

# Decision Notice 103/2020

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## **Elective Care Centre: failure to respond**

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**Applicants:** The Applicant

**Public authority:** NHS Highland

**Case Ref:** 202000495



Scottish Information  
Commissioner

## Summary

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On 11 December 2019, the Applicant asked NHS Highland for information about the North of Scotland Elective Care Centre. This decision finds that NHS Highland failed to respond to the request within the timescale allowed by the Freedom of Information (Scotland) Act 2002 (FOISA), and also that it failed to respond to the Applicant's review request promptly (as required by FOISA). The decision also finds that NHS Highland failed to give the Applicant proper notice of his rights when communicating the review outcome.

## Background

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Date	Action
11 December 2019	The Applicant made an information request to NHS Highland.
	NHS Highland did not respond to the information request
30 January 2020	The Applicant wrote to NHS Highland, requiring a review in respect of its failure to respond.
	The Applicant did not receive a response to his requirement for review.
7 April 2020	NHS Highland wrote to the Applicant and asked him if he had received a response (understood to have been issued earlier). NHS Highland was advised that no response had been received.
13 April 2020	NHS Highland provided the Applicant with a response, dated 27 February 2020.
4 May 2020	The Applicant wrote to the Commissioner, stating that he was dissatisfied with NHS Highland's handling of his request and its failures to respond and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7 July 2020	NHS Highland was notified in writing that an application had been received from the Applicant and was invited to comment on the application.
20 July 2020	The Commissioner received submissions from NHS Highland. These submissions are considered below.

## Commissioner's analysis and findings

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1. In its submissions to the Commissioner, NHS Highland fully accepted that the Applicant did not receive a response to his request within the statutory timescale contained in FOISA and that it had therefore failed to comply with the legislation. It explained that, while the response dated 27 February 2020 had been prepared on that date, it was not provided to the Applicant until 13 April 2020.

2. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.
3. It is a matter of fact that NHS Highland did not provide a response to the Applicant's request for information within 20 working days, so the Commissioner finds that it failed to comply with section 10(1) of FOISA.
4. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review. It must, however, comply promptly in all cases. Again, this is subject to qualifications which are not relevant in this case.
5. The Coronavirus (Scotland) Act 2020 (the Coronavirus Act), which came into force on 7 April 2020, extended the maximum period in section 21(1) of FOISA from 20 to 60 working days. In terms of the Coronavirus (Scotland) (No.2) Act 2020, which came into force on 27 May 2020, this period reverted to 20 working days.
6. With regard to the requirement for review, the Commissioner must consider the applicable timescale at the time NHS Highland responded. At that time, the relevant maximum period was 60 working days. In other words, NHS Highland had until 24 April 2020 to respond to the review requirement of 30 January 2020. As NHS Highland provided a response to the Applicant's requirement for review on 13 April 2020, the Commissioner must conclude that it responded within that maximum timescale.
7. The Commissioner also believes it appropriate, in the circumstances, to consider whether NHS Highland could be said to have responded to the Applicant's requirement for review "promptly", as section 21(1) also requires. He has borne in mind that, under the timescale applying before amendment, a review outcome was already considerably overdue when the Coronavirus Act came into force. NHS Highland obviously had this in mind in preparing a response to be issued on 27 February 2020. Unfortunately, this was not issued at the time – or, indeed, until 13 April 2020. It clearly was not "prompt" by the time it was issued, and the effects of the pandemic can reasonably be said to have had little, if any, impact on that lack of promptness. In all the circumstances, the Commissioner finds that NHS Highland did not respond to the Applicant's requirement for review promptly and in that respect failed to comply with section 21(1) of FOISA.
8. The Commissioner notes the Applicant's concern that the review outcome was not sent to the email address from which the original request was sent. That request was, however, clearly made on behalf of the Applicant and the review outcome was sent to – and received by – the Applicant's office. The Commissioner can identify no breach of FOISA in this connection.
9. The remainder of section 21 sets out the requirements to be followed by a Scottish public authority in carrying out a review. Section 21(10) of FOISA states that a Scottish public authority's response to the applicant (under section 21(5)) following a review carried out under section 21 must contain particulars about the rights of application to the Commissioner and of appeal to the Court of Session conferred by sections 47(1) and 56 respectively. This information was missing from the review outcome of 13 April 2020, so the Commissioner must find that NHS Highland it failed to comply with section 21(1) and (10) of FOISA.
10. Given that NHS Highland responded to the Applicant's requirement for review on 13 April 2020, he does not require NHS Highland to take any action in relation to the above failures.

## **Decision**

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The Commissioner finds that NHS Highland failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant. In particular, NHS Highland failed to respond to the Applicant's request for information within the timescale laid down by section 10(1) of FOISA. He also finds that NHS Highland failed to respond to the Applicant's requirement for review promptly, in breach of section 21(1) of FOISA, and that the review outcome of 13 April 2020 did not meet the requirements of section 21(10) of FOISA.

The Commissioner does not require NHS Highland to take any action in respect of these failures, in response to the Applicant's application, given that a review outcome was eventually issued.

## **Appeal**

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Should either the Applicant or NHS Highland 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.

**Daren Fitzhenry**  
**Scottish Information Commissioner**

**8 September 2020**

**Scottish Information Commissioner**

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