

Decision Notice

Decision 029/2019: Mr Q and the Scottish Ministers

Hospital waiting time statistics

Reference No: 201801458

Decision Date: 1 March 2019



Scottish Information
Commissioner

Summary

The Ministers were asked about hospital waiting time statistics.

The Ministers provided information they believed would meet the request.

The Commissioner was satisfied that the Ministers did not hold further information falling within the scope of this request. However, the Ministers failed to comply with FOISA by failing to provide notice that information was not held, to provide adequate advice and assistance and to respond to the review requirement in time.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 15 (Duty to provide advice and assistance); 17(1)(b) (Notice that information is not held); 21(1) (Review by Scottish public authority)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. Both Appendices form part of this decision.

Background

1. On 1 June 2018, Mr Q made a request for information to the Scottish Ministers (the Ministers). Mr Q requested information related to percentages quoted by the First Minister in response to a First Minister's Question (FMQ) on 31 May 2018 (full details of the request can be found in Appendix 2).
2. The Ministers responded on 29 June 2018. The Ministers provided what they considered to be all the information requested, alongside some explanations.
3. On 2 July 2018, Mr Q wrote to the Ministers, requesting a review of their decision on the basis that he had not been provided with all of the information requested. Mr Q also sought clarification of the information provided; whether it related to patients "seen" or "waiting" and whether the information provided included the latest financial year available.
4. The Ministers notified Mr Q of the outcome of their review on 28 August 2018. The Ministers concluded that their initial response fully answered his request for information.
5. On 2 September 2018, Mr Q wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Q stated he was dissatisfied with the outcome of the Ministers' review because he argued that he had still not been provided with the information requested. In addition, he was not satisfied with the time taken to respond to his request.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Q 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 4 October 2018, the Ministers were notified in writing that Mr Q had made a valid application. The case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and to answer specific questions: these focused on the steps taken to identify and locate any relevant information held by the Ministers.

Commissioner's analysis and findings

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 Mr Q and the Ministers. He is satisfied that no matter of relevance has been overlooked.
10. 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. If no such information is held by the authority, it is required to give the applicant notice to that effect under section 17(1) of FOISA.
11. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. Where appropriate, the Commissioner will consider 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 actually held by the public authority.

Whether the Ministers held further information

12. Mr Q argued that the Ministers had failed to respond to his request for "direct links" to the official statistics and specific tables used, containing the referenced numbers used for comparison. Mr Q explained that although he was able to access the Information Services Division (ISD, part of NHS National Service Scotland) quarterly release on inpatient (and outpatient) waiting times on which the questions at FMQ were based, he was not able to access the data on which the 30% and 43% reduction figures referred to by the First Minister were based. Mr Q did not accept that the information requested was not held by the Ministers.
13. In response to this point, the Ministers explained that the data the ISD publish come from the Waiting Times Datamart¹ but this did not enable periods of patient unavailability to be deducted.
14. The Ministers explained that the figures referred to in the FMQ came from the SMR01 dataset as a source and was derived from a calculation made by ISD from the dataset held by ISD, rather than the published Waiting Times Datamart. The Ministers explained that they requested a bespoke analysis of health and care data held in the SMR01 dataset, which resulted in them being provided with a set of figures from which the percentages were derived. These raw figures were provided to Mr Q in the initial response to his request.
15. The Ministers explained that their initial response and review did not specifically address the part of Mr Q's request which sought "direct links" to statistical information as they had

¹ <https://www.isdscotland.org/Health-Topics/Waiting-Times/Inpatient-Day-Cases-and-Outpatients/data-mart/>

provided the information he requested in the form in which it was held – in line, they argued, with their obligations under FOISA to provide information held.

16. The Ministers did not consider it appropriate to provide a formal notice under section 17(1) of FOISA to confirm they were unable to provide “direct links”, understanding that their initial response provided all of the requested information, albeit not in the specific form of direct links requested.
17. The Ministers explained that any further information would be held by ISD and anyone could make a request to it to extract the information for [unadjusted] waiting times statistics.
18. With reference to the “bespoke analysis” requested, the Ministers, when questioned about the searches conducted, confirmed that they were provided with the final figures only, from which these percentages were derived. Furthermore, the Ministers highlighted that Mr Q’s request only sought data from two specific points in time for two annual figures. Given this explanation, the Ministers considered that no further searches were required.

