

Decision Notice



Decision 087/2010 Ms Lyndsay Moss of The Scotsman and Lothian NHS Board

Investigations concerning wrongful payments to dentists

Reference No: 200801400
Decision Date: 11 June 2010

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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Summary

Ms Lyndsay Moss of The Scotsman (Ms Moss) asked Lothian NHS Board (NHS Lothian) for information in relation to an investigation which she understood was being carried out into an alleged fraud by a specified dentist. She also sought more general information about the number of dentists being investigated in relation to wrongful payments and how much money NHS Lothian was trying to reclaim from those dentists.

NHS Lothian refused to disclose the information on the grounds that it was exempt from disclosure under sections 34 (Investigations) and 38 (Personal information) of the Freedom of Information (Scotland) Act 2002 (FOISA). Ms Moss remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, NHS Lothian advised the Commissioner that it did not wish to reveal whether it held information regarding the named dentist in terms of section 18(1) of FOISA.

Following an investigation, the Commissioner found that NHS Lothian had partially failed to deal with Ms Moss' request for information in accordance with Part 1 of FOISA. The Commissioner found that NHS Lothian was entitled neither to confirm nor deny whether it held information in relation to the named dentist in terms of section 18(1) and was also entitled to withhold the number of dentists being investigated in relation to wrongful payments under section 38(1)(b). However, he found that the total money NHS Lothian was trying to reclaim from the dentists in question was not exempt under FOISA and ordered NHS Lothian to disclose this total amount to Ms Moss.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) and (6) (General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions); 18 (Further provisions as respects response to request); 34(1)(a) and (b), (3) and (4) (Investigations by Scottish public authorities and proceedings arising out of such investigations) and 38(1)(b), (2)(a)(i) and (b) and (5) (definitions of "data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of personal data); 2(g) (Sensitive personal data); Schedule 1 The data protection principles Part 1 The Principles (first data protection principle)

National Health Service (General Dental Services) (Scotland) Regulations 1996 regulation 25 (Recovery of overpayments)



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 25 July 2008, Ms Moss asked NHS Lothian for information about an investigation which she understood was taking place in relation to payments made to a named dentist, including when the investigation was launched, how much money NHS Lothian was trying to get back from the dentist and why the dentist was being investigated (Part 1).
2. She also asked NHS Lothian to tell her how many dental practitioners it was investigating over wrongful payments, and how much money NHS Lothian was trying to have returned from the dental practitioners due to wrongful payments (Part 2).
3. NHS Lothian responded on 15 August 2008, but refused to disclose the information to Ms Moss.
4. On 15 August 2008, Ms Moss requested a review of NHS Lothian's decision.
5. NHS Lothian notified Ms Moss of the outcome of its review on 10 September 2008, advising her that it upheld its previous decision without amendment.
6. On 22 September 2008, Ms Moss wrote to the Commissioner, stating that she 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.
7. The application was validated by establishing that Ms Moss 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

8. On 10 October 2008, NHS Lothian was notified in writing that an application had been received from Ms Moss and was asked to provide the Commissioner with information for the purposes of the investigation. NHS Lothian responded with the information requested and the case was then allocated to an investigating officer.



9. The investigating officer subsequently contacted NHS Lothian on 13 November 2008, 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. NHS Lothian was asked to justify its reliance on any provisions of FOISA it considered applied to the information requested. NHS Lothian provided a response on 4 December 2008.
10. On 3 February 2009, the investigating officer requested additional submissions from NHS Lothian to support the exemptions it was relying on to withhold the information from Ms Moss. NHS Lothian's response on 4 March 2009 provided additional information on the relationship between itself and the other NHS bodies involved in the investigation, and stated that it also sought to rely on section 35 of FOISA to withhold the requested information.
11. Further submissions were sought from NHS Lothian and from Ms Moss during the investigation and, on 4 September 2009, NHS Lothian confirmed that it was refusing to reveal whether it held the information regarding the named dentist in terms of section 18(1) (by virtue of section 34(1)) of FOISA.
12. This decision has subsequently been delayed while waiting on the outcome of the appeal to the Court of Session by Craighdale Housing Association and others against a decision of the Commissioner (see reference below) which related to how the exemption for personal information at s38 should be interpreted.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner has considered all of the information withheld from Ms Moss and all of the submissions presented to him. He is satisfied that no matter of relevance has been overlooked.

