



Scottish Information
Commissioner

**Decision 146/2007 Mr Alexander Doherty and the
Common Services Agency for the Scottish Health
Service**

Information relating to the death of Joseph Doherty

Applicant: Mr Alexander Doherty

**Authority: The Common Services Agency for the Scottish Health
Service**

Case No: 200500611

Decision Date: 22 August 2007

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 146/2007 – Mr Alexander Doherty and the Common Services Agency for the Scottish Health Service

Request for information relating to the death of Joseph Doherty – information withheld – the Commissioner generally upheld the use of the exemption by the CSA

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); 2(1) (Effect of exemptions); 15(1) Duty to provide advice and assistance); 25(1) (Information otherwise accessible); 36(1) (Confidentiality) and 37(1) (Court records, etc).

The relevant text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Alexander Doherty requested all documents held by the Central Legal Office of the Common Services Agency for the Scottish Health Service (the CSA) concerning the death of his brother, Joseph Doherty, and all legal matters concerning the ensuing court action for damages filed by Mr Doherty's parents against Greater Glasgow Health Board.

The CSA withheld the information from him in terms of section 36(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). Mr Doherty was dissatisfied with the response he received from the CSA to his initial request for information and to his subsequent request for review. Mr Doherty applied to the Scottish Information Commissioner for a decision as to whether the CSA was correct to withhold the information from him.

The Commissioner found that, generally, the CSA was correct to withhold the information requested by Mr Doherty in terms of section 36(1). He found, however, that the CSA incorrectly withheld a number of documents under that exemption, but that the remaining documents were exempt from disclosure under the absolute exemptions contained in section 25(1) and 37(1) of FOISA.



Background

- 1 Mr Alexander Doherty (Mr Doherty) made an information request to the CSA in terms of section 1(1) of FOISA on 27 January 2005, requesting all documents held by its Central Legal Office concerning the death of his brother, Joseph Doherty, and all legal matters concerning the ensuing court action for damages filed by Mr Doherty's parents against Greater Glasgow Health Board. It should be noted that the Central Legal Office of the CSA provides legal advice and representation to Greater Glasgow Health Board.
- 2 The CSA responded to Mr Doherty on the same day, advising that, although it held the information requested, the information was exempt from release under sections 25(1) and 36(1) of FOISA.
- 3 On 30 January 2005, Mr Doherty asked the CSA to review its decision not to release the information on the basis of 25(1) and 36(1) of FOISA.
- 4 The CSA carried out an internal review of Mr Doherty's request and responded to him on 14 February 2005, stating that all of the information was exempt and upholding its decision to withhold the information requested from release. However, on review, the CSA only relied on the exemption in section 36(1) of FOISA. The CSA explained to Mr Doherty that the information it held was subject to legal professional privilege. The CSA considered that the public interest lay in maintaining the exemption, rather than in disclosing the information to Mr Doherty.
- 5 Mr Doherty wrote to me on 15 February 2005 asking me to investigate on his behalf. Mr Doherty commented that given that all the legal aspects to this case were complete, he found it difficult to understand why the information was being withheld.
- 6 Mr Doherty's application was validated by establishing that he had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to his request. The case was then allocated to an investigating officer.



Investigation

- 7 The investigating officer wrote to the CSA on 24 February 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. In particular, the CSA was asked to comment on its reliance on the exemption contained in section 36(1) and to provide copies of all of the information it held in relation to Mr Doherty's request.
- 8 The CSA responded on 10 March 2005, providing all of the information that had been requested by, but withheld from, Mr Doherty and offering comment on the issues raised.
- 9 The CSA was asked for further submissions and responded in April 2005.
- 10 In its comments, the CSA gave information on its application of section 36(1) of FOISA to the information requested in its entirety, and also further details on why it considered the public interest to be balanced in favour of maintaining the exemption.
- 11 Additionally, the CSA claimed that the witness statements which fell within the locus of Mr Doherty's request were exempt from disclosure under section 38(2) of FOISA (I take this to be a reference to section 38(1)(b) of FOISA, given that section 38(2) sets out the "first condition" referred to in section 38(1)(b)) on the basis that to disclose the witness statements would constitute a breach of confidence actionable by the individuals who had made the statements.
- 12 The CSA provided a schedule of documents relating to the documentation falling within the scope of the request.
- 13 On receipt of its comments, the investigating officer wrote to the CSA, requesting further submissions relating to the application of section 36(1) of FOISA to the information requested.
- 14 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 relevant to the investigation under FOISA, they did contain some arguments as to why all of the information which he had requested should be disclosed. I have therefore considered Mr Doherty's comments in determining where the public interest lies in relation to this case.
- 15 There followed further correspondence between all parties in order to clarify specific issues which arose during the course of the investigation. The contents of these communications have been taken into account in consideration of the case.



