

Decision Notice



Decision 084/2008 Mr John Falconer and the Common Services Agency for
the Scottish Health Service

Report produced by NHS Counter Fraud Services

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Scottish Information Commissioner

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Summary

Mr John Falconer (Mr Falconer) requested a copy of a report prepared by NHS Scotland Counter Fraud Services (CFS) into NHS Lothian's Laboratory Van Service from the Common Services Agency for the Scottish Health Service (the CSA). The CFS is part of the CSA. The CSA refused to provide the report on the basis that it was exempt under section 34 (Investigations by Scottish public authorities and proceedings arising out of such investigations) and section 35 (Law enforcement) of the Freedom of Information (Scotland) Act 2002.

Following an investigation, the Commissioner found that the CSA had been entitled to withhold the report on the basis that its disclosure would, or would be likely to, prejudice substantially its statutory function in relation to the prevention and detection of fraud and other irregularities within the NHS.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections: 1(1) (General entitlement); 2(1) (Effect of exemptions); sections 34(1)(a) and (b) (Investigations by Scottish public authorities and proceedings arising out of such investigations) and sections 35(1)(a), (b) and (g), (2)(a) and (b) (Law enforcement)

National Health Service (Functions of the Common Services Agency) (Scotland) Order 1974: article 3(o)

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 8 May 2007, Mr Falconer wrote to the CSA requesting either a copy of the full report commissioned by NHS Lothian (Laboratory Van Service) Edinburgh or a redacted version of the report if it was considered by the CSA that only some of the information contained in the report could be released to Mr Falconer.



2. The CSA responded on 17 May 2007, confirming that it held the information requested by Mr Falconer, but withholding the information on the basis of the exemptions in sections 34 and 35 of FOISA. On considering the public interest test set out in section 2(1)(b) of FOISA, the CSA concluded that the public interest in maintaining the exemptions (and thereby withholding the report) outweighed the public interest in disclosing it.
3. On 18 June 2007, Mr Falconer wrote to the CSA requesting a review of its decision.
4. The CSA notified Mr Falconer of the outcome of its review on 17 July 2007. The CSA upheld its original decision to withhold the information requested by Mr Falconer in its entirety by virtue of exemptions in sections 34 and 35 of FOISA.
5. On 18 July 2007, Mr Falconer wrote to the CSA in light of its response, to discuss the possibility of receiving a redacted version of the report, in line with his original request. The CSA, in responding to Mr Falconer's request, confirmed that the exemptions cited in its letter of 17 July 2007 applied to the report in its entirety and as such a redacted copy could not be released.
6. On 18 December 2007, Mr Falconer wrote to the Commissioner, stating that he was dissatisfied with the outcome of the CSA's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. Further correspondence subsequently took place with Mr Falconer to establish that his application to the Commissioner was valid, that he had made a request for information to a Scottish public authority (i.e. the CSA) and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

8. On 30 January 2008, the CSA was notified in writing that an application had been received from Mr Falconer and was asked to provide the Commissioner with the information which had been withheld from Mr Falconer. The CSA provided the Commissioner with a copy of the report sought by Mr Falconer and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the CSA on 20 February 2008, providing it with an opportunity to comment on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the CSA was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
10. The CSA responded with on 3 March 2008. In its response, the CSA confirmed its position that the entire report requested by Mr Falconer was exempt and that it wished to apply the exemptions in sections 34(1)(a)(i) and (ii), 34(1)(b), 35(1)(a), (b) and (g).



11. In presenting its case to the Commissioner, the CSA provided the investigating officer with a copy of the Minute taken during the Review Panel meeting to review Mr Falconer's request. The CSA confirmed that it was satisfied that the Minute contained all of the arguments it wished to rely on in the context of this investigation.

Submissions from the CSA

12. As noted above, Mr Falconer requested a copy of the report prepared by the CFS. The CFS is part of the CSA and provides a counter fraud service to NHS Scotland.
13. In support of its application of section 34(1)(a) and (b) of FOISA, the CSA confirmed that because the CFS is a Specialist Reporting Agency, it had a duty to conduct an investigation to ascertain whether a person should be prosecuted for an offence. (A Specialist Reporting Agency is a body which has the power to refer allegations of criminal behaviour directly to the Procurator Fiscal without prior referral of the matter to the police.)
14. The CSA explained that this duty is set out in the National Health Service (Functions of the Common Services Agency) (Scotland) Order 1974 as amended by article 2 of the National Health Service (Functions of the Common Services Agency) (Scotland) Amendment (No.2) Order 2003. The CSA added that the investigation conducted by the CFS may lead to a report being made to the Procurator Fiscal to enable it to be determined whether criminal proceedings should be instituted.
15. The CSA then went on to consider the public interest test and in doing so accepted that there is a public interest in ensuring that allegations of fraud in or against publicly funded bodies were investigated appropriately. In considering this issue, the CSA confirmed that it considered whether disclosure of the report would contribute to the prevention and detection of crime and confirmed that it sought guidance from the Commissioner's briefing notes available on the Commissioner's website. The CSA concluded that if the information were disclosed and it was believed that such information could be released into the public domain, this would put at risk the reporting of suspected fraud and the willingness of witnesses to provide information about suspected fraud. As this would inhibit the detection of fraud, the CSA did not consider that disclosure of the information would be in the public interest and therefore found, on balance, that the public interest lay in favour of withholding the report and maintaining the exemptions in section 34(1).
16. The CSA also considered the public interest in relation to the effective oversight of expenditure of public funds and concluded that sufficient mechanisms and channels were in place to satisfy the public interest in this context.
17. The CSA also asserted that the information requested was exempt in terms of section 35(1)(a), (b) and (g) of FOISA. The CSA submitted that in terms of section 35(1)(a) and (b) the information is exempt because the report had been prepared following an investigation into alleged fraud within the NHS Board in question, which had been conducted with the express purpose of establishing whether or not a crime had been committed and, if so, apprehending and prosecuting those suspected of committing that crime.