The Commissioner’s conclusions

19. Having considered all the relevant submissions and the scope of the information request, the Commissioner is satisfied with the explanations provided as to why no further relevant recorded information is held falling within the scope of this request. However, the request clearly sought direction to a published set of figures which would justify the figures quoted. As acknowledged by the Ministers, they were unable to provide this; consequently the Ministers should have issued a notice in terms of section 17(1) of FOISA (Information not held) in responding to this request.

Section 15 of FOISA – Duty to provide advice and assistance

20. Section 15(1) of FOISA requires a Scottish public authority, so far as is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it. Section 15(2) states that a Scottish public authority shall be taken to have complied with this duty where (in relation to the provision of advice and assistance in a particular case) it conforms with the Scottish Ministers’ Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004 (the Section 60 Code²).
21. It is essential to any requester pursuing their right to information that the requester knows enough about where to look for it to be able to pursue that right effectively. Section 9.3.1. in Part 2 of the Section 60 code states:

Where an authority issues a response informing the applicant that it does not hold the requested information, it is good practice for an authority to explain to the applicant why it does not hold the information.
22. In failing to clarify with Mr Q that the figures were the outcome of bespoke analysis carried out by ISD, and that any underlying data and calculations were held by ISD, and in failing to provide clarification on the figures which were provided to Mr Q, the Ministers failed in their duty to provide adequate advice and assistance to Mr Q.

² <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2016/12/foi-eir-section-60-code-of-practice/documents/e8e4fb4a-d101-40c4-aa33-388776b952d8/e8e4fb4a-d101-40c4-aa33-388776b952d8/govscot%3Adocument>

23. The Commissioner notes that Mr Q has since been advised to make a request to ISD directly and been provided with clarification on the terms used in the Ministers' response (specifically, on the distinction between "patients seen" and "patients waiting").

Timescales

24. Section 21(1) of FOISA gives authorities a maximum of 20 working days after receipt of the requirement to comply with a requirement for review, subject to qualifications which are not relevant in this case.
25. The Ministers recognised that they did not provide Mr Q's requirement for review within 20 working days, so the Commissioner finds that they failed to comply with section 21(1) of FOISA. In their submissions to his office, the Ministers apologised for the delay and explained the measures put in place to improve internal processes for responding to FOI requests and carrying out reviews.

Decision

The Commissioner finds that the Scottish Ministers (the Ministers) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Q.

The Commissioner is satisfied that the Ministers held no further information falling within the scope of this request.

However, in failing:

- to provide Mr Q with notice that information was not held (section 17(1));
- to provide adequate advice and assistance (section 15(1) and
- to respond to the requirement for review in time (section 21(1),

the Ministers failed to comply with Part 1.

Given that further explanations were provided to Mr Q during the investigation, the Commissioner does not require the Ministers to take any action in respect of these failures in response to Mr Q's application.

Appeal

Should either Mr Q or the Scottish Ministers 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

1 March 2019

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.

15 Duty to provide advice and assistance

(1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

(2) A Scottish public authority which, in relation to the provision of advice and assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection(1).

17 Notice that information is not held

(1) Where-

...

(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.

21 Review by Scottish public authority

(1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

Appendix 2: Initial request 1 June 2018

At FMQ, from the official report on 31 May 2018, the FM Nicola Sturgeon stated in response to questions on the latest hospital waiting times for March 2018:

“If we look at in-patient and day-case waiting times over the decade that the SNP has been in Government, the overall numbers are up, but the number of people waiting more than 12 weeks is down by 30 per cent and the number of people waiting more than 18 weeks is down by 43 per cent.”

I would be grateful if you could please provide the specific detail for the actual statistical numbers used by the FM for the decade apart comparison that arrived at the above stated 30% and 43% reductions.

Please provide direct links to the same official statistics and specific tables used that contain these referenced numbers that were used for the comparison. For transparency, please also provide the detail of the calculation that arrived at 30% and 43% reductions.”

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