

# Decision Notice

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**Decision 192/2016: Mr X and Lothian Health Board**

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**Procedures for contacting relatives of persons admitted to Accident and Emergency Department**

Reference No: 201600701

Decision Date: 14 September 2016



Scottish Information  
Commissioner

## Summary

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On 3 December 2015, Mr X asked Lothian Health Board (NHS Lothian) for information about its procedures for contacting relatives of persons admitted to the Accident and Emergency Department.

NHS Lothian informed Mr X it did not hold the information requested. Mr X remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and was satisfied that NHS Lothian did not hold the information requested. She also found that NHS Lothian failed to respond to the request within statutory timescales.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 10(1) (Time for compliance); 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 3 December 2015, Mr X made a request for information to NHS Lothian. He requested information about NHS Lothian's procedures for contacting friends and relatives of those admitted to its Accident and Emergency Department, to include information about the rights of persons admitted to have family members contacted on their behalf. NHS Lothian did not respond within statutory timescales.
2. On 20 January 2016, Mr X wrote to NHS Lothian, requesting a review in respect of its failure to respond, asking it to provide the information requested at its earliest convenience.
3. NHS Lothian notified Mr X of the outcome of its review on 25 January 2016. It explained that enquiries had established that his initial information request had not been received. NHS Lothian informed Mr X, in terms of section 17 of FOISA, that it did not hold the information requested. It explained that while it did not have a set policy, it was happy to contact relatives of patients admitted as appropriate. For prisoners attending in the custody of prison staff, where there were concerns from prison staff about maintaining safety, NHS Lothian clarified that any decision on contact would be made applying individual judgement and with regard to the condition of the patient involved.
4. On 29 January 2016, NHS Lothian's Emergency Department gave a separate response to Mr X. It apologised and explained the reasons for the delay in responding to his initial request. The response stated that NHS Lothian did not have a set policy or procedure for contacting relatives of patients attending Emergency Departments. It confirmed that any decision to inform relatives of a prisoner attending in the custody of prison staff would be subject to the judgement of the attending prison officers on questions of safety and security.

5. On 21 April 2016, Mr X wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. Mr X stated he was dissatisfied with the outcome of NHS Lothian's review because it appeared to him that NHS Lothian held information that had not been given to him, but which it had not withheld under any exemption. Mr X was also dissatisfied that NHS Lothian failed to respond to his initial information request, and that its review outcome failed to recognise the failure, claiming the request had not been received.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr X made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 16 May 2016, NHS Lothian was notified in writing that Mr X had made a valid application and 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. NHS Lothian was invited to comment on this application and answer specific questions. These focused on the searches carried out to identify and locate any information held by NHS Lothian and falling within the scope of Mr X's request. NHS Lothian was also asked to comment on its alleged failure to comply with section 10 of FOISA in responding to Mr X's initial request.

## Commissioner's analysis and findings

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9. In coming to a decision on this matter, the Commissioner has considered all of the relevant submissions, or parts of submissions, made to her by both Mr X and NHS Lothian. She is satisfied that no matter of relevance has been overlooked.

### Whether NHS Lothian held any information

10. Under 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 which are not relevant in this case.
11. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give the applicant notice in writing to that effect. In this case, NHS Lothian notified Mr X at review that it did not hold the information he had asked for.
12. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. She 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 as to what information the authority should hold, ultimately the Commissioner's role is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).
13. In its submissions to the Commissioner, NHS Lothian maintained that it did not hold any information falling within the scope of Mr X's request. It confirmed it held no formal policies, or any other documents, that dealt with staff contacting the relatives of patients, including patients who were prisoners.

14. NHS Lothian explained that the separate response issued by its Emergency Department on 29 January 2016 not only concurred with this, but also provided Mr X with details on what currently happened in such circumstances. In particular:
  - (i) information regarding a patient's clinical condition, regardless of whether or not they were a prisoner, would not be discussed with relatives by telephone. To prevent any conflict with the release of a patient's confidential information, personal clinical information would only be released with the patient's express consent and in the presence of the third party;
  - (ii) NHS Lothian's general principle on this aspect of patient care was to facilitate the contacting of relatives, usually by the individual patient themselves but to a lesser extent on their behalf; and
  - (iii) all requests for informing relatives regarding patients in prison custody were conveyed through the attending prison staff. In relation to those patients, NHS Lothian explained that it would always be guided by the attending officer regarding the safety of the communication. It explained the attending officer's decision would always be adhered to, given their ultimate responsibility for the safety and security of the prisoner.
15. NHS Lothian provided an explanation of the searches it had carried out in reaching its conclusion that it did not hold the information requested. These comprised a search of NHS Lothian's Intranet (where all policy documents were held) for any documents relating to alerting relatives of a patient, be they a prisoner or not. Further local checks had also been carried out within the Emergency Department. NHS Lothian submitted that these searches had established that no written policy or guidance was held concerning this matter.
16. Having considered all the relevant submissions and the terms of the request, the Commissioner is satisfied that NHS Lothian took adequate, proportionate steps to establish whether it held any information that fell within the scope of Mr X's request. She accepts that any information relevant to the request would have been identified using the searches described by NHS Lothian. She is therefore satisfied, on the balance of probabilities, that NHS Lothian does not (and did not, on receiving the request) hold the information requested. By serving notice under section 17(1), following its review, it complied with Part 1 of FOISA.

