



Scottish Information
Commissioner

**Decision 144/2007 Mr Alexander Doherty and
Greater Glasgow NHS Board**

Information relating to the death of Joseph Doherty

**Applicant: Mr Alexander Doherty
Authority: Greater Glasgow NHS Board
Case No: 200502042
Decision Date: 21 August 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 144/2007 – Mr Alexander Doherty and the Greater Glasgow NHS Board

Request for information relating to the death of Joseph Doherty – Information withheld – decision upheld by the Commissioner

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement); 2(1) (Effect of exemptions); 25(1) (Information otherwise accessible) and 36(1) (Confidentiality)

The full text of each of these provisions is set out in Appendix 1 to this decision.

Facts

Mr Alexander Doherty requested documents held by the Greater Glasgow NHS Board (the Board) concerning his brother, Joseph Doherty. Joseph Doherty committed suicide whilst an inpatient at Gartnavel Royal Infirmary in Glasgow.

The Board released some information in response to Mr Doherty's request and, later, in response to his request for review. However, Mr Doherty remained dissatisfied with the way in which his request for information had been dealt and applied to the Scottish Information Commissioner for a decision.

Following an investigation the Commissioner found that the Board had been correct to withhold the information from Mr Doherty.

Background

1. Mr Alexander Doherty (Mr Doherty) wrote to the Board on 18 February 2005 and requested all information which it held (with the exception of certain records) regarding his brother, Joseph Doherty.



2. The Board responded to Mr Doherty's request on 17 March 2005. It released the majority of four files of information relating to Mr Doherty's request, with personal information (such as details of other patients) redacted. It withheld a small number of documents contained within those files in terms of section 36(1) of FOISA. It also withheld the contents of the remaining file of information in their entirety on the basis that the contents were exempt from disclosure under sections 36(1) and 36(2) of FOISA.
3. Mr Doherty was dissatisfied with the response he received, and wrote to the Board on 29 April 2005 asking it to carry out a review of its decision.
4. On 30 May 2005, the Board responded to Mr Doherty's request for review. It released the remaining documents held within the first four files and withdrew its application of section 36(2) of FOISA to the remaining file.
5. Mr Doherty remained dissatisfied and wrote to me on 13 June 2005 asking me to investigate on his behalf. His application was validated by establishing that he had made a request for information to a Scottish public authority and had applied to me only after asking the authority to review his request. The case was then allocated to an investigating officer.

The Investigation

6. The investigating officer contacted the Board on 1 September 2005, notifying it of the application in terms of section 49(3)(a) of FOISA and giving it an opportunity to comment on the application.

The scope of the investigation

7. In correspondence with the investigating officer, Mr Doherty confirmed he wished to withdraw his application insofar as it related to the personal information which had been withheld by the Board from the first four files. As a result, I will not consider that personal information in this decision.
8. During the course of the investigation, Mr Doherty also withdrew his application insofar as it related to information such as newspaper articles, a press release, correspondence between himself and the Board and information which had already been released to him as a result of requests made to other Scottish public authorities. As a result, I will not consider whether the Board was correct to withhold documents falling into these categories of information from Mr Doherty any further.



The application of section 36(1) of FOISA to the information requested

9. During the investigation, the Board provided my office with all of the information which it had withheld from Mr Doherty and clarified why it considered that the information withheld from Mr Doherty was exempt from disclosure by virtue of section 36(1) of FOISA. It also explained why it considered the public interest to be balanced in favour of maintaining the exemption.
10. During the investigation, Mr Doherty also provided my office with detailed comments on the issues surrounding Joseph Doherty's death. While the comments from Mr Doherty were not all fully relevant to the investigation under FOISA, they did contain some arguments as to why the information which he had requested should be disclosed. I have therefore considered Mr Doherty's comments in determining the public interest arguments in relation to this case.
11. There followed further correspondence between all parties in order to clarify specific issues which arose during the course of my investigation. The contents of these communications have been taken into account in consideration of the case.

