

Decision Notice



Decision 020/2009 Dr Bill McDowell and Lothian NHS Board

Handling of a claim

Reference No: 200800943

Decision Date: 24 February 2009

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Kevin Dunion

Scottish Information Commissioner

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Summary

Dr McDowell requested from Lothian NHS Board (NHS Lothian) copies of all information held in relation to the processing of a particular claim. NHS Lothian responded by withholding the information requested under section 36 of FOISA. Following a review, Dr McDowell remained dissatisfied and applied to the Commissioner for a decision.

In the course of the investigation, NHS Lothian disclosed a number of documents to Dr McDowell. In relation to the remaining document withheld, the Commissioner found that NHS Lothian had dealt with Dr McDowell's request in accordance with Part 1 of FOISA (the information in it being subject to litigation privilege) and therefore did not require NHS Lothian to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions) and 36(1) (Confidentiality)

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

1. On 29 April 2008, Dr McDowell wrote to NHS Lothian requesting the following information:
 - (a) Copies of all paper and electronic information held in relation to the processing by NHS Scotland Central Legal Office (the CLO) of claim number SB2/408/57 relating to NHS Lothian covering the period 15 May 2007 to 21 April 2008 inclusive;
 - (b) The name of the independent consultant physician who was asked to prepare a report giving his expert opinion;
 - (c) The date the independent consultant was contacted to provide this;
 - (d) The date of receipt of the independent consultant's report; and
 - (e) A copy of the independent consultant's report.



2. NHS Lothian responded on 16 May 2008. In its response, NHS Lothian provided Dr McDowell with information in response to requests (c) and (d). All other information was withheld under section 36(1) and (2) of FOISA, on the basis that it related to the processing of a claim.
3. On 21 May 2008, Dr McDowell wrote to NHS Lothian requesting a review of its decision. In particular, Dr McDowell questioned NHS Lothian's withholding of information relating to the processing of the claim under section 36 of FOISA, given that no legal proceedings had been raised. In any event, he believed disclosure to be in the public interest.
4. NHS Lothian notified Dr McDowell of the outcome of its review on 17 June 2008. NHS Lothian upheld its original decision that the information was exempt from disclosure in terms of section 36(1) of FOISA, stating that the information in question was exempt as a consequence of both legal advice privilege and litigation privilege. NHS Lothian also confirmed that in its view it would not be in the public interest to release the information. NHS Lothian also made a correction to the date relevant to request (d), which it had provided in its initial response to Dr McDowell.
5. On 26 June 2008, Dr McDowell wrote to the Commissioner, stating that he was 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. In his application, Dr McDowell presented his reasons for believing disclosure of the withheld information to be in the public interest.
6. The application was validated by establishing that Dr McDowell had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 9 July 2008, NHS Lothian was notified in writing that an application had been received from Dr McDowell and was asked to provide the Commissioner with any information withheld from Dr McDowell. NHS Lothian responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted NHS Lothian, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, NHS Lothian was asked to justify its reliance on section 36 of FOISA and to provide a schedule detailing which exemption/s it wished to apply to each piece of information it was withholding.



9. NHS Lothian responded with a schedule detailing the information it had identified as falling within the scope of Dr McDowell's request. NHS Lothian identified a number of documents it now confirmed it would be prepared to disclose to Dr McDowell. The remaining documents were withheld in terms of section 36(1) and 36(2) of FOISA. In support of its decision to withhold certain of the information requested, NHS Lothian provided its arguments, which included consideration of the public interest test in relation to 36(1) of FOISA.
10. NHS Lothian also identified and provided to the Commissioner (initially for information) a copy of the CLO legal file relating to the claim. Initially, it was NHS Lothian's assertion that this particular file fell outwith the scope of Dr McDowell's request, because it was not actually held by NHS Lothian at the time of the request. On further consideration, however, NHS Lothian accepted that the CLO held the file on its behalf and therefore that all documentation within this file fell within the scope of the request. NHS Lothian subsequently provided a schedule detailing which documents it was prepared to release from the CLO file and which documents it maintained were exempt from disclosure.
11. As part of its submission, NHS Lothian also provided the investigating officer with Dr McDowell's late father's medical notes and a complaints file. NHS Lothian advised that as part of the claim process these files had been sent to the CLO for consideration. Having been asked to clarify this point by the investigating officer, Dr McDowell confirmed that he was not looking for copies of his late father's medical file or copies of the previous complaints file. The purpose of his request was to obtain information relating to the processing of his claim.
12. The Commissioner acknowledges that during the course of the investigation, NHS Lothian decided to make available a number of documents falling within the scope of Dr McDowell's request. These, including information naming the independent consultant, were released to Dr McDowell during the investigation. As a consequence, only the independent consultant's report (the information sought in Dr McDowell's request (e)) remains to be considered in this decision.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Dr McDowell and NHS Lothian and is satisfied that no matter of relevance has been overlooked.

