

# Decision Notice

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**Decision 030/2018: Dr A and Tayside Health Board**

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**Accommodation for Junior Doctors**

Reference No: 201701804

Decision Date: 7 March 2018



Scottish Information  
Commissioner

## Summary

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NHS Tayside was asked for details of accommodation provision for junior doctors working more than 60 hours, and also why there were delays in the approval of expenses. NHS Tayside did not initially treat the request as an information request. Following an appeal, it disclosed some information.

The Commissioner accepted that no further information was held, but decided that NHS Tayside should have recognised the request as an information request and dealt with it appropriately from the outset.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement)

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. Dr A has been in correspondence with Tayside Health Board (NHS Tayside) for nearly two years about free accommodation for junior doctors if they worked over 60 hours, in any given seven day period. She has also enquired about delays to her own expenses claims.
2. On 2 May 2017, Dr A made a request for information to NHS Tayside as part of this ongoing correspondence. She asked for information clarifying:
  - (1) whether accommodation was free if more than 60 hours were worked in a seven day period; and
  - (2) why there were delays to approval of her expense claims.She also stipulated that, if the department to which she had now written was unable to answer these points, it should state who would be the person to answer her queries.
3. NHS Tayside responded on 23 May 2017, providing explanations and referring to previous correspondence it considered relevant. It informed her that that the Director of Finance would respond in due course about her expense claims, and named the Director.
4. On 31 July 2017, Dr A wrote to NHS Tayside requesting a review of its decision, on the basis that she did not believe her request had been fully addressed.
5. NHS Tayside notified Dr A of the outcome of its review on 22 August 2017, apologising for the delay. With regard to junior doctors' accommodation, the review continued to refer Dr A to previous correspondence. NHS Tayside also re-iterated that the Director of Finance would correspond about her expenses.
6. On 11 October 2017, Dr A wrote to the Commissioner. Dr A applied to the Commissioner for a decision in terms of section 47(1) of FOISA. She set out the pattern and dates of her correspondence with NHS Tayside. She was not satisfied that this correspondence

answered her request. She also believed that NHS Tayside's previous responses contained factually inaccurate information, in light of the explanations provided in this case.

## **Investigation**

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7. The application was accepted as valid. The Commissioner confirmed that Dr A 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.
8. On 18 October 2017, NHS Tayside was notified in writing that Dr A had made a valid application. The case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. NHS Tayside was invited to comment on this application and answer specific questions, including what searches it had conducted to verify whether it held recorded information capable of addressing Dr A's request.
10. NHS Tayside provided submissions, answering further queries from the investigating officer during the investigation.
11. On 22 January 2018, NHS Tayside disclosed to Dr A information in a Directive from Scottish Government to NHS Chief Executives and HR Directors on the subject of junior doctors' rotas and monitoring of their hours as per national terms and conditions. Although clearly of relevance to the wider issues underlying Dr A's engagement with NHS Tayside, this document is not directly relevant to the request under consideration here.
12. On 1 February 2018, Dr A and NHS Tayside met to discuss the issues underlying her request. A letter dated 14 February 2018 was then emailed to Dr A, on 15 February 2018, apologising for the way in which NHS Tayside dealt with her enquiry and what it stated was a failure to provide the clarity and professional service she should have received.

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

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13. 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 Dr A and NHS Tayside. He is satisfied that no matter of relevance has been overlooked.

### **Whether information was held**

14. 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.
15. "Information" is defined in section 73 of FOISA as "information recorded in any form". Given this definition, it is clear that FOISA does not generally require a public authority to create recorded information in order to respond to a request, or to provide information which is not held in a recorded form (e.g. about a person's opinion). The definition excludes unrecorded information.
16. In her application, Dr A submitted that NHS Tayside held more information covered by her request than it has provided. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the

searches carried out by the public authority. He will consider, where appropriate, any reason offered by the public authority to explain why the information (or, in some cases, more information) is not held.

17. Although Dr A raised concerns in her application about what she believed were inconsistencies and inaccuracies in previous correspondence from NHS Tayside, the Commissioner only has the power to consider the request about which she has brought an application. His role is to determine what relevant information is (or was, at the time of receipt of the request) actually held by the public authority, not the accuracy of what is held or (except insofar as it may point to the existence of additional recorded information) any apparent lack of consistency or factual inaccuracy within explanations provided by the public authority.
18. Dr A also raised other issues which, while providing useful context, did not fall within the scope of what she asked for on 2 May 2017.
19. NHS Tayside explained the background to this request. NHS Tayside stated that in the course of Dr A's correspondence with the Head of HR Resourcing (February 2015 to February 2017) and, thereafter, during correspondence with the Director of HR & OD (overlapping with the period of this request), it had tried to answer Dr A's questions and give further information and clarification. However, it acknowledged that at no point did it deal with her request under FOISA: it recognised that it should have done so.

#### *Searches*

20. NHS Tayside explained that there was no policy or recorded practice on the provision of accommodation falling within the scope of Dr A's request. It provided submissions on the steps it had taken to establish this.
21. Part 2 of Dr A's request concerns reasons for delays to her expenses being authorised. NHS Tayside provided detailed explanations and evidence of how expense claims were handled, and when (and the circumstances in which) any relevant payments were made, or not made.
22. Part 2 clearly involves aspects of Dr A's own data: the fact that she has made expense claims, and the details of their handling, is biographical about Dr A as an identifiable employee of NHS Tayside. The Commissioner cannot divulge further details of the records held without breaching data protection principles, suffice to say that he is satisfied that the searches during the investigation were as set out by NHS Tayside in its submissions.

#### *Conclusions*

23. The Commissioner has considered all relevant submissions on this matter and the terms of the request. Having done so, the Commissioner accepts that NHS Tayside has now taken adequate, proportionate steps to establish whether it held information falling within the scope of the request. He also accepts that any information relevant to this request would have been identified by the steps taken, and that Dr A does not appear to remain dissatisfied with regard to the information held following her meetings with NHS Tayside.
24. Unfortunately, the Commissioner is not satisfied that the request was identified as an information request under section 1(1) of FOISA at any point before his investigation commenced, with the result that adequate steps were not taken to identify and locate any relevant information it held, or to ensure that the relevant procedural requirements of FOISA were met.

25. In the circumstances, the Commissioner finds that NHS Tayside failed to comply with section 1(1) of FOISA in responding to Dr A's request.

### **Handling of request**

26. As NHS Tayside has acknowledged, it did not recognise Dr A's request as a valid request under FOISA, either initially or when Dr A asked for a review. It is understandable that NHS Tayside should have wished to continue an ongoing course of correspondence in a relatively seamless manner, but it is important that information requests are recognised when made, to ensure that public authorities meet their obligations under FOISA (including those relating to timescales, searches and the giving of proper notice). In this way, the rights of those seeking the information are met.
27. The Commissioner would urge NHS Tayside to reflect carefully on its handling of Dr A's correspondence in this particular case.

## **Decision**

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The Commissioner finds that Tayside Health Board (NHS Tayside) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Dr A.

The Commissioner finds that NHS Tayside failed to comply with Part 1 (and in particular section 1(1)) of FOISA, by failing to recognise Dr A's email of 2 May 2017 as a request for information under section 1(1), either initially or when Dr A sought a review, and to take adequate steps to establish whether it held any relevant information.

For the reasons set out in the decision above, the Commissioner does not require NHS Tayside to take any action.

## **Appeal**

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Should either Dr A or NHS Tayside 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**

**7 March 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.

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