The Commissioner's Analysis and Findings

12. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Doherty and the Board and am satisfied that no matter of relevance has been overlooked.
13. The documents withheld from Mr Doherty constitute a file compiled by the Board following the death of Joseph Doherty in anticipation of legal action being taken against them. Joseph Doherty's parents subsequently took legal action against the Board. The case eventually settled out of court. Both of Mr Doherty's parents are now dead. Mr Doherty is the executor of his brother's and his parents' estates.
14. For ease, I have divided the contents of the file into four different categories of information:
 - a) Communications between the Central Legal Office of the Common Services Agency of the NHS (the CSA), the Board and the Mental Health Services Trust (the Trust) relating to the action for damages brought against the Board by Joseph Doherty's parents
 - b) Internal correspondence relating to the action for damages



- c) Witness statements made by staff employed by the Board who were involved in the care of Joseph Doherty
- d) Correspondence between the Board and other third parties.

The application of section 36(1) of FOISA to the withheld information

- 15. Section 36(1) of FOISA exempts information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. One type of communications which falls into this category is communications which are subject to legal professional privilege. Legal professional privilege can itself be split into two categories – legal advice privilege and litigation privilege (also known as communications post litem motam).
- 16. Legal advice privilege covers communications between lawyers and their clients, where legal advice is sought or given.
- 17. Litigation privilege is wider and applies to documents created by a party to the potential litigation in contemplation of the litigation, expert reports prepared on their behalf and legal advice given in relation to the potential litigation. For litigation privilege to apply litigation need not ever take place – the question of whether any particular document was actually created in contemplation of litigation will therefore be a question of fact. Even if litigation does take place, litigation privilege continues to apply after the litigation has ended.
- 18. The exemption in section 36(1) of FOISA is subject to the public interest test as required by section 2(1)(b) of FOISA. This means that even if I find that the information to be exempt in terms of section 36(1) of FOISA, I must order release of the information unless I am satisfied that the public interest in maintaining the exemption outweighs the public interest in the disclosure of the information.
- 19. I shall now go on to consider whether the documents withheld from Mr Doherty are exempt from disclosure by virtue of section 36(1) of FOISA.

Document category (a): Communications between the CSA, the Board and the Trust relating to the action for damages

- 20. Almost half of the documents withheld are communications between the Board and the Trust and the CSA which record the exchange of legal advice and information relating to the death of Joseph Doherty in preparation for the action for damages brought against the Board by Joseph Doherty's parents.
- 21. The Central Legal Officer of the CSA act as legal advisors for the Board and the Trust.



22. Having examined the documents which fall under this category of information, I am satisfied that they comprise information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings, either because they are subject to legal advice privilege or litigation privilege. As a result I am satisfied that these documents are exempt in terms of section 36(1) of FOISA.

Document category (b): Internal correspondence relating to the action brought against the Board

23. A number of the documents withheld from Mr Doherty comprise internal correspondence in relation to the action brought against the Board. The documents describe advice from the legal advisor and record discussions which evaluate that advice and suggest actions to take on the basis of that advice. Having examined the documents falling within this category, I am satisfied that they constitute communications which are subject to legal advice privilege or to litigation privilege and that, as such, they are exempt in terms of section 36(1) of FOISA.

Document category (c): Witness statements made by staff employed by the Board and who were involved in the care of Joseph Doherty

24. A number of the documents withheld are statements made by staff employed by the Board who were involved in the care of Joseph Doherty at the time of his death.
25. Again, I am satisfied that these are documents were prepared in contemplation of litigation, are subject to litigation privilege and, as such, are exempt in terms of section 36(1) of FOISA.

Document category (d): Correspondence between the Board and other third parties

26. The remaining documents withheld by the Board are records of communications between the Board and the Trust, and other third parties including the MWC, the Scottish Office and the Scottish Legal Aid Board. In addition, there is one letter from Mr Doherty's solicitors' parents to the Board which I will consider separately.
27. I have examined the contents of these communications and am satisfied that they relate to the Board's preparations for defending the action raised against the Board by Mr Doherty's parents. I consider that they are documents which are subject to litigation privilege and that they are exempt in terms of section 36(1) of FOISA.



28. However, I am not satisfied that the letter from Mr Doherty's solicitors' parents can be exempt in terms of section 36(1) of FOISA. Given that it is a communication from an "opposing party" I do not consider that it is a communication in respect of which a claim to confidentiality of communications can be made. (I will consider this letter in more detail below.)