Part 1 – the named dentist

Section 18 – “neither confirm nor deny”

14. NHS Lothian relied upon section 18(1) of FOISA to withhold the information Ms Moss sought in relation to Part 1 of her request.
15. Section 18 allows public authorities to refuse to confirm or deny whether they hold information in limited circumstances:
 - a request has been made to the authority for information which may or may not be held by it;
 - if the information were held by the authority (and it need not be), the information would be exempt under one of the exemptions contained in sections 28 to 35, 39(1) or 41 of FOISA; and



- the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
16. NHS Lothian submitted that the information requested by Ms Moss, if held, would relate to an investigation into a named dentist, and that confirming or denying whether it held the information would inevitably reveal whether or not an investigation had been undertaken. NHS Lothian submitted that maintaining the confidentiality of this information (if it was held) was crucial so that it could monitor payments to dentists and ensure that overpayments were recovered in private, rather than in the public arena where the possibility of a successful conclusion might be put at jeopardy if information were made public.
 17. NHS Lothian submitted that, if the information requested by Ms Moss existed and was held, it would be exempt from disclosure in terms of sections 34(1)(a) and 34(1)(b) of FOISA.
 18. Where a public authority has chosen to rely on section 18(1) of FOISA, the Commissioner must establish whether the authority is justified in stating that to reveal whether the information exists or is held would be contrary to the public interest. He must also establish whether, if the information exists and is held by the public authority, the authority would be justified in refusing to disclose the information by virtue of any of the exemptions provided for by sections 28 to 35, 39(1) or 41 of FOISA.
 19. In so doing, the Commissioner must ensure that in his decision notice he does not confirm one way or the other whether the information requested actually exists or is held by the public authority. This means, for example, that he is unable to comment in any depth on the reliance by the public authority on any of the exemptions listed in section 18(1), as to do so could have the effect of indicating whether the information exists or is held by the public authority.
 20. The Commissioner will now go on to consider section 34 of FOISA which NHS Lothian has relied upon in conjunction with its use of section 18(1) of FOISA.

Section 34(1) Investigations by public authorities, etc

21. NHS Lothian took the view that that the information, if held, would be exempt information by virtue of sections 34(1)(a) and (b) of FOISA. These sections exempt information from disclosure if it has at any time been held by a Scottish public authority for the purposes of:
 - an investigation which the authority has a duty to conduct to ascertain whether a person should be prosecuted for an offence (section 34(1)(a)(i));
 - an investigation which the authority has a duty to conduct to ascertain whether a person prosecuted for an offence is guilty of it (section 34(1)(a)(ii));
 - 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 (section 34(1)(b)).



22. NHS Lothian advised the Commissioner that, under the National Health Service (Scotland) Act 1978, the Chief Executive of a Health Board, as accountable officer, is responsible for the Board's spend on family health services/primary care. The Public Finance and Accountability (Scotland) Act 2000 makes provision for the designation of accountable officers for the propriety and regularity of public finances for the body for which they are answerable and ensuring that the resources of the body are used economically, efficiently and effectively. In addition, NHS Lothian referred the Commissioner to regulation 25 of the National Health Service (General Dental Services) (Scotland) Regulations 1996 (set out in full in the Appendix), which requires overpayments to practitioners to be investigated and brought to the practitioner's attention.
23. NHS Lothian further advised the Commissioner that if a Board considers that criminal conduct has occurred, in particular fraud, it is under a duty to refer the matter to the Procurator Fiscal as stated in an NHS Circular dated 18 May 2000¹ and NHS Circular dated 5 April 2002².
24. As a result of these submissions received from NHS Lothian, the Commissioner is satisfied that the information, if held, would be held by NHS Lothian for the purposes of an investigation which it has a duty to conduct in terms of either section 34(1)(a) or (b) of FOISA.
25. The Commissioner is therefore satisfied that, if the requested information existed and was held by NHS Lothian, it would be exempt information by virtue of the exemptions in sections 34(1)(a) and (b) of FOISA.
26. These exemptions are subject to the public interest test set down by section 2(1)(b) of FOISA.
27. NHS Lothian considered that, in general terms, the disclosure of information concerning its investigations would hamper its ability to undertake thorough investigations, and that publicising its investigations before it was ready to do so would be contrary to the public interest.
28. NHS Lothian also argued that confirming whether it held the information could prejudice its ability to recover public funds, as an individual practitioner may seek to dispose of any funds and assets and may hide information with the result that prejudice could be caused to any criminal proceedings. NHS Lothian also commented that to reveal any of its investigations may prejudice its ability to monitor payment claims, investigate overpayments, seek recovery of overpayments, remove a practitioner from the relevant NHS list and refer matters to a Procurator Fiscal.