18. With respect to section 35(1)(g), read in conjunction with 35(2)(a) and (b), the CSA argued that this exemption was engaged because the CFS has a function in relation to the “prevention and detection of fraud and other irregularities in relation to all services under the National Health Service (Scotland) Act 1978” as set out in The National Services (Functions of the Common Services Agency) (Scotland) Amendment (no. 2) Order 2003. The CSA added that investigations in this case were undertaken to establish whether a person was responsible for a crime or other conduct which was improper. Following an investigation, and depending on the sufficiency of evidence, a report might be submitted to either the procurator fiscal in pursuit of criminal prosecution or to an NHS Board recommending disciplinary action.
19. The CSA takes the view that release of the report in question would prejudice substantially its ability to exercise its core statutory functions, including investigations into allegations of fraud or other improper conduct, in that it would inhibit informants coming forward with allegations of fraud and irregularities and inhibit the obtaining of candid and frank witness statements if it was believed that information would be released into the public domain.
20. Moving onto the public interest test, the CSA acknowledged the public interest in ensuring that allegations of fraud in or against publicly funded bodies are investigated appropriately. However, the CSA concluded that release of the information would put at risk the reporting of suspected fraud and the willingness of witnesses to co-operate in investigations and to be open in providing information in the future. This would have the effect of impeding the thoroughness of investigations, impacting adversely on the quality of evidence available to the CFS and the ability to pursue either criminal prosecutions or disciplinary action against perpetrators of fraud or other irregularities. On balance, then, the CSA concluded that the public interest in disclosing the report was outweighed by the public interest in withholding it.

Submissions from Mr Falconer

21. Mr Falconer’s main concerns related to ensuring that investigations such as those carried out by the CFS are done so in line with set procedures, adding that in his view it is in the public interest to ensure that investigations are carried out without reference to an authority’s own self interest.

Commissioner’s analysis and findings

22. In coming to a decision in this matter, the Commissioner has considered all of the information and submissions that have been presented to him by both Mr Falconer and the CSA and he is satisfied that no matter of relevance has been overlooked.



Section 35(1)(g) (Law enforcement)

23. Section 35(1)(g) of FOISA allows a Scottish public authority to withhold information if its disclosure would, or would be likely to, prejudice substantially its ability (or that of another Scottish public authority or public authority covered by the (UK) Freedom of Information Act 2000) to carry out its functions for any of the purposes listed in section 35(2). The CSA believe that the disclosure of the information withheld from Mr Falconer would, or would be likely to, prejudice substantially its ability to exercise its statutory functions relating to investigations into allegations of fraud or other improper conduct.
24. In considering the use of section 35(1)(g), the Commissioner must consider three fundamental points as follows:
- Does the CSA have a statutory function in relation to one or more of the purposes listed in section 35(2)?
 - If so, would disclosure of the information prejudice substantially, or be likely to prejudice substantially, the CSA's ability to carry out one or more of the functions listed in section 35(1)(g)?
 - Even if this is the case, does the public interest in maintaining the exemption outweigh the public interest in disclosure of the information?

The CSA's statutory functions

25. The CSA has argued that it has a statutory function in relation to the purposes contained in section 35(2)(a) (to ascertain whether a person has failed to comply with the law) and section 35(2)(b) (to ascertain whether a person is responsible for conduct which is improper). As noted above, the CSA has submitted that it has a function in relation to the prevention and detection and investigation of fraud or other irregularities in relation to all services provided under the National Health Service (Scotland) Act 1978. The CSA has provided the Commissioner with a copy of the relevant legislation, together with a copy of the CFS's partnership agreement with NHS Boards, as evidence of this function. The Commissioner is therefore satisfied that the CSA has a statutory function in relation to both of the purposes contained in section 35(2)(a) and (b) of FOISA.

