

Decision Notice

Decision 048/2019: Mr C and the Risk Management Authority

Policy approach to individuals with an Autistic Spectrum Disorder

Reference No: 201900124

Decision Date: 21 March 2019



Scottish Information
Commissioner

Summary

RMA was asked about its policy, practice and guidance regarding individuals with an Autism Spectrum Disorder.

RMA gave notice that it did not hold most of the information requested. It refused to comply with one part of the request as the cost of providing the information was estimated at more than £600.

The Commissioner investigated and found that RMA had complied with FOISA in responding to the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 17(1) (Notice that information is not held)

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 26 November 2018, Mr C made a request for information to the Risk Management Authority (RMA). His request was in eight parts, seven of which are considered in this decision notice:

Request 1.

RMA policy anent individuals with an Autism Spectrum Disorder (including Asperger's Syndrome) (ASD) both generally and in particular with regard to (i) risk assessment and (ii) risk management in terms of its s.149 Equality Act 2010 (EA) Public Sector Equality Duty (PSED).

Request 2.

Evidence that RMA has given proper consideration to the impact that its policies and practices have, or are likely to have, on individuals with an ASD by providing:

- (a) names and addresses of bodies and (where appropriate) individuals consulted by RMA – including in particular the involvement of individuals with an ASD – in gathering equality evidence anent the needs of individuals with an ASD;
- (b) the equality evidence provided by the bodies and individuals referred to at (a) above;
- (c) evidence of due regard to its PSED in decision making by RMA anent individuals with an ASD;
- (d) evidence that RMA decision makers including Accredited Risk Assessors are aware of and understand their EA duties;

- (e) evidence that RMA decision makers including Accredited Risk Assessors have given due weight to the equality needs of individuals with an ASD in making decisions;
- (f) guidance and criteria provided to RMA to decision makers including Accredited Risk Assessors to ensure they have due regard to the equality needs of individuals with an ASD;
- (g) evidence how RMA has due regard to its PSED in relation to other bodies (e.g. the Scottish Prison Service, Parole Board for Scotland, and local authority criminal justice social work services) anent the equality needs of individuals with an ASD.

Request 3.

Specific adjustments made by RMA for individuals with an ASD, in particular with regard to (i) risk assessment and (ii) risk management.

Request 4.

Individuals subject to Risk Management Plans (RMP) broken down by year of original RMP: (i) total number; (ii) number who have identified as having an ASD and (iii) number of RMPs modified to take account of ASD where applicable.

Request 5.

Evidence how RMA complies with each of the goals of the Scottish Government's "Strategy for Autism".

Request 6.

Evidence how RMA complies with Action 79 of the Scottish Government's "Delivery Plan for the United Nations Convention on the Rights of Persons with Disabilities" (UNCPRD), as set out in its document "A Fairer Scotland for Disabled People".

Request 7.

Where RMA fails to comply with (a) the Scottish Government's Strategy for Autism and/or (b) Action 79 of the Scottish Government's Delivery Plan for the UNCPRD, specify (i) the measures that are being taken to ensure compliance and (ii) the date by which it will be fully compliant.

2. RMA responded on 18 December 2018. It explained that it does not have a specific policy for individuals with an ASD, but fulfils its duty under the EA in a number of ways (further detail was given). It stated that it did not hold information covered by parts 1, 2 (except 2(d)), 3, 5, 6 and 7 of Mr C's request. In relation to part 2(d), RMA provided a brief answer.
3. In relation to part 4 of Mr C's request, RMA stated that each individual subject to an Order of Lifetime Restriction (OLR) must have an RMP, and provided a breakdown of the number of initial RMPs approved in each year since the OLR sentence was introduced. RMA stated that it did not routinely record whether OLR offenders are identified as having an ASD, and to gather this information would require each RMP to be reviewed. It estimated the cost of this task at £2,403. It stated that, as the cost exceeded £600, it was not required to provide the information.
4. On 21 December 2018, Mr C wrote to RMA requesting a review of its decision. He provided detailed reasons why he believed that RMA should hold the information he had asked for. In summary, his view was that RMA would require the information in order to ensure compliance with its statutory duties under section 149 of the EA (the Public Sector Equality Duty (PSED)). He stated that the PSED requires RMA to develop specific policies for

individuals with an ASD as a significant class generally and in particular for risk assessment and minimisation, risk management, publication of guidance and training of risk assessors. In relation to part 4 of his request, Mr C disputed the cost estimate.

