



Scottish Information
Commissioner

**Decision 162/2006 – Mr Paul Westmorland and
NHS Grampian**

*Request for information relating to dental practitioners, information
about a particular, named dentist and information about the care of
a particular, named patient.*

**Applicant: Mr Paul Westmorland
Authority: Grampian NHS Board
Case No: 200600104
Decision Date: 28 August 2006**

**Kevin Dunion
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Decision 162/2006 – Mr Paul Westmorland and Grampian NHS Board

Request for information relating to dental practitioners, information about a particular, named dentist and information about the care of a particular, named patient – partially withheld on the basis of section 17 of the Freedom of Information (Scotland) Act 2002 (FOISA) – information not held – section 38(1)(b) of FOISA – personal information

Facts

Mr Westmorland submitted an information request to Grampian NHS Board (NHS Grampian) for answers to 40 questions which he posed concerning dental practitioners, information about a particular, named dentist and information about the care of a named patient. NHS Grampian provided information in response to 12 of Mr Westmorland's questions. NHS Grampian withheld certain information from Mr Westmorland on the basis that the information was exempt information as it constituted personal data and was exempt in terms of section 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). NHS Grampian indicated that it did not hold certain information and so cited section 17 of FOISA – notice that information is not held. The decision was upheld by NHS Grampian on review and Mr Westmorland appealed to the Commissioner for a decision.

Outcome

The Commissioner found that NHS Grampian had complied with Part 1 of FOISA and had applied the terms of section 17 of FOISA correctly in relation to some of the information it withheld from Mr Westmorland.

The Commissioner found that NHS Grampian had complied with Part 1 of FOISA and had applied the exemption under section 38(1)(b) correctly in relation to some of the information it withheld from Mr Westmorland. It had not, however, applied section 38(1)(b) correctly to Mr Westmorland's question 8, 14 and 15, where it should instead have applied section 17.

The Commissioner found that NHS Grampian had complied with Part 1 of FOISA by providing full answers to certain of Mr Westmorland's questions, but required NHS Grampian to provide a response to the second part of Mr Westmorland's question 1.



Appeal

Should either Mr Westmorland or NHS Grampian wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

Background

1. On 4 October 2005, Mr Westmorland submitted a request for information to NHS Grampian. In this request, Mr Westmorland was seeking answers to 40 questions in relation to general matters concerning dental practitioners, matters concerning a particular, named dentist and also information about the care of a named patient.
2. NHS Grampian responded to Mr Westmorland's request on 9 November 2005. In its response, NHS Grampian provided information in its answers to 12 of Mr Westmorland's questions. NHS Grampian indicated in its responses to other questions that certain of the information was not held by NHS Grampian and so it cited section 17 of FOISA in relation to that information. In a number of instances, it advised Mr Westmorland where the relevant information might be found. NHS Grampian also sought to rely on the exemption under section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i), for withholding certain information.
3. On 16 November 2005, Mr Westmorland submitted a request for review to NHS Grampian. Mr Westmorland asked NHS Grampian to review its response to 16 questions which he highlighted. One of these questions (question 6) was a new question which Mr Westmorland only addressed to NHS Grampian at this stage. Mr Westmorland also asked two supplementary questions in addition to those he had already asked: again these questions were only raised when the review was requested. These additional and supplementary questions were not followed up by requests for review and therefore cannot be considered in this decision.
4. NHS Grampian responded to the request for review on 19 December 2005. In its response, NHS Grampian upheld its original decision in respect of the answers that had been given to the 16 questions highlighted by Mr Westmorland. NHS Grampian did provide some information in relation to the additional questions that Mr Westmorland had addressed to it.



5. On 21 December 2005, Mr Westmorland applied to me for a decision as to whether NHS Grampian had breached Part 1 of FOISA in withholding certain information. The case was subsequently allocated to an investigating officer.

