



Decision Notice 034/2024

Out of hours GP provision

Authority: Highland Health Board
Case Ref: 202200436

Summary

The Applicant asked the Authority for information regarding the GP provision of out-of-hours care.

The Authority stated that it would cost too much to respond to the request.

The Commissioner investigated and found that the Authority was not entitled to refuse to comply with the request on the basis that it would cost too much.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (3) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 15(1) (Duty to provide advice and assistance); 17(1) (Notice that information is not held); 47(1) and (2) (Application for decision by Commissioner)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs) and 5 (Excessive cost - prescribed amount)

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 4 February 2022, the Applicant made a request for information to the Authority. He asked:

- i) In this health board, how many GPs are currently providing out-of-hours care? Please provide this information at the time of making this inquiry as well as for the year ending 15th November 2020 and 15th November 2021.
 - ii) In this health board, how many GP shifts are needed at the time of making this inquiry to provide full out-of-hours care each week?
 - iii) On how many occasions during the year ending 15th November 2020 and 15th November 2021 have out of hours shifts for GPs not had a full complement of GPs in this health board? Please also provide this information at the time of making this inquiry?
 - iv) In this health board, what is the total number of out of hours GP shifts that have been unfilled? Please provide this information in terms of number of hours that have been unfilled for the year ending 15th November 2020 and 15th November 2021. If it is not possible to provide this figure in terms of hours unfilled, please provide the number of unfilled shifts.
 - v) In this health board, what are the average waiting times for patients requiring out-of-hours care, from the initial phone call to a GP arriving at their address during the period 15th November 2020 – 15th November 2021?"
2. The Authority responded on 1 March 2022. It refused to comply with the request, relying on section 12(1) of FOISA and arguing that compliance would exceed the £600 cost ceiling set out in the [Fees Regulations](#)¹ by the Scottish Ministers.
 3. On 1 March 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant provided the Authority with a response he had received from another NHS Board, and he asked the Authority to provide him with the information he had requested.
 4. The Authority notified the Applicant of the outcome of its review on 30 March 2022. It explained that it has 21 Out of Hours sites which is significantly more than any other NHS Board. It noted that on any given evening, 25% of the Out of Hours cover in Scotland is in its region, and therefore there is a significant amount of work associated with any data collection from rotas. The Authority upheld its previous reliance on section 12(1) of FOISA.
 5. On 14 April 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review because it failed to provide him with the information he had requested. The Applicant submitted that every other health board in Scotland had provided him with the information, apart from the Authority, which had relied on section 12(1) of FOISA.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. The Authority was notified in writing that the Applicant had made a valid application and the case was then allocated to an investigating officer.

¹ <https://www.legislation.gov.uk/ssi/2004/467/contents/made>

8. 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 related to its reasons for concluding that complying with the request would incur costs exceeding £600.

Commissioner's analysis and findings

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

Section 12(1) (Excessive cost of compliance)

10. Section 12(1) of FOISA provides that a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the relevant amount prescribed in the Fees Regulations. This amount is currently £600 (see regulation 5). Consequently, the Commissioner has no power to require the disclosure of information should he find that the cost of responding to a request for that information would exceed this sum.
11. The projected costs a Scottish public authority can consider in relation to a request for information are, according to regulation 3 of the Fees Regulations, the total costs (whether direct or indirect) it reasonably estimates it will incur in locating, retrieving and providing the information requested, in accordance with Part 1 of FOISA.
12. The authority may not charge for the cost of determining whether it:
 - (i) actually holds the information, or
 - (ii) whether or not it should provide the information.
13. The maximum hourly rate the authority can charge for staff time is £15 per hour.
14. The Applicant submitted that he was unhappy with the way the Authority responded to his information request because it failed to provide the information he had asked for. He commented that every other health board in Scotland was able to provide the information without any issues. The Applicant submitted that being able to construct a national picture of GP out of hours care in Scotland was in the public interest and he did not agree with the Authority that the exemption under section 12(1) applied to this request.
15. In its initial submissions to the Commissioner, the Authority referred to its "response of 17 June 2022" which advised that within the Authority, the out-of-hours (OOH) service was managed as individual district services rather than one single OOH service, and it explained that this was the reason that the time involved in collating all of the data would exceed 40 hours. The Authority submitted that compliance with this request would require a manual review of rotas across a number of years and 35 separate rosters.
16. It explained that it provides information every two years as part of the [2019 Primary Care Out of Hours Workforce Survey](#)² which is published on the Public Health Scotland website. It submitted that each time this survey happens it takes more than 40 hours to analyse just one year.