5. RMA notified Mr C of the outcome of its review on 15 January 2019. In relation to the parts of its response under consideration in this decision notice, it upheld its previous response, while noting that it had underestimated the cost of complying with part 4.
6. On 18 January 2019, Mr C applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He was dissatisfied with the outcome of RMA's review of the estimated cost of complying with part 4 of his request, stating that there was a reasonable expectation that the information should be held electronically and a keyword search should take minutes. In relation to the "information not held" responses to other parts of his request, he indicated that RMA should have interpreted his request less narrowly.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr C 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 8 February 2019, RMA was notified in writing that Mr C had made a valid application. The case was then 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. RMA was invited to comment on this application and to answer specific questions. These related to the cost of complying with part 4 of the request, and how it had established that it did not hold information covered by the other parts of the request.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both Mr C and RMA. He is satisfied that no matter of relevance has been overlooked.

Section 17(1) – Notice that information is not held

11. RMA gave Mr C notice that it did not hold any information covered by parts 1, 2, 3, 5, 6 or 7 of his request, with the exception of part 2(d).
12. In terms of 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. If no such information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice of this in writing.
13. The standard of 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 also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.

RMA's submissions

14. In its response to Mr C, RMA stated that it does not have a specific policy for individuals with an ASD. It has a statutory function to publish standards and guidelines for risk assessment and management. It asserted that it fulfils its duty under the EA in a number of ways: it produces equality impact assessments for these publications; and RMA's various published standards and guidelines "promote an individualised formulation-based approach to risk assessment, using structured professional judgement." It noted that its latest publications include "content on the role of formulation, victim considerations, and the importance of attending to protected characteristics." RMA considered that it pays due regard to the EA and advances equality.
15. In its submissions to the Commissioner, RMA reiterated its response to Mr C, and also addressed each part of his request, providing reasons to support its position that, in each case, it did not hold recorded information.
16. In relation to requests 2(a) and (b) (names and addresses of parties consulted by RMA re. needs of individuals with an ASD; the equality evidence provided by these parties), RMA submitted that it has not carried out targeted or specific consultations on ASD and therefore does not hold any relevant information. RMA "gives advice and guidance on risk assessment and management to cover its broad application across violent and sexual offenders in Scotland".
17. RMA considered that requests 2(c) and (e) asked broadly the same question (evidence of due regard to the PSED in decision making anent individuals with an ASD; evidence that RMA decision makers, including accredited assessors, give weight to the equality needs of individuals with an ASD). RMA commented that it has responsibility to approve OLR RMPs, and reviews them to ensure that the plans pay due regard to its standards and guidelines. However, decisions, interventions and adaptations for individual OLR offenders form part of the day to day management of offenders and as such are a matter for the relevant lead authority, not RMA.
18. In relation to assessors accredited by RMA (request 2(e)), RMA explained that these assessors are accredited to undertake risk assessment reports on behalf of the High Court. They are not RMA employees and their reports are court documents subject to defence critique. RMA does not gather evidence on how much weight the assessors give to the equality of individuals with an ASD.
19. In request 2(f), Mr C asked for guidance and criteria which RMA provides to decision makers, including accredited risk assessors, to ensure they have due regard to the equality needs of individuals with an ASD. The RMA submitted that it has not issued any such guidance and criteria.
20. In relation to request 2(g) (evidence of RMA's due regard to its PSED in relation to other bodies anent the needs of individuals with an ASD), RMA submitted that the question suggests that RMA has a responsibility for how other public bodies have regard to the needs of individuals with an ASD. It stated that it does not hold any information on this.
21. In part 3 of Mr C's request, he asked about specific adjustments made by RMA for individuals with an ASD in particular with regard to risk assessment and risk management. RMA reiterated the response it had provided to Mr C on 18 December 2018, in which it noted that the responsibility for managing offenders rests with lead authorities, such as the Scottish Ministers, Local Authorities or the National Health Service (NHS). RMA stated that it does

not manage offenders or produce RMPs, so has no capacity to make specific adjustments for individuals.

