

Decision Notice



Decision 147/2011 Dr X and Fife NHS Board

Details of complaints

Reference No: 201100681, 201100688, 201100795
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Summary

Dr X requested from Fife Health Board (NHS Fife) information relative to complaints made against certain individuals and refusal of surgery. NHS Fife responded by withholding certain information under section 38(1)(b) of FOISA, which relates to personal data. Following a review, Dr X remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that NHS Fife had partially failed to deal with Dr X's request for information in accordance with Part 1 of FOISA, by wrongly applying the exemption in section 38(1)(b) of FOISA to withhold certain of the information. He required NHS Fife to provide Dr X with the information wrongly withheld.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(e)(ii) (Effect of exemptions); 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) section 1(1) (Basic interpretative provisions) (definition of "personal data"); Schedule 1 (The data protection principles, Part I – the principles) (the first and sixth data protection principles) and Schedule 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (condition 6).

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data – Recital 26.

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 31 October 2010, Dr X wrote to NHS Fife with 25 requests for information which included requests for the following information:



- i. The number of complaints made against [named person employee A] since joining NHS Fife;*
 - ii. The nature of those complaints against [named person employee A];*
 - iii. The number of total complaints made to NHS Fife related to the refusal of surgery;*
 - iv. The number of complaints made to NHS Fife related to the refusal of surgery because of a "lack of fitness for surgery";*
 - v. The age and race of the patients who have been refused surgery for cancer treatment because of a "lack of fitness for surgery";*
 - vi. The details of how those judgements were arrived at, e.g. based on physical fitness tests, excessive alcohol intake, reduction in weight, reduction in activity, irregular heart rhythm;*
 - vii. The number of total complaints made against [named person employee B] at NHS Fife?*
 - viii. The number of total complaints made against [named person employee B] related to the refusal of surgery?*
 - ix. The number of complaints made against [named person employee B] related to the refusal of surgery because of a "lack of fitness for surgery"?*
2. NHS Fife provided three separate responses on 10 and 13 December 2010. NHS Fife provided some of the other information requested, but in relation to the above nine requests stated that it did not disclose the number of complaints logged against individual staff members or the numbers who had been refused surgery where the number was less than six, as disclosure would breach the confidentiality of the staff members and patients concerned.
3. On 20 and 22 December 2010, Dr X wrote to NHS Fife requesting reviews of the above decisions. He did not believe that disclosure of any of the above information would breach confidentiality. He also believed that disclosure of information about any complaints made against the staff members would be in the public interest.
4. NHS Fife notified Dr X of the outcome of its reviews on 17 January 2011. The requested information was withheld under section 38(1)(b) of FOISA, on the basis that disclosure would breach the data protection principles.
5. On 8, 11 and 30 April 2011 Dr X wrote to the Commissioner, stating that he was dissatisfied with the outcome of NHS Fife's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The applications were validated by establishing that Dr X had made requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its responses to those requests.



Investigation

7. On 27 April and 11 May 2011, NHS Fife was notified in writing that the above applications had been received from Dr X and asked to provide the Commissioner with any information withheld from him. NHS Fife responded with the information requested, but indicating that it did not collect information relative to requests v and vi above. The case was then allocated to an investigating officer. The Commissioner decided that the applications should be conjoined, with a view to making a single decision.
8. The investigating officer subsequently contacted NHS Fife, 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 Fife was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested, with particular reference to the requirements of section 38(1)(b).
9. NHS Fife responded on 17 June 2011 and maintained that information held relative to requests i to iv and vii to ix inclusive was personal data and subject to section 38(1)(b) of FOISA. It also confirmed that while it held information relative to requests v and vi, the cost of collating and providing that information would exceed £600, and therefore (by virtue of section 12(1) of FOISA) it was not obliged to comply with these request. This was accepted by Dr X and requests v and vi will not be considered further in this decision.
10. The relevant submissions obtained from Dr X and NHS Fife will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

11. 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 X and NHS Fife and is satisfied that no matter of relevance has been overlooked.

Section 38(1)(b) - Personal Information

12. NHS Fife submitted that the information held relative to requests i to iv and vii to ix inclusive was personal data for the purposes of the DPA and that disclosure of this information would contravene the first data protection principle on fair and lawful processing. In relation to all of the above except requests i and ii, NHS Fife also submitted that disclosure of the information would breach the sixth data protection principle. Consequently, it argued that the information was exempt under section 38(1)(b) of FOISA.



13. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (2)(b) (as appropriate), exempts information from disclosure where that information is personal data and its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles in Schedule 1 to the DPA.
14. In considering the application of this exemption, the Commissioner must first determine whether the information in question is personal data as defined in section 1(1) of the DPA and then, if it is, whether any of it is sensitive personal data as defined in section 2 of the DPA. If he is satisfied that the information is personal data, he will go on to consider whether its disclosure would breach any of the data protection principles, considering the implications of its status as sensitive personal data as and where appropriate.
15. It must be borne in mind that this particular exemption (i.e. section 38(1)(b) read in conjunction with section 38(2)(a)(i) or (b)) is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.

