

# Decision Notice



Decision 006/2014 Mr and Mrs Sinclair and Lothian Health Board

Handling of request and requirement for review

Reference No: 201302487

Decision Date: 21 January 2014

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**Rosemary Agnew**

Scottish Information Commissioner

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## Summary

On 27 August 2013, Mr and Mrs Sinclair asked Lothian Health Board (NHS Lothian) for a copy of its Health and Safety Policy, highlighting the section interpreted as applying to door locking during speech therapy sessions. NHS Lothian responded by providing a copy of highlighted sections from its restraint policy.

Following an investigation, the Commissioner found that NHS Lothian's response failed to address Mr and Mrs Sinclair's request (and particularly their requirement for review) fully in accordance with Part 1 of FOISA. Given that Mr and Mrs Sinclair received the information they sought following a subsequent request, the Commissioner did not require NHS Lothian to take any action.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 21(4), (5) and (10) (Review by Scottish public authority)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. On 27 August 2013, following previous related discussions and correspondence, Mr and Mrs Sinclair wrote to NHS Lothian's Children's Speech and Language Therapy Service. In this letter, they referred to a discussion in which they had asked for the written policy for door locking during speech therapy sessions. Noting that they had been informed that there were no such policies and that the speech therapist used their professional interpretation of the Health and Safety Policy, Mr and Mrs Sinclair asked for a copy of the Health and Safety Policy with the relevant section highlighted.
2. NHS Lothian responded on 5 September 2013, affirming that there was no specific policy on door locking during therapy sessions, but that staff adhered to all NHS Policies in this area. NHS Lothian provided Mr and Mrs Sinclair with highlighted sections from its Restraint Policy.



3. On 17 September 2013, Mr Sinclair wrote to NHS Lothian requesting a review of its decision. He asked to be provided with the whole of the Restraint Policy, along with additional documents.
4. NHS Lothian responded on 23 September 2013, by offering to have a meeting with Mr Sinclair to discuss his concerns. Alternatively, if he wished to log his concerns with the Customer Relations and Feedback Team, NHS Lothian indicated that it would consider his request for the policy documents. An address was provided to Mr Sinclair for the Customer Relations and Feedback Team.
5. On 24 October 2013, following further correspondence between them and NHS Lothian, Mr and Mrs Sinclair wrote to the Commissioner, stating that they were dissatisfied with the outcome of NHS Lothian's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. They had since received the information they sought, but were not satisfied that NHS Lothian had handled their request in accordance with FOISA, or with the time taken to obtain the information.
6. The application was validated by establishing that Mr and Mrs Sinclair made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

## Investigation

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7. On 5 November 2013, NHS Lothian was notified in writing that an application had been received from Mr and Mrs Sinclair and was asked to provide comments on the application (as required by section 49(3)(a) of FOISA). NHS Lothian was asked to respond to specific questions, focusing on its handling of the request and requirement for review.
8. A response was received from NHS Lothian on 19 November 2013.

## Commissioner's analysis and findings

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



### Handling of requirement for review

10. The review process provided for in section 21 of FOISA allows a Scottish public authority to reconsider its handling of a request for information, should the applicant express dissatisfaction with the way the request was initially dealt with. In effect, it acknowledges that the authority's initial handling of the request may not have met the requirements of Part 1 of FOISA.
11. Section 21(4) states that the authority may do the following in respect of the initial request for information, in response to a requirement for review:
  - a. confirm the decision complained of, with or without such modifications as it considers appropriate;
  - b. substitute a different decision for the original decision; or
  - c. reach a decision, where the complaint is that no decision has been reached.Clearly, only paragraphs a. and b. applied in this case. A response had been provided to the request, albeit one Mr and Mrs Sinclair regarded as incomplete.
12. Section 21(5) then requires the public authority to give the applicant notice in writing of what it has done under subsection (4), with a written statement of its reasons for so doing. Section 21(10) also requires that this statement include details of the applicant's rights of application to the Commissioner and appeal to the Court of Session.
13. In its response to Mr Sinclair's requirement for review, NHS Lothian offered Mr Sinclair the opportunity to meet with it to discuss his concerns, or alternatively to pursue the request with its Customer Relations and Feedback Team.
14. NHS Lothian explained that when it received the email of 17 September 2013 from Mr Sinclair, it felt that the requests made by Mr and Mrs Sinclair were continuing to change and expand. The response made to this email was intended to address their concerns and clarify what they were seeking. It acknowledged that appropriate technical advice should have been sought on the handling of the request.
15. Having considered Mr Sinclair's requirement for review, the Commissioner accepts that it sought documents in addition to those specified in the initial request for information (and therefore contained a new information request). However, she is also satisfied that it expressed dissatisfaction that the initial request had not been dealt with in full (i.e. the information requested had not been provided in full). The review should have addressed that area of dissatisfaction, with an outcome meeting the requirements of section 21(4). NHS Lothian failed to do this. In addition, NHS Lothian failed to provide Mr Sinclair with details of his rights of application and appeal. The Commissioner therefore finds that NHS Lothian's response to Mr Sinclair's requirement for review failed to comply with sections 21(4), (5) and (10) of FOISA.



16. In their application, Mr and Mrs Sinclair expressed dissatisfaction as to the time taken by NHS Lothian to provide the information they requested. Mr and Mrs Sinclair also commented that it was only as a consequence of them contacting the Customer Relations and Feedback Team that they received the information.
17. NHS Lothian explained that it considered its response of 5 September 2013 provided Mr and Mrs Sinclair with the relevant parts of the policy, highlighted as requested. It would have been more straightforward to reach a conclusion on this point had NHS Lothian responded properly to the requirement for review dated 17 September 2013. In any event, Mr and Mrs Sinclair are now satisfied that they have received all the information they were seeking.
18. The Commissioner cannot identify a specific breach of FOISA in the time taken for Mr and Mrs Sinclair to obtain this information. However, she considers it reasonable to comment that the proper handling of Mr and Mrs Sinclair's requirement for review (which is the key issue in this case) might well have brought the matter to a conclusion more quickly. Certainly, that should not have required a further request for information, as made by Mr and Mrs Sinclair before they received the information.

## DECISION

The Commissioner finds that Lothian Health Board (NHS Lothian) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr and Mrs Sinclair.

The Commissioner finds that, in failing to provide a proper response to Mr Sinclair's requirement for review, with details of Mr Sinclair's right to apply to the Commissioner and appeal to the Court of Session, NHS Lothian failed to comply with section 21 of FOISA.

Given that Mr and Mrs Sinclair now have the information they were seeking as a consequence of a subsequent request for information, the Commissioner does not require NHS Lothian to take any action in respect of these failures in response to Mr and Mrs Sinclair's application.

Decision 006/2014  
Mr and Mrs Sinclair  
and Lothian Health Board



## Appeal

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Should either Mr and Mrs Sinclair 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.

**Margaret Keyse**  
**Head of Enforcement**  
**21 January 2014**



## Appendix

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### 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.
- ...
- (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.
- ...

##### 21 Review by Scottish public authority

- ...
- (4) The authority may, as respects the request for information to which the requirement relates-
- (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
  - (b) substitute for any such decision a different decision; or
  - (c) reach a decision, where the complaint is that no decision had been reached.
- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.
- ...
- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.