22. Part 5 of Mr C's request asked for evidence of RMA's compliance with the goals in the Scottish Government's Strategy for Autism. RMA submitted that, after reviewing the goals in the strategy, it found that they were aimed primarily at service providers, Local Authorities or the NHS: it was therefore not necessary or possible for RMA to "comply with each goal".
23. In part 6 of his request, Mr C asked for evidence of compliance with Action 79 of the Scottish Government's Delivery Plan for the UNCRPD. Action 79 is: "We will work together to explore how the justice system could better understand and respond to individuals with autism as they interact as witnesses, victims, suspects or offenders". RMA submitted that the delivery plan was developed and is being taken forward by the Scottish Government. RMA has not been approached as part of this plan (although it entertained the possibility that it might be consulted in future). RMA reiterated that it does not hold any relevant information.
24. Given its submissions in relation to parts 5 and 6 of the request, RMA submitted that part 7 of the request was "not applicable". (Part 7 begins "Where the RMA fails to comply with 5 or 6 above...". The Commissioner understands RMA's view is that part 7 is based on a misunderstanding of its responsibilities.)

Mr C's submissions

25. In his request for review, Mr C provided detailed reasons for believing that RMA should hold information covered by his request. He argued that, as a public authority listed in Schedule 19 of the EA, RMA must have due regard to its duty to advance equality of opportunity for individuals with protected characteristics; to remove or minimise disadvantage; to take steps to meet the needs of individuals that are different to persons who do not have the protected characteristic; and to take account of disabled person's disabilities including, where necessary, treating them more favourably than others (the PSED).
26. Mr C described the assessment of an individual with an ASD which, in his view, highlighted the consequences of RMA's failure to provide clear and explicit guidance and training on the proper assessment of individuals with an ASD. He gave a detailed account of the principles and approach that he believed were required in order to ensure that all individuals with an ASD in the Scottish criminal justice system are properly identified and risk assessed. In his view, RMA should take a lead role in this.
27. Mr C acknowledged that responsibility for the management of individual offenders with OLR sentences, including the production of risk management plans, rests with lead authorities such as the Scottish Ministers, NHS, and Local Authorities rather than RMA. However, he argued that it was a logical step for RMA to take on responsibility for the accreditation and oversight of offender programmes (in particular, for sexual and violent offending). He stated that these require adjustment in order to deliver full benefits to participants with an ASD.

Information not held - the Commissioner's conclusions

28. In his application for a decision, Mr C submitted that "any relevant information relating to the requested information should be provided...rather than applying an overly rigid interpretation of the information sought by me". RMA commented that the questions in the information request were numerous and very specific, and each question had been answered accurately.
29. The Commissioner accepts that Mr C's questions were specific, rather than general requests for information. He does not accept Mr C's suggestion that RMA's interpretation of the request was "overly rigid". It was reasonable for RMA to consider whether it held information

specifically relevant to each part of Mr C's request. Mr C's requests did not lend themselves to a more general interpretation.

30. The Commissioner has concluded that while Mr C expects RMA to comply with its statutory duties under the EA (the PSED) by developing policy, guidance and practice which takes specific account of individuals with an ASD, this does not correspond to the RMA's view of what is required in order to comply with those statutory duties. (It is clearly outwith the Commissioner's remit to judge this matter.)
31. The Commissioner notes that Mr C (in his request for review, 21 December 2018) apparently accepted that RMA is not a lead authority with responsibility for producing RMPs for the management of individual offenders with OLR sentences.
32. RMA has explained why it does not have a leading or active role in relation to some of the other responsibilities or areas of policy indicated in Mr C's information request. Given RMA's understanding of its role and activities, the Commissioner accepts that it is unlikely to hold information covered by Mr C's request, which is predicated on a different view of RMA's responsibilities.
33. For the reasons explained above, the Commissioner accepts that, on the balance of probabilities, RMA correctly gave notice to Mr C that it did not hold any recorded information covered by parts 1, 2 (excluding 2(d)), 3, 5, 6 and 7 of his request, and in doing so complied with section 17(1) of FOISA.