Substantial prejudice to the exercise of its statutory function

26. Details of the CSA's arguments with respect to substantial prejudice are outlined above. Having considered the arguments and the content of the report in question, the Commissioner accepts the CSA's arguments that release of the report would inhibit input from informants and witnesses, and consequently would, or would be likely to, prejudice substantially the exercise by the CSA of the functions listed in section 35(2)(a) and (b).



The Public Interest Test

27. On the basis that the Commissioner is satisfied that the information in question is exempt under section 35(1)(g), he is required to go on to consider the public interest test required by section 2(1)(b) of FOISA and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. If the two are evenly balanced, the presumption should always be in favour of disclosure.
28. In considering the public interest test, the CSA looked at both the public interest in disclosing the information and the public interest in maintaining the exemption. In doing this, the CSA acknowledged the public interest in ensuring that allegations of fraud in or against publicly funded bodies were investigated appropriately. However, on balance, it took the view that the negative effect disclosure would have on its ability to carry out its statutory function outweighed the benefits of disclosure.
29. The Commissioner has taken into consideration the arguments presented to him and notes that there is a general public interest in scrutinising the processes by which Scottish public authorities, such as the CSA, carry out their functions. This ensures that authorities are accountable and transparent in their actions.
30. The Commissioner is aware that Mr Falconer has a personal interest in knowing the outcomes of the report. Satisfying a personal interest may also have the effect of satisfying the public interest. However the Commissioner is not of the view that the two interests wholly coincide in this case. The Commissioner is aware that Mr Falconer was invited to a meeting by NHS Lothian to discuss the conclusions of its investigation. This was subsequently followed up with a letter to Mr Falconer from NHS Lothian. Mr Falconer was also provided with an executive summary of the investigation, in response to an earlier information request made by him under FOISA. In providing this summary, the Commissioner's view is that Mr Falconer had been provided with sufficient information to inform him of the result of the CSA's investigation and that any public interest in the disclosure of the report in question will have been met by the disclosure of the executive summary.
31. It is clear to the Commissioner that the report itself was never intended to be released into the public domain and that the investigation could not have been carried out in the way it was if there was any suggestion that the report would be put into the public domain. Along with conclusions and recommendations, the report contains personal data relating to a number of individuals, details of surveillance activity and interviews with individuals. It is the Commissioner's view that release of this report would have a detrimental effect on the ability of the CFS to carry out its investigations in the future, which would not be in the public interest.



32. In consideration of the arguments presented and evaluation of the information requested, the Commissioner is satisfied that the public interest would be better served by the exemption being maintained. The Commissioner considers that it is fair to conclude that the thoroughness of future investigations of this kind could be negatively affected by placing into the public domain the information sought by Mr Falconer, in that it might restrict the willingness of witnesses to co-operate in investigations, which in turn could affect the effectiveness of the investigation. The Commissioner therefore finds that the CSA correctly applied section 35(1)(g) read in conjunction with section 35(2)(a) and (b) of FOISA to the information requested and that in this case the public interest strongly lies in favour of maintaining the exemption.
33. The Commissioner would like to make it clear that although he is satisfied that the information that has been withheld from Mr Falconer does come within the scope of the exemption in section 35(1)(g) of FOISA and that the public interest lies in maintaining the exemption, he is not seeking to indicate that all information of this kind would be treated in the same way. The Commissioner considers all applications to him on a case by case basis.
34. Having decided that the information withheld from Mr Falconer is exempt in terms of section 35(1)(g) and that it is in the public interest for this exemption to be maintained, the Commissioner is not required to consider whether the exemptions under section 34 also relied on by the CSA apply to the information withheld.

DECISION

The Commissioner finds that the Common Services Agency for the Scottish Health Service was entitled to withhold the report in question from Mr Falconer in terms of Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) .

Appeal

Should either Mr Falconer or the CSA 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 Investigations
22 July 2008



Appendix

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.

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 –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

34 Investigations by Scottish public authorities and proceedings arising out of such investigations

- (1) Information is exempt information if it has at any time been held by a Scottish public authority for the purposes of-
 - (a) an investigation which the authority has a duty to conduct to ascertain whether a person-
 - (i) should be prosecuted for an offence; or
 - (ii) prosecuted for an offence is guilty of it;
 - (b) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted; or

...



35 Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-
- (a) the prevention or detection of crime;
 - (b) the apprehension or prosecution of offenders;
 - (c) the administration of justice;
 - ...
 - (g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c. 36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);
 - ...
- (2) The purposes are-
- (a) to ascertain whether a person has failed to comply with the law;
 - (b) to ascertain whether a person is responsible for conduct which is improper;
 - ...

National Health Service (Functions of the Common Services Agency) (Scotland) Order 1973

Article 3

It shall be the duty of the Agency to undertake the following functions –

...

- (o) the prevention, detection and investigation of fraud or other irregularities in relation to all services provided under the National Health Service (Scotland) Act 1978