² <https://www.publichealthscotland.scot/publications/primary-care-workforce-survey/primary-care-out-of-hours-workforce-survey-31-march-2020/>

17. The Authority submitted that it had not undertaken detailed calculations to project the cost of responding to the request, as its reliance on section 12(1) was based on providing the time and resource required in retrieving and collating the information taking more than 40 hours to complete. It noted that the 2019 Primary Care Out of Hours Workforce Survey had 6840 data items which had to be calculated manually in order to collate monthly information (570 separate combinations of clinicians/rosters).
18. The Authority explained that the information that was requested by the Applicant was part of the National OOH Workforce Survey (referred to above). It submitted that it could provide this information via data extract from its Adastra reporting system, for the subset of sites which use this. However, it submitted that complete information is held on rosters, which are held, in part, by third party contractors which it requests, collates and aggregates as part of the Workforce Survey. The Authority submitted that it does not hold all of this information, aside from the work done to complete the survey, and in this sense it differs from other health boards.
19. The Authority explained that the [National OOH Workforce Survey](#)³ collates detail of the hours worked, and the numbers of staff across a range of professional groups and so would provide much of the detail the Applicant requires. The Authority acknowledged that it does not provide detail around unfilled shifts, on the basis that this information was not possible for boards to accurately assess.
20. The Authority noted that across its geographical area, there were 31 separate OOH services active on any given night/weekend, reflecting the large area that it covers. It argued that this was far in excess of any other health board.
21. The Authority explained that it was currently working on the return for the 2023 OOH Workforce Survey. This required a minimum of approximately 1 to 1.5 hrs for administrators in each of the 31 sites to collate and review/record the roster. In addition, a Band 7 manager had been tasked with collating and compiling this information (approximately 5 hours) with oversight from a senior manager to ensure the survey was completed correctly and on time. The Authority noted that it was not able to provide complete information in 2022, as this could not be resourced.
22. The Authority also submitted that it was not possible to provide information on the number of GP shifts required. It explained that a number of its sites are multi-disciplinary and rosters may be filled with GPs or advanced nurse practitioners depending on staff availability. In addition, the Authority also questioned the definition of a "shift" as used by the Applicant. It submitted that, unlike most other health boards, many of its sites have on-call components. It argued that a single "shift" might be 62 hours of on call, Friday to Monday. The Authority offered to provide further detail on the staffing model for each of its OOH sites, if required.
23. The Authority reiterated that it had a significantly higher number of sites providing OOH services than any other health board area, and that, in contrast to other boards, there was no single rostering database or information system for this.
24. The Commissioner was not satisfied with these submissions. He pointed out that if the Authority was unclear about the definition of the term "shift" it should have sought clarification from the Applicant, as provided for in section 1(3) of FOISA. The Commissioner also noted that the Authority appeared to be saying that it did not hold all of the information requested

³ <https://www.isdscotland.org/Health-Topics/General-Practice/Workforce-and-Practice-Populations/Out-of-hours-workforce/index.asp>

by the Applicant. He sought clarity over the information that was held by the Authority, pointing out that section 12(1) of FOISA cannot be used to encompass the costs involved in determining whether or not information was held.