¹ http://www.sehd.scot.nhs.uk/mels/2000_28.html

² http://www.sehd.scot.nhs.uk/mels/HDL2002_23.pdf



29. Ms Moss, on the other hand, commented that many people struggle to access an NHS dentist close to where they live and that it is legitimate to find out where public money is being misspent, given that the money could be used to improve service provision. Ms Moss also commented that it is in the public interest to investigate cases where taxpayers' money may have been used inappropriately and to find out what efforts are being made to recoup that money. She stated that it is important to understand how public bodies use public money, and how they react when mistakes are discovered. She also commented that investigation procedures should not be cloaked in secrecy, simply to spare any potential embarrassment to NHS management.
30. The Commissioner has considered carefully the arguments put by both sides, but has come to the conclusion that it would be contrary to the public interest to reveal whether the information exists or is held by NHS Lothian. While he agrees with many of the public interest arguments put forward by Ms Moss, on balance he finds that there is a greater public interest in ensuring that NHS Lothian is able to carry out investigations into fraud and to take steps to recoup public money which may have been overpaid. As a result, he finds that, if the information were in fact held, the public interest would lie in maintaining the exemption. For the same reasons, he finds that it is in the public interest for NHS Lothian neither to confirm nor deny whether the specific information sought by Ms Moss in Part 1 of her request is held.
31. He therefore finds that NHS Lothian was entitled, in terms of section 18(1) of FOISA, neither to confirm nor deny that it holds information in relation to the named dentist.
32. NHS Lothian also argued that some of the information in relation to Part 1 is exempt under section 35 of FOISA. However, in the circumstances, the Commissioner does not consider it necessary to go on to consider this particular exemption.

Part 2 - Numbers of dentists being investigated, etc.

33. As noted above, Part 2 of Ms Moss's request was for the number of dental practitioners NHS Lothian was investigating over wrongful payments and how much money NHS Lothian was trying to recoup from dental practitioners due to wrongful payments. NHS Lothian confirmed that it held this information, but also claimed that it was exempt under sections 34(1)(a) and (b), (3) and (4) and 38(1)(b) of FOISA.
34. The Commissioner will firstly consider whether disclosing the information sought by Ms Moss in Part 2 of her request is exempt under section 38(1)(b) of FOISA.

Section 38(1)(b) FOISA – Personal information

35. Section 38(1)(b), read in conjunction with either section 38(2)(a)(i) or (2)(b) (as appropriate), provides that information is exempt information if it constitutes personal data (as defined in section 1(1) of the DPA) and if its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in the DPA.



36. NHS Lothian argued that the information withheld from Ms Moss constituted the personal data of the dentists involved, and that its disclosure would contravene the first data protection principle, which requires that personal data shall be processed fairly and lawfully (the principle is set out in full in the Appendix).

Is the information personal data?