Section 12(1) – Excessive cost of compliance

34. RMA refused to comply with part 4 of Mr C's request on the grounds that it would cost more than £600 to provide the information.
35. Under section 12(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the amount prescribed for that purpose in the Fees Regulations. This amount is currently £600 (regulation 5). Consequently, the Commissioner has no power to order a public authority to disclose information should he find that the cost of responding to a request for that information exceeds this sum.
36. The projected costs the public authority can take into account in relation to a request for information are, according to regulation 3 of the Fees Regulations, the total costs, whether direct or indirect, the authority reasonably estimates it is likely to incur in:
 - (i) locating,
 - (ii) retrieving, and
 - (iii) providing the information requested in accordance with Part 1 of FOISA.
37. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.
38. An authority can take into account the time taken to redact information in order that a response can be provided when calculating the costs involved, but cannot take account of the cost of determining:
 - (i) whether it actually holds the information requested, or
 - (ii) whether or not it should provide the information.

39. RMA provided Mr C with a breakdown of the number of initial RMPs approved in each year since 2007, when the OLR sentence was introduced. However, Mr C also asked how many individuals subject to these RMPs had identified as having an ASD, and how many RMPs had been modified to take account of ASD where applicable.
40. RMA submitted that it was unable to obtain this information from a keyword search of electronic documents, as suggested by Mr C. Some RMPs were electronic documents but others were scanned copies which could not be searched in this way, and would require someone to read through the document.
41. RMA submitted that the wording in each plan would need to be carefully reviewed, to ascertain whether ASD was indeed a factor that had been taken into account, even if a word search had retrieved a relevant word. There would be occasions where the lead authority had carried out assessments for ASD that did not lead to a medical diagnosis.
42. RMA noted that updated or amended RMPs are produced whenever there is a significant change, and some OLR offenders have seven or more versions of their RMP in their case file. Each would need to be checked. RMA also argued that, to undertake the task completely, checks would also need to be made of other case information, such as Annual Implementation Reports or Case Review meeting records, as there could be instances of ASD being considered by Lead Authority Case Managers but no further action taken or deemed appropriate; and therefore not included in the RMP; or occasions where ASD had been identified but the RMP not yet updated.
43. RMA argued that these additional checks would be necessary, as Mr C has asked how many RMPs were modified to take account of ASD. It considered this to be a significant task, requiring each RMP to be analysed carefully to identify any considerations, modifications or actions that took account of ASD. It noted that the RMP template has different sections for different aspects, so “finding a key word in one section would not be the end of the search: decisions, modifications, approaches etc may be present within different sections and may not always be written in an unambiguous manner or related solely to ASD in isolation.”
44. RMA estimated that it would take an average of one hour to review each RMP for the information requested by Mr C. It had based its cost calculation on the 178 initial RMPs created since 2007, and submitted that, for the reasons outlined above, the actual time required would be more than this. The RMA stated that its charge per hour would be £13.50.

Excessive costs – the Commissioner’s conclusion

45. The Commissioner accepts that the information covered by part 4 of Mr C’s request is not easily obtainable through a key word search. He accepts RMA’s submission that the RMPs require careful scrutiny and analysis to establish whether the individual offender has identified as having an ASD, and to ascertain whether the RMP has been modified to take account of ASD where applicable.
46. The Commissioner accepts that RMA would be obliged to examine at least 178 initial RMPs to obtain the information, and possibly other versions of the RMP too. Even if an hour is a generous estimate of the amount of time to review a single RMP, the Commissioner accepts that the cost of reviewing 178 documents is likely to be well in excess of the £600 limit in the relevant Fees Regulations.
47. Accordingly, the Commissioner accepts that RMA was not obliged to comply with part 4 of Mr C’s request, in terms of section 12(1) of FOISA.

48. Given the number of RMPs approved since 2007, the Commissioner cannot identify any way in which Mr C could bring his request within the cost threshold, apart from limiting the number of years covered by his request. As RMA has provided him with details of the numbers of initial RMPs approved in each year, it may be possible for him to do this.

Decision

The Commissioner finds that the Risk Management Authority (RMA) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr C.

Appeal

Should either Mr C or RMA 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 March 2019

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.
- ...
- (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.
- ...
- (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.
- ...

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.
- ...

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.

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