25. The Commissioner noted that the Authority had claimed that the reason it could not provide the Applicant with the same information as other health boards, was because it had a significantly higher number of OOH sites, and that it did not have a single rostering system. The Commissioner asked the Authority for details of the rostering systems and the number of OOH sites in other health boards, so he could compare that information with the OOH set up at the Authority.
26. The Authority was also pressed further on whether it considered that it had complied with its duties under section 15(1) of FOISA, as it did not appear to have provided the Applicant with any guidance or suggestions on how to reduce the scope of his request to bring it under the £600 cost ceiling. Finally, the Commissioner asked the Authority about the Adastra system it had referred to, noting that the authority had suggested it could provide the Applicant with data from sites that used that system.
27. The Authority submitted that it did not know the number of OOH sites in other health boards but it understood, from discussions with colleagues through the National OOHs Operation groups (these groups have a role in developing, repeating and monitoring the National OOH's workforce survey), that it had a significant additional complexity given the number of bases, the variation between weekend and weekday rotas, and the mix of direct provision and externally contracted services. The Authority provided the Commissioner with a list of all the OOH sites it covers. The Authority also acknowledged that it did not know the rostering practices of other health boards, but maintained that it did not have a single rostering system, which meant that compiling the requested information would take a significant amount of time.
28. On the question of whether the Adastra system could be used to provide some of the information requested by the Applicant, the Authority noted that while all OOH sites have a dispatch location they do not routinely use this for all calls. It explained that in some locations, people are more likely to phone the doctor direct. It also noted that it can use Adastra to provide the number of doctors working in each of the years requested, but this may provide only a partial answer.
29. The Authority withdrew its previous comments about information not being held and its query about the definition of a "shift" and submitted that its original rejection of the request was on the basis of "excessive cost of compliance" and that it should not have brought additional grounds for refusal. The Authority did not comment on its duties under section 15(1) of FOISA.
30. The Commissioner remained dissatisfied with the submissions provided by the Authority. He noted that it had not provided him with any calculations that explained why compliance would cost more than £600. He was concerned that the Authority had conflated the costs of responding to the Primary Care OOH Workforce Survey with the Applicant's information request. He noted that the Applicant's information request was much more limited in nature and was not seeking the kind of detailed staffing information sought in the OOH survey.
31. Given his concerns, the Commissioner asked the Authority to carry out a sample search in order for him to determine whether or not information was held for each part of the request, and whether the cost of compliance was likely to exceed £600. The Commissioner selected five different OOH sites and for each site he asked the Authority to provide him with the

information captured by one part of the request. The Commissioner required a different OOH site to be used for each part of the request in order to provide him with a broader picture of the information held and the costs likely to be incurred.

32. In its response, the Authority provided information it held in response to three of the five parts of the information request, and it submitted that it did not hold information for the other two parts of the request. The Authority maintained that despite the fact that some information was not held, compliance with the request would still require more than 40 hours of resource.

Commissioner's view on section 12(1)

33. As noted above and in the [Commissioner's briefing on section 12\(1\) of FOISA](#)⁴, Authorities cannot charge for any costs incurred in determining whether or not they hold information. Furthermore, section 17(1) of FOISA requires that if an Authority does not hold information, it must give a requester notice in writing of this fact when it responds to the request.
34. It is clear in this case that the Authority does not hold all of the information requested by the Applicant, and that it has failed to notify the Applicant as required by section 17(1) of FOISA. Furthermore, while acknowledging that it does not hold all of the information requested by the Applicant, the Authority continues to argue that compliance with the request would incur costs exceeding £600, although it has not provided any calculations that demonstrate this.
35. From the brief sample search that was carried out, the Authority stated that it did not hold information for two of the five questions. To put it another way, the Authority has confirmed that for the sample searches it carried out, it did not hold 40% of the requested information. The Authority maintained that despite some information not being held, the cost of compliance would still exceed £600, but it has not provided the Commissioner with any calculations that support this view.
36. The Authority provided the Commissioner with very rough calculations that illustrated the work involved in responding to the OOH annual Workforce Survey, but it failed to recognise or acknowledge that the Applicant's information request does not seek the same information as the OOH Workforce Survey.
37. The Applicant asked five questions in his request, which are mainly seeking information about GP's roles in delivering the OOH services. In contrast, the [2019 OOH Workforce Survey](#)⁵, requires information about each individual (doctors, nurses, phlebotomists, healthcare support workers, etc.) who worked at least one shift in the OOH service, including the number of hours they worked. The survey goes on to ask each health board to comment on its ability to fill OOH shifts, on what happened if shifts could not be filled as planned, and on the impact of Protected Learning Time on OOH cover as well as other questions about its ability and experiences of delivering an OOH service. The work required to undertake the OOH Workforce Survey is clearly significant, but it does not, in any way, seem comparable to the work required to respond to the Applicant's information request, which is more focused on GP's and seems much narrower and requiring less resource.
38. In any event, it is the Authority's responsibility to explain, with detailed calculations and submissions, why compliance with this request would incur the same costs as compliance

⁴ <https://www.itspublicknowledge.info/sites/default/files/2022-03/FeesandExcessiveCostofComplianceBriefing.pdf>

⁵ https://www.isdscotland.org/Health-Topics/General-Practice/Workforce-and-Practice-Populations/Out-of-Hours-Workforce/_docs/2019-10-31-PCOOHWS2019-Survey.xlsx

with the OOH Workforce Survey, and in the Commissioner's view, the Authority has failed to do this.