The Public Interest

29. Given that I have found all but one of the documents withheld from Mr Doherty to be exempt in terms of section 36(1) of FOISA, I shall now go on to consider the whether the public interest in maintaining the exemption outweighs that in disclosing the information.
30. The Courts have long recognised the strong public interest in maintaining the right to confidentiality of communications on the grounds of legal professional privilege. Many of the arguments in favour of maintaining this privilege were discussed by the House of Lords shortly before FOISA came into force, in *Three Rivers District Council and Others v Governor and Company of the Bank of England* (2004) UK HL 48 (<http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm>).
31. In Decision 75/2007 (Mr Doherty and the Mental Welfare Commission for Scotland), I set out a number of issues which would be raised by disclosure of information relating to the death of Joseph Doherty. In the case currently under consideration, disclosure of the information would raise the same issues. In all of these cases there is a strong public interest in maintaining legal professional privilege.
32. In favour of maintaining the exemption, I must consider the public interest in allowing an authority to communicate its position to its advisers fully and frankly in confidence, in order to maintain the most comprehensive legal advice to defend its position adequately should that become necessary. I must also consider the public interest in allowing a public authority to receive comprehensive legal advice about its proposed actions and to take action to defend itself against a court action without sharing its preparations with the opposing party.



33. The Board set out in its submissions that there has already been extensive scrutiny of the circumstances of Joseph Doherty's death by the Board, investigative bodies, the media and the public. According to the Board, this scrutiny has led to improvements in its administrative practices in reporting suicides. The Board did not accept that disclosure of this information would enhance the already intensive scrutiny of the decision making process in this case. It stated that the public had already been provided with full access to information about the regulatory functions undertaken by the bodies concerned. Finally, it pointed out that it had released a large volume of documentation in response to Mr Doherty's initial request and request and request for review.
34. As with decisions 75/2007, I consider that there may be arguments for releasing the information on public interest grounds if it would provide new information which would contribute to the ongoing debate surrounding a patient's consent to medical treatment or the use of electro convulsive therapy to treat those suffering from mental illness.
35. This was a case where the actions of those bodies involved in the care, treatment, and the investigation of the circumstances surrounding Joseph Doherty's death were subject to intense and public scrutiny. I cannot accept that disclosure of the information would contribute further to the already exhaustive debate on the actions of those bodies, or raise further issues relating to the care, treatment or death of Joseph Doherty which have not been addressed.
36. Having examined the documentation held by the Board in detail, I am of the opinion that it does not provide sufficient insight to the matters set out above to override the compelling public interest in maintaining the right to maintaining legal professional privilege.
37. I do understand that this will be disappointing for Mr Doherty, given that the issue is of such personal significance to him. The particular interest of an individual could equate with a wider public interest. However whilst the disclosure of all or any of this information would be of great interest to Mr Doherty, in my view this is would not reveal information in the public interest, and any benefit from disclosure would not outweigh the benefit to the overall public interest in maintaining the exemption.
38. Having considered the public interest in favour of disclosure of the information and the public interest in favour of maintaining the exemption in section 36(1), and having balanced the two, I am satisfied that the public interest in disclosing the information which has been withheld in terms of section 36(1) of FOISA is outweighed by the public interest in maintaining the exemption.



The letter from Mr Doherty's parents solicitors

39. As noted above, I have not upheld the use of the exemption in section 36(1) in respect of the letter from Mr Doherty's parents' solicitors. I consider, however, that this letter is exempt from release to Mr Doherty on the basis of the absolute exemption contained in section 25(1) of FOISA. Section 25(1) exempts from release information which an applicant can reasonably obtain other than by requesting it under section 1(1).
40. As executor of his parent's estate, Mr Doherty has a right to access this letter from his parents' solicitors and, given the subject matter of this case, I would suggest that this is the appropriate way for him to access the letter without having to consider whether the letter should be put into the public domain as a consequence of being released under FOISA.

Decision

I find that the Greater Glasgow NHS Board (the Board) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding information from Mr Doherty's. While I consider that one of the documents withheld from Mr Doherty was not exempt in terms of section 36(1), I do consider that it is exempt in terms of section 25(1) of FOISA. Consequently I do not require the Board to take any action as a result of this decision.

Appeal

Should either Mr Doherty or the 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 of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
21 August 2007



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.

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.

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

36 Confidentiality

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