The Commissioner's Analysis and Findings

- 16 In investigating the case, I found there to be a number of different issues raised by Mr Doherty's application to me. These were:
- the scope of the information request
 - the application of section 36(1) of FOISA to the information requested by Mr Doherty
 - the remaining exemptions applied to the information withheld from Mr Doherty

The scope of the information request

- 17 The documents withheld from Mr Doherty constitute a file compiled by the Central Legal Office of the CSA recording its work preparing to defend the interests of its client, the Greater Glasgow Health Board, in relation to an action for damages brought by Joseph Doherty's parents against Greater Glasgow Health Board. The case eventually settled out of court. It should be noted that both of Mr Doherty's parents are now dead. Mr Doherty is the executor of his brother's and his parents' estates.
- 18 I note that some of the information which has been withheld from Mr Doherty does not relate to Joseph Doherty, but to a third party (also deceased). Given the terms of Mr Doherty's information request, I do not consider information which relates solely to the third party (this may be whole documents or parts of documents) to fall within the scope of Mr Doherty's request. Consequently, I will not consider such information in this decision notice.
- 19 For ease, I have divided the contents of the file into different categories of information:
- a) The fatal accident inquiry determination
 - b) Records of legal advice requested from the CSA and counsel by Greater Glasgow Health Board and the Mental Health Services Trust
 - c) Records of advice given to Greater Glasgow Health Board and the Mental Health Services Trust by the CSA and counsel
 - d) Court records held in anticipation of the action brought against Greater Glasgow Health Board
 - e) Internal correspondence and communications between the CSA and third parties in anticipation of legal action being brought against the Health Board (including witness statements)
 - f) Press release



g) Correspondence between the CSA and Mr Doherty's parents' solicitors etc

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

- 20 The CSA has submitted that all of the information withheld from Mr Doherty is exempt in terms of section 36(1) of FOISA.
- 21 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).
- 22 Legal advice privilege covers communications between lawyers and their clients, where legal advice is sought or given.
- 23 Litigation privilege is wider and applies to documents created by a party to potential litigation in contemplation of 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. (This is relevant given that Mr Doherty has questioned why information is being withheld after litigation has ended.)
- 24 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.
- 25 The CSA has submitted that it claimed the exemption in terms of section 36(1) on the basis of the fundamental legal duty of confidentiality which arises from the relationship between its Central Legal Office and the Greater Glasgow Health Board.
- 26 The CSA commented that the approach to the defence taken by the Central Legal Office is relevant to other cases where it has been instructed to defend actions taken against Greater Glasgow Health Board and other Health Boards in Scotland. The release of the information could accordingly be of value to other claimants where proceedings or claims of negligence or fault are brought against the NHS.



- 27 The CSA also noted that should the information be released without the consent of the client (here, Greater Glasgow Health Board) it could lead to an actionable breach of confidence being raised by the client. It submitted that in this case the files requested are not capable of being readily divided without the risk of disclosing its opinions on facts and its tactical approach.
- 28 Basically, the CSA has withheld the entire contents of the legal file on the basis of section 36(1), given that it is a legal file. However, I consider that this is an overly simplistic approach. While it is possible that a legal file will include a lot of material which is exempt in terms of section 36(1), it does not necessarily follow that every item within the file consists of information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The actual contents of the information must be considered.

Document category a: Fatal accident inquiry determination

- 29 Within the file are copies of the fatal accident inquiry determination on the death of Joseph Doherty. In an email dated 12 June 2007, Mr Doherty confirmed that he wished to withdraw his application as it related to the determination, as he already held copies of this document. As a result, I shall not consider further whether the CSA was correct in withholding these documents from Mr Doherty.

Document category b: Records of legal advice requested from the CSA and counsel by Greater Glasgow Health Board and the Mental Health Services Trust

- 30 A number of the documents withheld are communications from Greater Glasgow Health Board and the Mental Health Services Trust requesting advice and information relating to the death of Joseph Doherty and subsequent action brought against Greater Glasgow Health Board by his parents. Given the timing, circumstances and contents of this correspondence, I am satisfied that this correspondence comprises 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 or litigation privilege. As a result I am satisfied that these records are exempt from disclosure in terms of section 36(1) of FOISA.

Document category c: Records of advice given to Greater Glasgow Health Board and the Mental Health services trust by the CSA and counsel

- 31 A large proportion of the documents which have been withheld by the CSA comprise correspondence from the Central Legal Office of the CSA to Greater Glasgow Health Board and the Mental Health Services Trust giving legal advice on various matters relating to Joseph Doherty's death.