The Investigation

6. Mr Westmorland's appeal was validated by establishing that he had made a valid information request to a Scottish public authority under FOISA and had appealed to me only after asking NHS Grampian to review its response to his request.
7. A letter was sent by the investigating officer to NHS Grampian on 19 January 2006, asking for its comments on Mr Westmorland's application in terms of section 49(3)(a) of FOISA. NHS Grampian was asked to provide, amongst other items, all of the information which had been withheld and an analysis of the exemptions that it was relying on in withholding certain information. NHS Grampian was also asked to provide details of its consideration of the public interest test if applicable.

Submissions from NHS Grampian

8. As mentioned above, NHS Grampian has cited section 17 of FOISA and has indicated that in some cases it does not hold the information which would answer Mr Westmorland's questions. NHS Grampian has also sought to rely on the exemption under section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i). I will consider NHS Grampian's reasoning for relying on section 17 and the exemption under section 38(1)(b) further in the section on Analysis and Findings below.

Submissions from Mr Westmorland

9. In his submissions to my Office, Mr Westmorland has identified his concerns in relation to the manner in which the NHS dealt with a specified, named dentist whose practices had caused concern.



The Commissioner's Analysis and Findings

10. In its response to my Office, NHS Grampian provided a copy of the questions that Mr Westmorland asked together with its responses. NHS Grampian also provided me with a list of the questions that Mr Westmorland requested a review of its answers to, together with its answers and comments. An explanation was provided by NHS Grampian of its reliance on section 17 of FOISA and the exemption under section 38(1)(b)
11. In its submissions to my Office, NHS Grampian has advised that it provided a full response to some of the questions that were posed by Mr Westmorland, and as a result has not applied any exemptions to information which Mr Westmorland sought under questions 1, 2, 3, 4, 5, 12 and 16. I am satisfied on the basis of the submissions that I have received from NHS Grampian that they have sought to provide a full answer to Mr Westmorland in relation to questions 2, 3, 4, 5, 12 & 16. Mr Westmorland has identified no basis for being dissatisfied with these responses and in all the circumstances I am satisfied that NHS Grampian dealt with these questions in accordance with Part 1 of FOISA.
12. However, I am not satisfied that NHS Grampian has addressed Mr Westmorland's first question fully. In particular, I am not satisfied that it has addressed the second part of question 1. I therefore require NHS Grampian to respond to the second part of question 1 for Mr Westmorland.

The application of section 17 – Notice that information is not held

13. As indicated above, NHS Grampian has sought to rely on section 17 of FOISA in not providing certain information to Mr Westmorland.
14. Section 17 of FOISA applies 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.



In such circumstances, the authority 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.

15. Of the responses by NHS Grampian to the 16 questions in respect of which Mr Westmorland sought a review, NHS Grampian has cited section 17 in response to three of these (questions 10, 11 and 13).
16. In order to determine whether NHS Grampian was correct to cite section 17 in respect of information that would address the questions posed by Mr Westmorland, I must be satisfied that NHS Grampian does not (and did not at the time it dealt with Mr Westmorland's request) hold this information.
17. In its submissions to my Office concerning questions 10 & 11, NHS Grampian has indicated that no searches were carried out by it to determine whether it held the information requested. The reason that NHS Grampian has given for not having carried out a search is that it, as a health board, has no responsibility for the subject matter of these questions. NHS Grampian submits that Practitioner Services Division Dental (which is a separate independent division within the NHS) has sole responsibility for these matters. Therefore, NHS Grampian has advised that this is why no information which would address these questions is held by it.
18. In respect of its reliance on section 17 in relation to question 13, NHS Grampian has submitted that no searches were carried out by it to determine whether it held the information requested. NHS Grampian has advised that it has no responsibility in relation to the subject matter of this question. NHS Grampian submits that Mr Westmorland did forward copy correspondence to it in December 2005 (i.e. after his request to the authority), but that all of the correspondence relating to this matter had passed between Mr Westmorland or the named dentist and the Practitioner Services Division Dental, Scottish Dental Practice Board, Scottish Dental Estimates Board, and/or the Scottish Home and Health Department. NHS Grampian states that it was not copied in on this correspondence. Therefore, as it did not receive any of the correspondence relating to this matter, NHS Grampian has concluded that no information which would address Mr Westmorland's questions is held by it.
19. In its submissions to my Office, NHS Grampian has provided some background information in relation to copies of correspondence that Mr Westmorland has forwarded to it concerning the subject matter of certain questions raised by Mr Westmorland, including questions 10 and 11. NHS Grampian has advised that this correspondence, in which NHS Grampian is named, was received by Mr Westmorland in 1990 and was from various national boards. NHS Grampian has submitted that any correspondence that it received at that time concerning the matters in question would have been destroyed some time ago in line with the Records Management Policy which was in existence at that time.