Is the information under consideration personal data?

16. The Commissioner has considered whether the withheld information is personal data for the purposes of section 1(1) of the DPA; that is, 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 (the full definition is set out in full in the Appendix). It should be noted that the DPA gives effect to Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("the Directive"), which therefore has a bearing on how the DPA should be interpreted.
17. In this case NHS Fife submitted that information it held and which fell within the scope of requests i, ii, vii, viii and ix was the personal data of the staff members named in the requests. The Commissioner accepts this, being satisfied that the information (which is biographical of, and focuses on, the named individuals) relates to those individuals.
18. Whilst not specifically claiming that the information held and falling within the scope of requests vii, viii and ix was the personal data of the patients concerned, NHS Fife claimed that disclosure of this information would also cause damage and distress to the clinician's patients. For completeness, therefore, the Commissioner will also consider whether the disclosure of this information could lead to the identification of living individuals other than the members of staff involved, and (by extension) whether it should be considered to be those individuals' personal data. The Commissioner will consider this information along with the information held by NHS Fife and falling within the scope of requests iii and iv.
19. In relation to requests iii and iv, NHS Fife submitted that the information was personal data relating to a particular clinical speciality and that release would lead to identifiable information on its Consultant Surgeons' performance at work. In addition, it was likely to identify those patients who had been refused surgery.



20. The Commissioner has considered NHS Fife's submissions in the light of the decision of the House of Lords in the case of *Common Services Agency v Scottish Information Commissioner [2008] UKHL 47*¹, in which the Lords considered a request for information relating to childhood leukaemia statistics in the Dumfries and Galloway postal area. In that case, the Lords concluded that the definition of "personal data" in the DPA must be read in the light of recital 26 of EU Directive 95/46/EC (the recital is set out in full in the Appendix) and therefore be taken to permit the disclosure of information which had been rendered fully anonymous in such a way that individuals were no longer identifiable from it, without having to apply the data protection principles. Therefore, if living individuals cannot be identified from the actual information requested, then the information is not personal data and it cannot be exempt under section 38(1)(b) of FOISA.
21. The Commissioner has also noted the opinion delivered by the High Court of England and Wales in *Department of Health v Information Commissioner [2011] EWHC 1430 (Admin)*.
22. The Commissioner has considered whether the information held and falling within the scope of requests iii and iv could be considered to be fully anonymous, or whether it might be possible to identify living individuals from that information. At the same time, he has considered whether the information held and falling within the scope of requests vii, viii and ix could lead to the identification of living individuals other than the members of staff involved.
23. Recital 26 states that to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the [data] controller or by any other person to identify the said person. Similarly, the guidance entitled "Determining what is personal data" (issued by the UK Information Commissioner, who is responsible for enforcing the DPA throughout the UK)² states that consideration of whether a person can be identified should look not just the means reasonably likely to be used by the ordinary man in the street to identify a person, but also the means which are likely to be used by a determined person with a particular reason to want to identify the individual.
24. The Commissioner has therefore considered not only Dr X's reasons for seeking the information (considered further below, in relation to his legitimate interest), but also how other people might use the information following its release, along with other information already in the public domain, to identify living individuals.
25. While NHS Fife claimed that individuals would be identifiable from the information, and although it was asked by the investigating officer to describe the route by which disclosure of the information could lead to identification, it did not provide any submissions to justify this claim.

¹ <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>

² http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf



26. Having received minimal submissions on this question from NHS Fife, the Commissioner has considered whether the population and geographical size of the authority's area would make identification a real possibility: generally speaking, the smaller the population and geographical size, the higher the likelihood that identification will occur. Given a population of over 350,000 spread over approximately 1,325 km², these factors do not appear to make identification a real possibility in this case. He also notes in this connection that the relevant information held by NHS Fife covers a substantial period, from 2003 to receipt of the request. He has no evidence of any other information being available in the public domain which, combined with the withheld information, could lead to the identification of the individuals concerned. In all the circumstances, it is not evident to the Commissioner how disclosure of the withheld information could make identification possible.
27. Consequently, the Commissioner has no basis for concluding that the disclosure of the information held by NHS Fife and falling within the scope of requests iii and iv would identify any living individuals, and must therefore conclude that the information is not personal data as defined by section 1(1) of the DPA. He must also find, therefore, that NHS Fife was not entitled to withhold this information under section 38(1)(b) of FOISA.
28. For the same reasons, the Commissioner finds that there is no basis for concluding that the information held by NHS Fife and falling within the scope of requests vii, viii and ix could lead to the identification of living individuals other than the members of staff involved
29. The Commissioner will now consider whether disclosure of the information held and falling within the scope of requests i, ii, vii, viii and ix, which he is satisfied is the personal data of the named staff members, would breach the first data protection principle as submitted by NHS Fife.

Would disclosure breach the first data protection principle?

30. NHS Fife argued that disclosure of the withheld personal data would breach the first data protection principle. In doing so it made reference to the Information Commissioner's Guide to Data Protection³ and in particular section B1.7, which advises on the processing of personal data in line with the first data protection principle.
31. The first data protection principle requires that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA is also met. The processing under consideration in this case is disclosure in response to Dr X's information request.
32. The Commissioner has not found it necessary to consider the conditions in Schedule 3 in this decision.

