and Galloway replied again to the requester that it held no information of the sort he had requested.

The Commissioner found that NHS Dumfries and Galloway had failed to respond to the request in accordance with Part 1 of FOISA, but he did not require it to take any action because it had already issued a new response with an apology.

## 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)

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 8 March 2018, Mr Kerr made a request for information to Dumfries and Galloway Health Board (NHS Dumfries and Galloway). He asked if NHS Dumfries and Galloway held any correspondence from him that was "malicious" and, if it did, how many "malicious documents" did it hold. He also asked for the dates of such correspondence and whether the correspondence was recorded/reported as being malicious at the time of receipt. He asked for the same information about any correspondence from him that was "aggressive" or "threatening".
2. NHS Dumfries and Galloway responded on 4 April 2018 and refused to confirm or deny whether it held the information requested. It informed Mr Kerr that it was applying section 18(1) of FOISA with section 38(1)(b) (Personal information). (Section 18(1) of FOISA provides that a Scottish public authority can choose to "neither confirm or deny" that information exists, if the information would be exempt from disclosure under certain other provisions in FOISA, including section 38(1)(b).)
3. On 13 April 2018, Mr Kerr wrote to NHS Dumfries and Galloway requesting a review of its decision on the basis that there was no public interest in refusing to confirm whether the requested information existed or was held by NHS Dumfries and Galloway. Mr Kerr also questioned whether section 38 of FOISA had been correctly applied as he disputed that it was his personal data he was seeking. Mr Kerr said he believed section 17 of FOISA should have been cited because no information was held.
4. NHS Dumfries and Galloway notified Mr Kerr of the outcome of its review on 3 May 2018. It explained that it had applied section 38(1)(b) as the information he had asked for related to letters he had sent. It confirmed that it does not have the option to categorise correspondence on its logging database as being malicious, aggressive or threatening; therefore, it was unable to provide any of the information covered by his request.

5. On 10 June 2018, Mr Kerr applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Kerr was dissatisfied with the outcome of NHS Dumfries and Galloway's review because it had not stated whether it held the information he had requested or provided the information (if held). Mr Kerr argued that section 38 of FOISA had been wrongly applied, believing that NHS Dumfries and Galloway did not hold the information he had requested.

## **Investigation**

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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. 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 answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.
8. NHS Dumfries and Galloway responded on 12 September 2018. It stated that it should have overturned section 18 at review and should have cited section 17 (Notice that information is not held) as NHS Dumfries and Galloway did not hold any copies of letters which had been logged, reported or recorded as malicious, threatening or aggressive. NHS Dumfries and Galloway offered to apologise to Mr Kerr and to provide a new response which reflected this position.
9. On 28 September 2018, NHS Dumfries and Galloway wrote to Mr Kerr, issuing a new response to his request for review. In terms of section 17(1) of FOISA, it gave notice (for each of the twelve parts of his request) that it did not hold any information, and apologised for the previous error.
10. Mr Kerr confirmed on 1 October 2018 that he had received NHS Dumfries and Galloway's letter of 28 September 2018. He asked the Commissioner to issue a decision on his application. He reiterated that his request should have received a response in terms of section 17 of FOISA.

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

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

### **Section 17(1) - Notice that information is not held**

12. 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.
13. NHS Dumfries and Galloway stated that it held no information falling within the scope of Mr Kerr's request and explained how it had established this.
14. There seems now to be no dispute between public authority and applicant on whether recorded information was held that fell within the terms of the request.

15. The Commissioner finds that NHS Dumfries and Galloway failed to comply fully with Part 1 of FOISA in responding to Mr Kerr's request. NHS Dumfries and Galloway failed to give notice to Mr Kerr in line with section 17(1) that it did not hold the information he had asked for. In its review response of 3 May 2018, NHS Dumfries and Galloway explained that it does not have the option to categorise correspondence on the mail logging databases as being malicious and therefore was unable to provide the information. However, it made reference to section 38(1)(b) of FOISA, which relates to third party personal data, and indicated that section 17 of FOISA was not relevant.
16. As Mr Kerr has now received a revised response from NHS Dumfries and Galloway (citing section 17 of FOISA) and an apology, the Commissioner does not require NHS Dumfries and Galloway to take any further action in response to Mr Kerr's application.

## Decision

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The Commissioner finds that Dumfries and Galloway Health Board (NHS Dumfries and Galloway) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Kerr.

NHS Dumfries and Galloway failed to give notice that it did not hold the information, as required by section 17(1).

Given that it did not hold the information at the time of the request, and Mr Kerr has now been informed of this, the Commissioner does not require NHS Dumfries and Galloway to take any further action in response to Mr Kerr's application.

## Appeal

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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**

**12 October 2018**

### 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.

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(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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