- 32 Again, given the timing, circumstances and contents of this correspondence, I am satisfied that information of this nature comprises correspondence in respect of which a claim of confidentiality of communications could be maintained in legal proceedings, either because they are subject to legal advice or litigation privilege. As a result, I am satisfied that these records are exempt from release in terms of section 36(1) of FOISA.

Document category d: Court records held in anticipation of the action brought against Greater Glasgow Health Board

- 33 Some of the documents withheld by the CSA constitute court records produced in relation to the action brought against Greater Glasgow Health Board by Joseph Doherty's parents, either by the CSA or by the courts.
- 34 I do not consider that the documents in the file which have been lodged with, or otherwise placed in the custody of a court for particular proceedings, served on or by a Scottish public authority for the purposes of such proceedings or created by a court (or by a member of its administrative staff) for the purposes of, or in the course of such proceedings, are exempt in terms of section 36(1) of FOISA on the basis of legal professional privilege. However, given that there is a specific, absolute (i.e. not subject to the public interest test) exemption for such records, I will consider them below in relation to the section 37 exemption.

Document category e: Internal correspondence and communications between the CSA and third parties in anticipation of legal action being brought against the Health Board (including witness statements)

- 35 Having examined the documents which fall under this category of information, I am satisfied, given the timing, circumstance and contents of the correspondence, that the information withheld under this heading comprises 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 (usually) litigation privilege. As a result I am satisfied that these documents are exempt in terms of section 36(1) of FOISA.

Document category f: Press Release

- 36 One of the documents withheld from Mr Doherty is a press release from the Scottish Office relating to the Mental Welfare Commission for Scotland's investigation into the care of Joseph Doherty. I am not satisfied that in this case the press release falls under the categories of information exempted by virtue of section 36(1) of FOISA and so I find that the CSA incorrectly applied section 36(1) to the document. However, I will consider the status of the press release in relation to the exemption in section 25 (Information otherwise accessible) below.



Document category g: Correspondence between the CSA and Mr Doherty's parents' solicitors

- 37 The correspondence between the CSA and the legal representatives of the parents of Joseph Docherty can be split into two main types – correspondence in connection with the proposed settlement of the court action raised by Joseph Docherty's parents and correspondence which is otherwise related to the action being raised.
- 38 Having considered these documents, I am not satisfied that these items of correspondence can be exempt in terms of section 36(1) of FOISA. Given that they involve correspondence with an "opposing party" I do not consider that they are communications in respect of which a claim to confidentiality can be made. (I will, however, go on to consider these communications below when I consider the section 25(1) exemption.)

The Public Interest

- 39 The exemption contained within section 36(1) is subject to the public interest test set out in section 2(1)(b) of FOISA. As noted above, this means that even if the information sought by Mr Doherty is exempt in terms of section 36(1), the information should still be released unless the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- 40 Where I have found that the information is exempt in terms of section 36(1), I will go on to consider whether the public interest in maintaining the exemption outweighs that in disclosing the information. In coming to these conclusions I have taken account of the detailed submissions provided to me by both Mr Doherty and the CSA.
- 41 Mr Doherty is clearly of the opinion that there is value to be gained by disclosure of the information with the CSA holds. He considers that disclosure of the information may bring to light new issues relating to the death of Joseph Doherty for him to pursue. Release of the information would certainly throw light on the processes used by the CSA to prepare for the action taken against Greater Glasgow Health Board.
- 42 Perhaps of most significance to Mr Doherty, release could provide clarification of why the CSA pursued settlement with Joseph Doherty's parents rather than concluding the matter at court.
- 43 Other, more general, public interest issues in favour of releasing the information might include enhancing scrutiny of the legality of the actions of a public body and, by extension, effective oversight of expenditure of public funds and obtaining value for money.



- 44 It might also be in the public interest to order disclosure where it would make a significant contribution to debate on a matter of public interest. Here, Mr Doherty considers that due to the controversial nature of the treatment which his brother received, and questions surrounding the issues of consent and appropriate investigation of regulatory authorities, there is a significant public interest in the information which the CSA holds being disclosed.
- 45 Similarly, if the information withheld by the CSA raised any questions of wrongdoing or malpractice on the part of the organisations charged with the care and treatment of Mr Doherty's brother, then there may be arguments for releasing the information on public interest grounds.
- 46 The Courts have long recognised the strong public interest in maintaining the right to legal professional privilege on administration of justice grounds. Many of the arguments in favour of maintaining legal professional privilege were discussed in a House of Lords case, *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>).
- 47 In Decision 073/2007 (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, I would argue that the issues which would be raised by disclosure would remain the same. I concluded that there will always be a strong public interest in maintaining the right to legal professional privilege. As a result, while I will consider each case on an individual basis, I am likely only to order the release of such communications in compelling cases.
- 48 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.
- 49 I note Mr Doherty's reasoning for the public interest in disclosure and 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.
- 50 Having examined the documentation held by the CSA in detail, I am of the opinion that, whilst it does give detail as to the circumstances of Joseph Doherty's death, it does not provide further insight to the matters set out above.