³ http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/the_guide_to_data_protection.pdf



33. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. However, these three aspects are interlinked. For example, if there is a specific condition in Schedule 2 which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.
34. The Commissioner will now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be disclosed. If any of these conditions can be met, he must then consider whether the disclosure of this personal data would be fair and lawful.

Can any of the conditions in Schedule 2 to the DPA be met?

35. In the circumstances, the Commissioner considers that condition 6 would appear to be the only condition which might permit disclosure to Dr X. In any event, NHS Fife has not argued that any other condition would be relevant. Condition 6 allows personal data to be processed where the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject (the individual(s) to whom the data relate).
36. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
 - a. Does Dr X have any legitimate interest in obtaining the personal data?
 - b. If yes, is the disclosure necessary to achieve these legitimate aims? In other words, is the disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate aims be achieved by means which interfered less with the privacy of the data subject?
 - c. Even if the processing is necessary for Dr X's legitimate purposes, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject? There is no presumption in favour of the disclosure of personal data under the general obligation laid down by section 1(1) of FOISA. Accordingly, the legitimate interests of Dr X must outweigh the rights and freedoms or legitimate interests of the data subject before condition 6 will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that NHS Fife was correct to refuse to disclose the personal data to Dr X.

Does the applicant have a legitimate interest?

37. NHS Fife made no submissions as to whether or not it considered Dr X to have a legitimate interest in the withheld personal data.
38. Dr X argued that he had a legitimate interest in obtaining the information and explained the history surrounding his previous correspondence with NHS Fife and certain regulatory bodies regarding a specific case. In the light of this, he had concerns about the lack of a national policy on "fitness for surgery" and the low cancer survival rate in Scotland.



39. He also explained he was researching health management practices in Scotland (in a professional capacity) and in the near future would be establishing a “Patients’ Association” in Scotland, to assist in the advocacy of individual patients’ rights. Consequently, he needed to know as much as possible about the NHS complaints system. To this end, he would be seeking similar information from other health boards across Scotland.
40. Dr X also noted that the Patient Rights (Scotland) Bill had recently been approved by the Scottish Parliament, as a result of which there would be significant changes in health care (for example, the establishment of independent Patient Rights Officers and a new advice and support service for complainants). He believed there to be a public interest in disclosure of the requested information.
41. As indicated above, the Commissioner considers the appropriate question to be whether the applicant has a legitimate interest in obtaining the personal data under consideration. That interest, however, will in many cases not be confined to the individual applicant and may therefore coincide with the public interest. In this case, the Commissioner has found it appropriate to take into consideration all of the arguments on legitimate interest put forward by Dr X.
42. In the circumstances of this particular case, having considered the arguments put forward by Dr X, the Commissioner accepts Dr X’s submissions that he has a legitimate interest in the matters he has identified. He also accepts that this legitimate interest extends to the wider public. He is not, however, satisfied that this can be construed as a legitimate interest in obtaining the withheld personal data. Having considered the terms of the relevant requests and the personal data in question, he cannot see how the legitimate interests identified by Dr X (which relate to issues considerably broader in their scope than the conduct of two particular officers in a particular health board) would be advanced by disclosure of that information.
43. Given that the Commissioner has found that Dr X does not have a legitimate interest in obtaining the withheld personal data, he must find that condition 6 is not met in this case. In the absence of a condition permitting disclosure, he must also find that disclosure would be unlawful. Consequently, he finds that disclosure of the withheld personal data would contravene the first data protection principle.
44. Given that the Commissioner has concluded that the disclosure of the withheld personal data would contravene the first data protection principle, he is not required (and does not intend) to consider whether disclosure would also be in breach of the sixth data protection principle.
45. Having found that disclosure would breach the first data protection principle, the Commissioner therefore concludes that the information it held and which fell within the scope of requests i, ii, vii, viii and ix was correctly withheld under section 38(1)(b) of FOISA.

DECISION



The Commissioner finds that Fife Health Board (NHS Fife) partially failed to comply with Part 1 (and in particular section 1(1) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information requests made by Dr X and falling within the scope of his applications to the Commissioner. Whilst the Commissioner finds that certain information was properly withheld under section 38(1)(b) of FOISA, he also finds that the information falling within the scope of requests iii and iv was not personal data and therefore was wrongly withheld under that exemption.

The Commissioner requires NHS Fife to provide Dr X with the information held by it which falls within the scope of requests iii and iv, by 23 September 2011.

Appeal

Should either Dr X or Fife Health Board 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
5 August 2011



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

...

- (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.

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;

...

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.

...

6. Personal data shall be processed in accordance with the rights of data subjects under this Act.

Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

...

6(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the



processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

...

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

Recital 26

Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas, to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person; whereas the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable; whereas codes of conduct within the meaning of Article 27 may be a useful instrument for providing guidance as to the ways in which data may be rendered anonymous and retained in a form in which identification of the data subject is no longer possible;