37. “Personal data” is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the definition is set out in full in the Appendix).
38. NHS Lothian argued that, given the small number of dentists under investigation, it may be possible to identify any one of the dentists under investigation. NHS Lothian also commented that, although there may be several dentists employed at one practice, each dentist is listed individually on the Health Boards List of Approved Practitioners and therefore could have claimed the payment sought to be recovered.
39. The difficult issues brought about by cases which involve the disclosure of small numbers (and in particular the issue of identification) have been addressed by the courts³. In this case, NHS Lothian is concerned that the disclosure of what it considers to be a small number of dentists would lead to identification of the dentists in question. The Commissioner agrees that this would be the case. It is clear that the lower the denominator (i.e. the number of people who could fall within a particular statistic), the more likely it is that a person can be identified. In this case, the risk of identification is particularly high, given that the denominator (i.e. the dentists included on the list of approved practitioners) is clearly defined and easily identifiable by the public.
40. The Commissioner therefore considers that the dentists under investigation could be identified if the number were to be disclosed. He is also satisfied that the data has these individual dentists as its focus and is biographical about them in a significant sense, and consequently, that the data relates to those individuals. He is therefore satisfied that the information constitutes those dentists’ personal data.
41. However, the Commissioner does not agree with NHS Lothian that the total amount of money NHS Lothian was trying to recoup is the personal data of the dentists. Given that it is an aggregated figure which Ms Moss has requested, the Commissioner does not accept that, in this case, the disclosure of this figure could identify any of the individuals involved or that the figure is personal data as defined by section 1(1) of the DPA.
42. As such, he finds that this figure cannot be exempt under section 38(1)(b) of FOISA. (He will, however, go on to consider the other exemptions applied by NHS Lothian in relation to this figure below.)

³ See Common Services Agency v Scottish Information Commissioner <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm> and Craigdale Housing Association and others v Scottish Information Commissioner <http://www.scotcourts.gov.uk/opinions/2010CSIH43.html>



First data protection principle – personal data shall be processed fairly and lawfully

43. Having satisfied himself that the number of dentists currently being investigated constitutes personal data, the Commissioner must now consider NHS Lothian's assertion that the disclosure of this information would breach the first data protection principle.
44. The first data protection principle requires that the processing of personal data (here, the disclosure into the public domain of the numbers of dentists being investigated) shall be fair and lawful and, in particular, that data shall not be processed unless at least one of the conditions in Schedule 2 to the DPA (and, additionally, in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA) is met.
45. NHS Lothian advised the Commissioner that it considered the number of dentists under investigation to be sensitive personal data as defined by section 2(g) of the DPA. Having considered the definition in section 2(g) (personal data consisting of information as to the commission or alleged commission by a person of any offence), the Commissioner is satisfied that the number comprises sensitive personal data.
46. Given the additional restrictions surrounding the disclosure of sensitive personal data, it is appropriate to consider whether there are any conditions in Schedule 3 which would permit the sensitive personal data to be disclosed before going on, if necessary, to consider any of the Schedule 2 conditions.

Processing of sensitive personal data

47. The Commissioner's guidance⁴ on the exemption in section 38 suggests it is unlikely that a public authority dealing with a request for sensitive personal data will be able to satisfy any of the Schedule 3 conditions unless it has the data subject's explicit consent for the disclosure (condition 1) or the information has already been made public as a result of steps deliberately taken by that individual (condition 5). This is because the other conditions contained in Schedule 3 involve disclosure for a stated purpose and are very restrictive in nature. Disclosure of sensitive personal data in response to a request made under FOISA cannot be viewed as being for a stated purpose or as restrictive. As the Court of Session has noted⁵, information disclosed under FOISA is disclosed into the public domain. It ceases to be protected by any confidentiality it had prior to disclosure. As a result, this means that it is very unusual for sensitive personal data to be released in response to a freedom of information request without conditions 1 or 5 of Schedule 3 having been met. Neither of these conditions have been met in this case.

⁴ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.asp>

⁵ *Craigdale Housing Association and others v Scottish Information Commissioner*, supra



48. Having also considered the other conditions which allow sensitive personal data to be processed, the Commissioner has come to the conclusion that there are no conditions which would permit the sensitive personal data under consideration in this case to be disclosed. He therefore finds that disclosure of the number of dentists currently being investigated would breach the first data protection principle and that the information is exempt from disclosure under section 38(1)(b) of FOISA.