- 51 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 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.
- 52 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.

Other exemptions under FOISA

Section 25(1)

Correspondence otherwise available to Mr Doherty

- 53 The CLO originally claimed the exemption in section 25(1) on the basis that Mr Doherty would have access to all correspondence between his solicitor and the CLO, the Procurator Fiscal, all documentation available to his solicitor arising from the fatal accident inquiry and the claim against the Greater Glasgow Health Board. The CLO “dropped” this exemption on review, after deciding that all of the contents of the file were exempt in terms of section 36(1) of FOISA. However, I consider that the exemption in section 25(1) is relevant to some of the information which has been withheld from Mr Doherty.
- 54 Section 25(1) of FOISA states that information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information. As with section 37(1), this is an absolute exemption in that it is not subject to the public interest test required by section 2(1)(b) of FOISA.
- 55 I note that in this case, the CSA has argued that Mr Doherty will have access to correspondence between his solicitor and the CLO, the Procurator Fiscal etc. from his solicitor. It should be noted that the court action was not raised on behalf of Mr Doherty himself, but on behalf of Mr Doherty’s parents. However, I am aware that Mr Doherty is the executor of his parents’ estates. As executor, Mr Doherty has the right to access this correspondence 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.
- 56 Given that I consider that this correspondence is information which Mr Doherty, as executor, can reasonably obtain other than by requesting it under FOISA, I consider that the information is exempt.



Press release

- 57 Document number 61 is a photocopy of a press release published by the Scottish Executive and taken from their website.
- 58 Clearly, as the document is taken from the Scottish Executive's website, it is publicly available. I am therefore satisfied that the document falls under section 25(1) of FOISA.
- 59 Section 25 is an absolute exemption in that it is not subject to the public interest test contained in section 2(1)(b) of FOISA. This means that I am not required to go on to consider whether the public interest in disclosing the information requested is outweighed by the public interest in maintaining the exemption.
- 60 However, in terms of the CSA's duty to provide advice and assistance to Mr Doherty in terms of section 15(1) of FOISA, I require the CSA to provide Mr Doherty with sufficient details about the press release (such as its date or the web address at which it can be located) to allow Mr Doherty to access the press release.

Section 37(1)

- 61 As I have set out above, I consider that some of the documents withheld by the CSA are exempt in terms of section 37(1) of FOISA.
- 62 In essence, section 37(1) provides for an absolute exemption in respect of all information lodged, or otherwise placed in the custody of the court or created by a court (or its staff) for the purposes of court proceedings. The aim of the exemption is to leave the legal dispute resolution and inquiry system in charge of its own processes as regards the disclosure of information. Given that this is an "absolute" exemption, it is not subject to the public interest test required by section 2(1)(b) of FOISA.

Section 38(1)(b)

- 63 As already noted, the CSA also applied the exemption contained in section 38(1)(b) of FOISA to the witness statements which it had taken in preparation for the court case. Given that I have found that the information is exempt in terms of section 36(1) (and that the exemption should be maintained), I am not required to go on to consider whether the exemption contained in section 38(1)(b) also applies to the documents.



Decision

I find that the Common Services Agency for the Scottish Health Service (the CSA) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding information from Mr Doherty. While I am satisfied that the majority of the information is exempt in terms of section 36(1) of FOISA, I consider that a number of documents are not exempt under this exemption. In this respect, I find that the CSA failed to comply with section 1(1) of FOISA. However, given that I have found that the remaining information is exempt under section 25(1) or 37(1) of FOISA, the only action I require the CSA to take is to provide details about the press release (as specified in paragraph 60 above) to Mr Doherty within 45 days of receipt of this decision notice.

Appeal

Should either the CSA or Mr Doherty 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
22 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 the public interest in maintaining the exemption.

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

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.

37 Court records, etc.

- (1) Information is exempt information if it is contained in-
- (a) a document-
 - (i) lodged with, or otherwise placed in the custody of, a court for the purposes of proceedings in a cause or matter;
 - (ii) served on, or by, a Scottish public authority for the purposes of such proceedings; or
 - (iii) created by a court or a member of its administrative staff for the purposes of, or in the course of, such proceedings