20. In communication with the investigating officer, NHS Grampian has provided a copy of the Records Management Policy which was current at that time. In reading this policy I am satisfied that the class of documents into which this information would fall into was only required to be retained by NHS Grampian (had it been held by it) for a period of three years. Therefore, I am satisfied that the information in question would not now be held by NHS Grampian.
21. I am satisfied on the basis of the submissions that have been advanced by NHS Grampian that the information which would address Mr Westmorland's questions 10, 11 & 13 is not held by NHS Grampian. I understand that this information may be held by other divisions of the NHS (i.e. different Scottish public authorities, as Mr Westmorland has been advised by NHS Grampian) and as such it may be prudent for Mr Westmorland to direct these questions to these other divisions. I am satisfied that NHS Grampian has relied on the terms of section 17 of FOISA correctly in relation to these questions.

The application of section 38(1)(b) – Personal information

22. In order for NHS Grampian to be able to rely on the exemption under section 38(1)(b), as read in conjunction with section 38(2)(a)(i), it must show that the information which has been requested is personal data for the purposes of the Data Protection Act 1998 (DPA) and that release of the information would breach any of the data protection principles (i.e. the principles in schedule 1 to the DPA).
23. NHS Grampian relied on the exemption under section 38(1)(b), read in conjunction with section 38(2)(a)(i), in relation to 5 of the 16 questions in respect of which Mr Westmorland requested a review.
24. In justifying its reliance on the exemption under section 38(1)(b), NHS Grampian has submitted that the information which it is withholding in respect of questions 7, 8, 9, 14 & 15 falls within the definition of personal data as laid down in section 1(1) of the DPA. NHS Grampian asserts that the information is personal data relating to a particular, named dentist and therefore that it is the personal data of that person. NHS Grampian considers that release of this information would breach the first data protection principle, which requires that personal data shall be processed fairly and lawfully. The first principle also provides, more particularly, that personal data shall not be processed unless at least one of the conditions in schedule 2 of the DPA is met: in addition, in the case of sensitive personal data (as defined by section 2 of the DPA), at least one of the conditions in schedule 3 must be met.
25. In considering the application of the exemption, I first have to establish whether the information sought by Mr Westmorland is personal data as defined in section 1(1) of the DPA.



26. Section 1(1) of the DPA defines personal data as “data which relate to a living individual who can be identified –
- (a) from those data, or
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of the data controller,
- and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual”.
27. I also have to bear in mind the effect that the Court of Appeal case of *Durant v Financial Services Authority* [2003] EWCA 1746 had on the interpretation of the definition of personal data under section 1(1) of the DPA. This case highlighted that for information to be personal data it must relate to an individual, be biographical in respect of the individual concerned to a significant extent and must have that individual at its focus – in short it must affect the individual’s privacy.
28. Finally, it has to be borne in mind that disclosure under FOISA is, by definition, disclosure to the world at large and not simply to the applicant.
29. NHS Grampian has submitted that all of the information held by it and falling within the scope of questions 7, 8, 9, 14 and 15 is the personal data of the dentist, who is the focus of the information. It is biographical in a significant sense in respect of the dentist in his professional (and in some respects his personal) capacity and any disclosure would affect his privacy. Having considered the information and the submissions made by NHS Grampian, I am satisfied that this is the case to some extent. In relation to questions 8, 14 and 15, however, I have to conclude from the submissions and information provided to me that no information is held and therefore that NHS Grampian should, in response to these questions, have given Mr Westmorland notice in terms of section 17 of FOISA.
30. I am also of the view that certain of the information withheld from Mr Westmorland in relation to question 9 (documents WI2 and WI3) contains personal data of dental patients, and that the data in question (being information about the health of those individuals) falls within the definition of sensitive personal data contained in section 2 of the DPA.
31. As indicated above, however, it is not sufficient that the information falls within the scope of what is deemed to be personal data for it to be exempt under section 38(1)(b), read in conjunction with section 38(2)(a)(i). The release of the information would have to be contrary to one of the data protection principles.