Total money being recovered

49. As the Commissioner has found that the number of dentists currently being investigated is exempt from disclosure under section 38(1)(b), he will only go on to consider whether NHS Lothian was entitled to withhold the total monies sought to be recovered under sections 34(1)(a)(i), (ii), 34(1)(b), 34(3) and 34(4) of FOISA.
50. The exemptions in sections 34, as set out in full in the Appendix, are described as "class-based" exemptions. This means that if information falls within the description set out in the exemption, the Commissioner is obliged to accept it as exempt. There is no harm test: the Commissioner is not required or permitted to consider whether disclosure would, or would be likely to, prejudice substantially an interest or activity, or otherwise to consider the effect of disclosure in determining whether the exemption applies. The exemptions are, however, subject to the public interest test contained in section 2(1)(b) of FOISA.

Sections 34(1)(a)(i) and (ii) and (b)

51. In order for the exemptions in section 34(1)(a)(i), (ii) or (b) to apply, the Commissioner must first of all be satisfied that the information sought by Ms Moss (i.e. the total sum which NHS is trying to recoup) has at any time been held by NHS Lothian for the purposes of an investigation of the type specified in section 34(1)(a)(i), (ii) or (b).
52. NHS Lothian provided the Commissioner with a copy of a list that it held containing the name of the individual dentist(s) and monies sought to be recovered from each dentist. During the investigation, NHS Lothian was asked for its comments on the fact that Ms Moss had requested a total sum and to provide an explanation as to how the total sum related to a *specific* investigation. NHS Lothian commented that as the monies sought to be recovered for a number of dentists (within the list held by NHS Lothian) were of a specific type of payment, it would be possible to link the withheld information to a specific investigation.
53. The Commissioner dealt with a similar issue in *Decision 037/2009 Mr Stephen Stewart of the Daily Record and Chief Constables of Central, etc.* That case involved a request by a journalist for collated annual payments made to informants. The Commissioner came to the conclusion that the word "information" as set out in section 34(1) related to the actual information sought by Mr Stewart (i.e. the collated payments) and not to the further breakdown of the figure. The Commissioner also took the view that the collated amount was sufficiently far removed from any particular investigation to fall outwith the scope of this exemption.



54. The Commissioner has come to a similar view in this case. While he does not dispute that a specific over-payment detailed within the list held by NHS Lothian could be linked to a specific investigation, this is not the information which Ms Moss has requested. The Commissioner considers that the total sum NHS Lothian is trying to recover does not constitute information which was held for the purposes of a specific investigation or of specific investigations and so falls outwith the scope of this exemption.
55. Given that the Commissioner has found that the information in question is not held for the purposes of an investigation, he finds that the information held by NHS Lothian is not exempt under sections 34(1)(a)(i), (ii) or (b) of FOISA.

Section 34(3) – confidential sources

56. NHS Lothian also applied the exemption in section 34(3) of FOISA to the total sum NHS Lothian is trying to recover.
57. There are a number of tests, all of which must be satisfied, in order for the exemption in section 34(3) to apply:
- was the information obtained or recorded by the authority for the purposes of an investigation (other than such investigations as are mentioned in section 34(1))?
 - is/was the investigation carried out by virtue of Her Majesty's prerogative or under statutory powers?
 - was the investigation carried out for one or more of the purposes listed in section 35(2) of FOISA?
 - does the information relate to the obtaining of information from confidential sources?
58. NHS Lothian stated that the information which had been requested by Ms Moss had been obtained from patient records and that the information therefore related to the obtaining of information from confidential sources.
59. In *Decision 057/2007 Mrs Lilian Gordon and the Chief Constable of Grampian Police*, the Commissioner took the view that the purpose of section 34(3) was not to protect information gathered from confidential sources, or necessarily the confidentiality of the source itself, but to protect information which relates to the obtaining of information from such source, in other words information about the process of gathering the information as distinct to the mode of gathering the information, something which, if it were released to the public, might be detrimental to that process.
60. As a consequence, the Commissioner does not consider it to be relevant that the information was simply obtained from a confidential source, such as a patient record.
61. The Commissioner therefore considers that the information does not relate to the obtaining of information from confidential sources and that, as a result, given that the test in section 34(3)(b) is not satisfied in this case, the exemption in section 34(3) cannot apply.



