



Scottish Information
Commissioner

**Decision 157/2007 Mr Doherty and the Scottish
Executive**

*Information relating to the care, treatment and death of Joseph
Doherty*

**Applicant: Mr Alexander Doherty
Authority: The Scottish Executive
Case No: 200501642
Decision Date: 28 August 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 157/2007 – Mr Alexander Doherty and the Scottish Executive

Request for information relating to the care, treatment and death of Joseph Doherty – whether documents held lie within the scope of the request – information withheld by the Scottish Executive

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2(1) (Effect of exemptions); 30(b) (Prejudice to effective conduct of public affairs) and 36(1) (Confidentiality)

Mental Health (Care and Treatment) (Scotland) Act 2003: section 7(a) (Duty to bring matters generally to the attention of Scottish Ministers and others)

The full text of these provisions is set out in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Alexander Doherty (Mr Doherty) asked the Scottish Executive (the Executive) for information it held relating to the care, treatment and death of Joseph Doherty. Joseph Doherty committed suicide whilst a patient at Gartnavel Royal Infirmary in Glasgow. Subsequently, Mr Doherty has instigated a number of enquiries and investigations into the circumstances surrounding his brother's death.

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

Following an investigation the Commissioner found that the Executive had complied with part 1 of FOISA in responding to Mr Doherty's request.



Background

1. On 27 January 2005 Mr Doherty wrote to the Health Department of the Executive and requested all information held by it in relation to the care, treatment and death of Joseph Doherty, his brother.
2. The Executive responded to Mr Doherty on 18 February 2005, disclosing a number of documents relating to his request, but withholding other documents on the basis that they were exempt from disclosure under sections 30(b)(i) and (ii) and 36(1) of FOISA.
3. Mr Doherty was dissatisfied with the response which he received, and so wrote to the Executive on 21 February 2005 requesting that it carry out a review of the way in which it had dealt with his information request.
4. The Executive carried out a review and notified Mr Doherty of the outcome on 17 March 2005. As a result of the review, the Executive released some further documents to Mr Doherty, but continued to withhold a number of documents under sections 30(b)(i) and (ii) and section 36 of FOISA.
5. Mr Doherty remained dissatisfied with the Executive's response and applied to me for a decision as to whether the Executive had dealt with his request for information in line with FOISA. 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 only after asking the authority to review its response to his request.

The Investigation

6. The investigating officer wrote to the Executive on 17 June 2005 notifying it of the application made by Mr Doherty and giving it an opportunity to comment on the application as a whole and particularly on its reliance on the exemptions in sections 30(b)(i) and (ii) and section 36 of FOISA. The investigating officer also asked the Executive to supply her with a copy of all of the information which it held in relation to Mr Doherty's application.
7. The Executive responded on 12 July 2005, providing the information and comments which had been requested.



8. During the investigation, the Executive corresponded with the investigating officer and clarified certain points in relation to its submissions. I will examine the arguments put forward by the Executive in my analysis and findings section below. However, they are summarised in brief here.
9. With reference to sections 30(b)(i) and (ii) of FOISA, the Executive argued that the documents were exempt from disclosure due to the content of the information in the documents. The Executive considered that to release the information withheld from Mr Doherty would inhibit its ability to request and receive comments from external bodies about sensitive matters in a secure manner in the future, which would in turn lead to the quality of its decision and policy making to deteriorate.
10. The Executive also refused to disclose certain information requested by Mr Doherty on the basis that it fell under the exemption contained in section 36(1) of FOISA. This exempts information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings.
11. As the original schedule of documents provided to my Office was somewhat unclear, the Executive provided the investigating officer with an amended schedule on 12 July 2006. All subsequent references to document numbers in this decision are to the numbers contained within this later schedule.
12. Mr Doherty also provided me with detailed comments on the issues surrounding the death of his brother. While the comments from Mr Doherty are not all relevant to the investigation under FOISA, the comments contained 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.

The scope of Mr Doherty's request

13. Mr Doherty also stated that he did not want his request for information to extend to newspaper articles, correspondence which he had already received, and his brother's medical records. This type of information has not, therefore, formed part of my investigation.
14. During the investigation, the Executive released a number of additional documents to Mr Doherty (in addition to the documents released in response to Mr Doherty's request and request for review). As Mr Doherty withdrew his application insofar as it related to those documents, I have not considered the documents in this decision.
15. In a letter of 21 July 2006, the Executive questioned whether much of the remaining information which it held actually lay within the scope of Mr Doherty's request for information. The exact wording of Mr Doherty's request is as follows:



“ All information held by your department in relation to the care, treatment and death of Joseph Doherty who died while in the care of Gartnavel Royal Hospital, Glasgow on 4 April 1992”.