39. It is clear to the Commissioner that the Authority has not taken any steps to identify what information is actually held, nor has it calculated how much resource would be involved in complying with the information request submitted by the Applicant. This is not sufficient to satisfy the requirements of section 12(1) of FOISA and the Commissioner is not persuaded, based on the information provided by the Authority, that compliance with the request would exceed £600.
40. In the absence of the provision of evidence by the Authority, in support of its application of section 12(1) of FOISA, including a clear breakdown of the searches required and the costings associated with these searches, together with the Authority's admission that some of the requested information is not held, the Commissioner finds that he cannot uphold the application of the provision.

Section 15 – Duty to advise and assist

41. Section 15(1) requires a Scottish public authority, so far as reasonable to expect it to do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it.
42. Section 15(2) states that a Scottish public authority which, in relation to the provision of advice and assistance in any case, conforms to the *Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004*⁶ ([the Section 60 Code](#)), is taken to comply with the duty to provide reasonable advice and assistance in section 15(1).
43. The Section 60 Code provides guidance to Scottish public authorities on the practice which Scottish Ministers consider desirable for authorities to follow in connection with the discharge of their functions under FOISA. The Section 60 Code provides (at 9.4.3):

“When refusing a request on cost grounds, it is good practice for the authority's response to provide clear advice on how the applicant could submit a new, narrower request within the cost limit. In giving advice [the authority] may wish to take account of how much the cost limit has been exceeded. Any narrower request would be a separate new request and should be responded to accordingly.”
44. In this case, the Authority did not provide the Applicant with any advice or assistance, in either their initial response or review outcome, on how he could narrow the scope of his request to allow him to access the information he was looking for, within the cost limit.
45. The Commissioner therefore finds that the Authority failed to comply with the duty under section 15(1) of FOISA to provide advice and assistance.
46. The Commissioner requires the Authority to carry out a further review and respond to the Applicant's request otherwise than by relying on section 12(1).
47. When carrying out this review, the Commissioner also requires the Authority to undertake searches to identify whether it holds all of the information requested by the Applicant, and to notify the Applicant, under section 17(1) of FOSIA, if it determines that any information is not held.

⁶<https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

Decision

The Commissioner finds that the Authority 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. The Commissioner found that the Authority was not entitled to rely on section 12(1) of FOISA in responding to this request, and that it failed to comply with its duties under section 15(1) and 17(1) of FOISA.

The Commissioner therefore requires the Authority to:

- carry out searches for the information requested by the Applicant, either disclosing the information or notifying the Applicant why the information cannot be provided under a provision in Part 1 or 2 of FOISA and
- provide the Applicant with a new review response (other than in line with section 12(1) of FOISA).

The Authority must carry out these steps and notify the Applicant of the outcome of its review, by **3 May 2024**.

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.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

David Hamilton
Scottish Information Commissioner

19 March 2024

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.”
- (3) If the authority –
 - (a) requires further information in order to identify and locate the requested information; and
 - (b) has told the applicant so (specifying what the requirement for further information is),

then provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

...

12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.
- (2) The regulations may provide that, in such circumstances as they may specify, where two or more requests for information are made to the authority-
 - (a) by one person;
 - (b) by different persons who appear to it to be acting in concert or whose requests appear to have been instigated wholly or mainly for a purpose other than the obtaining of the information itself; or
 - (c) by different persons in circumstances where the authority considers it would be reasonable to make the information available to the public at large and elects to do so,

then if the authority estimates that the total cost of complying with both (or all) of the requests exceeds the amount prescribed, in relation to complying with either (or any) of those requests, under subsection (1), section 1(1) does not oblige the authority to comply with either (or any) of those requests.

- (3) The regulations may, in respect of an election made as mentioned in subsection (2)(c), make provision as to the means by which and the time within which the information is to be made available to the public at large.
- (4) The regulations may make provision as to-
 - (a) the costs to be estimated; and
 - (b) the manner in which those costs are to be estimated.
- (5) Before making the regulations, the Scottish Ministers are to consult the Commissioner.
- (6) References in this section to the cost of complying with a request are not to be construed as including any reference to costs incurred in fulfilling any such duty under or by virtue of the Equality Act 2010 as is mentioned in section 11(5).

...

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 or 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-
 - (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).

Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

3 Projected costs

- (1) In these Regulations, "projected costs" in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.
- (2) In estimating projected costs-
 - (a) no account shall be taken of costs incurred in determining-
 - (i) whether the authority holds the information specified in the request; or
 - (ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and
 - (b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

5 Excessive cost - prescribed amount

The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.