Section 34(4) – civil proceedings

62. NHS Lothian also applied the exemption in section 34(4) of FOISA to the total sum sought by Ms Moss.
63. Section 34(4) of FOISA exempts information if the information has been obtained or recorded by a Scottish public authority for the purposes of civil proceedings, brought by or on behalf of the authority, which arise out of investigations under section 34(1) or (3).
64. In its submissions, NHS Lothian commented that it was in the process of pursuing civil proceedings against specific dentists. The Commissioner has noted this point but, for the reasons set out in paragraphs 59 and 60 above, he considers that information in this case, i.e. the total sum requested by Ms Moss, is too far removed from specific civil proceeding to be considered as information obtained or recorded for the purposes of civil proceedings. As such, he does not consider that the exemption applies.



DECISION

The Commissioner finds that Lothian NHS Board (NHS Lothian) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms Moss.

The Commissioner finds that NHS Lothian was entitled, under section 18(1) of FOISA, neither to confirm nor deny whether it held the information regarding the named dentist.

The Commissioner also finds that NHS Lothian was entitled to withhold the number of dentists under investigated in terms of section 38(1)(b) of FOISA (Part 2 of the request).

However, the Commissioner finds that NHS Lothian was not entitled to withhold the total amount of money it was trying to recoup. As such, the Commissioner finds that NHS Lothian failed to comply with Part 1 of FOISA and, in particular, with section 1(1) of FOISA.

The Commissioner therefore requires NHS Lothian to release the total amount of money NHS Lothian was trying to reclaim from the dentists, by 26 July 2010.

Appeal

Should either Ms Moss 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.

Kevin Dunion
Scottish Information Commissioner
11 June 2010



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 –

- (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.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (e) in subsection (1) of section 38 –

...

- (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

18 Further provision as respects responses to request

- (1) Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 28 to 35, 39(1) or 41 but the authority considers that to reveal whether the information exists or is so held would be contrary to the public interest, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.



- (2) Neither paragraph (a) of subsection (1) of section 16 nor subsection (2) of that section applies as respects a refusal notice given by virtue of this section.

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
- ...
- (3) Information held by a Scottish public authority is exempt information if-
- (a) it was obtained or recorded by the authority for the purposes of investigations (other than such investigations as are mentioned in subsection (1)) which are, by virtue either of Her Majesty's prerogative or of powers conferred by or under any enactment, conducted by the authority for any purpose specified in section 35(2); and
 - (b) it relates to the obtaining of information from confidential sources.
- (4) Information is exempt information if obtained or recorded by a Scottish public authority for the purposes of civil proceedings, brought by or on behalf of the authority, which arise out of such investigations as are mentioned in subsection (1) or (3).

...

38 Personal information

- (1) Information is exempt information if it constitutes-
- ...
- (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;



...

(2) The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles; or

...

(b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

...

(5) In this section -

"the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;

"data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;

...

Data Protection Act 1998

1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

"personal data" means 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;

...



2 Sensitive personal data

In this Act “sensitive personal data” means personal data consisting of information as to –

...

- (g) the commission or alleged commission by him of any offence, or

...

Schedule 1 – The data protection principles

Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
 - (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

National Health Service (General Dental Services) (Scotland) Regulations 1996

25 Recovery of payments

- (1) Where the Board (or the Agency) considers that it has authorised payment or, as the case may be, made payment of a fee to a dentist owing to an error or in circumstances when it was not due, the Board, or, as the case may be, the Health Board or primary care NHS Trust shall, except to the extent that the Secretary of State on the application of the Board or, as the case may be, the Health Board or primary care NHS Trust, directs otherwise, draw that overpayment to the attention of the dentist and –
 - (a) where he admits the overpayment; or
 - (b) where he does not admit the overpayment but, the matter having been referred under regulation 4(1) of the National Health Service (Service Committees and Tribunal) (Scotland) Regulations 1993 for investigation, the Health Board or primary care NHS Trust, or the Secretary of State on appeal, decides that there has been an overpayment

the amount overpaid shall be recoverable either by deduction from the remuneration of the dentist or in some other manner.

- (2) Recovery of an overpayment under the provisions of this regulation shall be without prejudice to the investigation of an alleged breach of the terms of service.

Decision 087/2009
Ms Lyndsay Moss of The Scotsman
and Lothian NHS Board