Section 36(1) of FOISA

14. NHS Lothian applied section 36(1) of FOISA to the independent consultant's report, stating that the exemption was claimed for information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. It argued that both legal advice privilege and litigation privilege applied to the information, adding that it had not waived privilege in this instance.



15. NHS Lothian went on to argue that its sole reason for communicating with the CLO (who act as NHS Lothian's legal advisers) arose from the intimation of the claim by Dr McDowell against it, adding that there was a greater public interest in withholding the information than in releasing it.
16. In NHS Lothian's view, there was no highly compelling reason why in this instance the Commissioner should overrule its right to confidentiality of communications with its legal advisers, or that in respect of litigation privilege. It submitted that in communicating with its legal advisers it was entitled to be able to do so fully and frankly, in confidence, in order to obtain comprehensive legal advice, thus enabling it to act with the greatest knowledge of the legality of its actions.
17. The exemption in section 36(1) of FOISA exempts from disclosure information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings. Among the types of communication which fall into this category are those which are subject to legal professional privilege. One aspect of legal professional privilege is litigation privilege, which covers documents created in contemplation of litigation (also known as communications *post litem motam*).
18. Communications *post litem motam* are granted confidentiality in order to ensure that any person or organisation involved in a court action can prepare their case as fully as possible, without the risk that their opponent will gain access to the material generated by their preparations. The privilege covers communications at the stage when litigation is pending or in contemplation. Whether a particular document was prepared in contemplation of litigation will be a question of fact, the key question often being whether litigation was actually in contemplation at a particular time.
19. Litigation privilege will apply to documents created by the party to the potential litigation, expert reports prepared on their behalf and legal advice given in relation to the potential litigation: the communication need not involve a lawyer to qualify. The litigation contemplated need never actually happen for the privilege to apply, and it will continue to apply after any litigation has been concluded.
20. In this particular case, the Council referred to a letter from Dr McDowell dated 15 May 2007. The letter entitled: Clinical negligence issues – care and treatment of [named individual]. It is clear to the Commissioner from this letter that Dr McDowell was, at the time of writing, contemplating a claim for compensation. The withheld document post dates this letter and relates directly to the consideration of Dr McDowell's claim for compensation.
21. The Commissioner has considered the timing and content of the correspondence in question and is satisfied that it stems from NHS Lothian contemplating possible litigation against it and, consequently, the Commissioner is satisfied that the withheld information is exempt by virtue of section 36(1) of FOISA.



The public interest test

22. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Where a public authority finds that this exemption applies to information which has been requested, it must go on to consider whether, in all circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption. Only if the public interest in maintaining the exemption (i.e. in withholding the information) does not outweigh that in disclosure is the authority is required to disclose.
23. In relation to the public interest test, for the reasons set out in paragraph 16 above, NHS Lothian stated that it considered the public interest in withholding the information in this instance outweighed the arguments in favour of releasing it.
24. Dr McDowell, on the other hand, is of the view that disclosure would be in the public interest in order to show that the investigation of the claim was conducted fairly and that public bodies are seen to be accountable for their actions. In the circumstances, including alleged delays and failures to keep him informed of progress, he believes it to be in the public interest to know about the processing of the claim in question and allow public scrutiny. He noted what he believed to be inconsistencies in evidence emerging from the complaints process and submitted that the release of the information would contribute to debate on a matter of public interest, i.e. the care and treatment of individuals under NHS care.
25. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48*, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege (including litigation privilege) in general. Consequently, while he will consider each case on an individual basis, he is likely to order the release of such communications in highly compelling cases only.
26. In this case, having considered the information in question, the Commissioner acknowledges a general public interest in authorities being open to scrutiny and accountable for their actions, but can see no more specific public interest in the disclosure of this particular information. On the other hand, as indicated above, there is a clear and compelling public interest in allowing the Council (like any other party to potential legal proceedings) to prepare fully for anticipated litigation without these preparations being open to examination by the other party. On balance, therefore, the Commissioner is satisfied in all the circumstances that any public interest in disclosure is outweighed by the public interest in maintaining the exemption in section 36(1).
27. Given that the Commissioner has found that the information considered in this decision was properly withheld under section 36(1) of FOISA, he is not required to go on to consider the application of section 36(2), which was also relied upon with respect to the report in question.



DECISION

The Commissioner finds that Lothian NHS Board acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 in withholding the report considered in this decision, following the request made by Dr McDowell.

Appeal

Should either Dr McDowell or NHS Lothian 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 after the date of intimation of this decision notice.

Margaret Keyse
Head of Enforcement
24 February 2009



Appendix

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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

...