32. In its submissions to my Office, NHS Grampian has contended that if this information were to be disclosed it would breach the first data protection principle. It has argued that the dentist would have had no expectation that the information would be made publicly available and therefore that disclosure would not be fair or lawful.
33. In order for information to be processed in a manner which is deemed to be fair and lawful, the DPA requires in particular that the information shall not be processed unless at least one of the conditions in schedule 2 to the DPA is met. In taking into consideration the information that has been withheld from Mr Westmorland in documents WI1 and WI2, I have taken into account the submissions made by NHS Grampian that, in their view the release of this information would be unfair and that none of the conditions in schedule 2 would be met if the information were to be released. I accept that the named dentist would have an expectation that the information in WI1 would be retained by NHS Grampian for his personal records only. I am not satisfied that the dentist would have the expectation that this information would be put into the public domain. I also accept the submissions from NHS Grampian in relation to document WI2. I am therefore not satisfied that release of the information would be fair or that any of the conditions in schedule 2 of the DPA would be met if the information were to be released. I accept, therefore, that disclosure of this information under FOISA would be in breach of the first data protection principle.
34. I am satisfied, therefore, that in relation to the information contained within documents WI1 and WI2 which NHS Grampian has withheld from Mr Westmorland, that it has relied on the exemption in section 38(1)(b), read in conjunction with section 38(2)(a)(i), correctly.
35. In relation to documents WI2 and WI3 and their bearing on individual dental patients, NHS Grampian has not been able to clarify what expectations those patients would have in respect of the information that is held in relation to their health records. I do not, however, have any evidence to suggest that these patients have consented to this information being processed in order to respond to a request under FOISA, or to processing for any remotely similar purpose. Furthermore, I am not satisfied that disclosure of the information in these documents would satisfy at least one of the conditions in schedule 2 of the DPA and at least one of the conditions in schedule 3. I am satisfied, therefore, that release of this information in response to this request would not be fair or (given the potential for a breach of confidentiality as a consequence of release) lawful, and therefore I accept that its disclosure under FOISA would be in breach of the first data protection principle.
36. I am satisfied, therefore, in relation to the information contained in documents WI2 and WI3 (insofar as it is the personal data of individual dental patients), that it has relied on the exemption in section 38(1)(b) read in conjunction with section 38(2)(a)(i) correctly.



37. Having considered documents WI4 and WI5, I cannot agree with NHS Grampian that these provide answers to any of the questions asked by Mr Westmorland and therefore do not regard them as falling within the scope of his request for information or his application to me.

Decision

I find that in withholding information in response to questions 10,11 & 13 asked by Mr Westmorland, NHS Grampian dealt with Mr Westmorland's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA). I find that the terms of section 17 of FOISA were relied upon correctly by NHS Grampian in withholding this information.

I find that, in withholding information in response to Mr Westmorland's questions 7 and 9, NHS Grampian dealt with Mr Westmorland's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA). I find that the exemption in section 38(1)(b) was relied upon correctly by NHS Grampian in withholding this information.

However, I find that NHS Grampian did not apply the correct exemption under FOISA in relation to its response to Mr Westmorland's questions 8, 14 and 15. I find that NHS Grampian should have relied on the terms of section 17 of FOISA in this case, instead of the exemption under section 38(1)(b) of FOISA. I find, therefore, that NHS Grampian did not deal with Mr Westmorland's request for information in accordance with Part 1 of FOISA in that it did not comply with section 17 of FOISA.

I find that NHS Grampian did not provide Mr Westmorland with a response to the second part of his question 1, and require NHS Grampian to do so within 45 days of the date of this decision notice.

Kevin Dunion
Scottish Information Commissioner
28 August 2006