### **Timescales and administrative issues**

17. Section 10(1) of FOISA requires Scottish public authorities to respond to requests for information promptly and in no more than 20 working days following the date of receipt of the request. This is subject to qualifications which are not relevant in this case.
18. In its review outcome dated 25 January 2016 (issued by the FOI Reviewer), NHS Lothian informed Mr X it had not received his initial request.
19. In the separate response from the Emergency Department, dated 29 January 2016, NHS Lothian apologised for the delay in responding, stating this was neither intentional nor deliberate. It explained this had been due to a delay in delivering internal mail, combined with the correspondence being received by the wrong member of staff.
20. In his application to the Commissioner, Mr X raised dissatisfaction that NHS Lothian had failed to respond to his initial request, and that its review response (of 25 January 2016) had failed to recognise that failure, claiming the request had not been received.

21. In its submissions to the Commissioner, NHS Lothian explained that, on receipt of Mr X's request for review, the FOI Communications Manager had passed this to the FOI Reviewer and to the Emergency Department, in order to identify the reasons for the failure to respond.
22. NHS Lothian explained that the FOI Communications Manager was informed that the initial request had not been received within the Office of the Clinical Director for Emergency Medicine or the Clinical Lead South East Scotland Major Trauma Network. NHS Lothian acknowledged that a change in management structure and the initial request not having been passed on appropriately within the Emergency Department resulted in Mr X having to request a review.
23. NHS Lothian acknowledged that its review outcome of 25 January 2016 (issued by the FOI Reviewer) did not contain an apology as, at that particular time, it believed that the initial request had not been received. It again apologised for this error and for the associated delay in responding.
24. NHS Lothian explained the request was subsequently passed to the Emergency Department and was treated as normal correspondence, not as an information request under FOISA. This resulted in the separate response subsequently being issued by the Emergency Department on 29 January 2016. NHS Lothian acknowledged that both this and the lengthy delay in responding to the request should not have occurred. It informed the Commissioner that the Emergency Department had been reminded of the formal process for handling information requests under FOISA.
25. NHS Lothian explained that the FOI Communications Manager was provided with a copy of the Emergency Department's response on 1 February 2016. NHS Lothian noted that it concurred with the review response of 25 January 2016 in that no formal policies were held concerning staff contacting the relatives of prisoners.
26. It is a matter of fact that NHS Lothian did not provide a response to Mr X's request for information within 20 working days, so the Commissioner finds that it failed to comply with section 10(1) of FOISA.
27. The Commissioner notes that in its separate response of 29 January 2016, NHS Lothian recognised and apologised for the delay in responding, explaining the reasons for the delay. She also observes that Mr X made no reference to this separate response when raising this specific matter of dissatisfaction. Acknowledging that the Emergency Department did not recognise or respond to Mr X's request as one made under FOISA, the Commissioner is satisfied with the steps taken by NHS Lothian to ensure that, in future, its Emergency Department complies with the formal process for responding to requests under FOISA.
28. In the light of these actions, and because NHS Lothian has responded to Mr X's requirement for review and has apologised to him (albeit separately), the Commissioner does not, on this occasion, require NHS Lothian to take any further action in relation to its failure to comply with the statutory timescale for responding to Mr X's initial request.

## Decision

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The Commissioner finds that Lothian Health Board (NHS Lothian) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr X.

The Commissioner finds that:

- (i) NHS Lothian was entitled to inform Mr X that it did not hold the information requested, and thereby complied with Part 1.
- (ii) NHS Lothian failed to comply with section 10(1) of FOISA in failing to respond to Mr X's initial request within the statutory timescale.

The Commissioner does not require NHS Lothian to take any action in respect of this failure, in response to Mr X's application.

## Appeal

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Should either Mr X or Lothian Health Board 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.

**Rosemary Agnew**  
**Scottish Information Commissioner**

**14 September 2016**

## Appendix 1: Relevant statutory provisions

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### 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.

...

#### 10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
- (b) in a case where section 1(3) applies, the receipt by it of the further information.

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#### 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.

...

**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**