16. The Executive argued that much of the remaining information which it held related to complaints which Mr Doherty had made following his brother's death, and did not directly relate to the care, treatment or death of Joseph Doherty.
17. While I understand the thrust of the Executive's argument, I note that Mr Doherty intentionally worded his request so that it would cover as much information as possible, presumably to ensure that all information relating, directly, or indirectly, to the care, treatment and death of Joseph Doherty. The complaints made by Mr Doherty relate back to the care, treatment and death of Joseph Doherty. I am therefore satisfied that the wording of Mr Doherty's request is sufficiently wide as to encompass the majority of the information withheld by the Executive.
18. However, I consider that the following documents are not within the scope of Mr Doherty's request as they do not relate to the care, treatment or death of Joseph Doherty:

File 1: paragraphs i and ii (including headings i and ii) of document 15; document 20; document 27; paragraphs 1-3 of document 28 and all of document 40 except paragraph 15

File 2: document 37

Related Decisions

19. Mr Doherty's request to the Executive forms part of a series of requests to Scottish public authorities which he has made relating to the circumstances surrounding Joseph Doherty's death. Due to the similarity of the cases, much of the reasoning in this decision overlaps with that applied to information withheld by other public authorities. I have already considered some of the information which has been withheld from Mr Doherty in relation to at least one other case.



The Commissioner's Analysis and Findings

20. 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 Executive and am satisfied that no matter of relevance has been overlooked.
21. I shall firstly consider the Executive's reliance on section 36(1) of FOISA.

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

22. 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).
23. Legal advice privilege covers communications between lawyers and their clients, where legal advice is sought or given.
24. 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.
25. 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.
26. A number of documents were withheld from Mr Doherty by the Executive on the basis that they were exempt by virtue of section 36(1) of FOISA. For ease of reference, I have divided the documents into two different categories.



Records of communications between the Scottish Office/Scottish Executive and its in house Solicitors

27. A number of the documents withheld by virtue of section 36(1) of FOISA are internal Scottish Office/Scottish Executive communications with their in house solicitors. (The information which has been withheld from Mr Doherty dates from February 1999, i.e. pre-devolution. The information in question is now held by the Scottish Executive.) The documents request and provide advice on legal matters raised by communications the Scottish Office/Scottish Executive had with Mr Doherty and the Mental Welfare Commission for Scotland (the Mental Welfare Commission) relating to the death, and subsequent investigation into the death, of Joseph Doherty. I am satisfied that the documents comprise information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings on the basis that they are subject to the legal advice privilege. As a result, these records are covered by the exemption contained within section 36(1) of FOISA.

Records of communications between the Mental Welfare Commission and the Scottish Executive

28. The Executive holds legal advice which its in-house solicitors gave to the Mental Welfare Commission. In an earlier, related decision (075/2007, Alexander Doherty and the Mental Welfare Commission of Scotland), I established that the in-house solicitors for the Scottish Office and, later, the Scottish Executive provided legal services to the Mental Welfare Commission at the time that this advice was given. I am therefore satisfied that this comprises information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings on the basis of legal advice privilege. I am satisfied that these records are covered by the exemption contained within section 36(1) of FOISA.
29. In addition, there are a number of documents comprising communications made in contemplation of legal action being taken by the Mental Welfare Commission which I am satisfied are communications in respect of which a claim to confidentiality of communications could be maintained in legal proceedings on the basis that the communications are subject to litigation privilege. Although the Commission never pursued the matter in court, I am satisfied that they were prepared in contemplation of litigation.
30. The exemption contained within section 36(1) is subject to the public interest test required by section 2(1)(b) of FOISA. This means that although I have found that the information withheld from Mr Doherty is exempt in terms of section 36(1), I must still order release of the information unless the public interest in maintaining the exemption outweighs the public interest in disclosing the information.



The public interest test

31. I shall now consider whether the public interest in maintaining the exemption outweighs that in disclosing the information withheld under section 36(1) by the Executive. In coming to these conclusions I have taken account of the detailed submissions provided to me by both Mr Doherty and the Executive.
32. The Courts have long recognised the strong public interest in maintaining 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>).
33. In previous, related decisions (075/2007 Mr Doherty and the Mental Welfare Commission for Scotland), 146/2007 Mr Doherty and the Common Services Agency for the National Health Service and 144/2007 Mr Doherty and Greater Glasgow NHS Board), I set out a number of public interest 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 the right to legal professional privilege.
34. 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.
35. The Executive set out in its submissions that it is in the public interest to maintain its duty of confidence to clients. It went on to say that it was in the public interest to ensure that those who take decisions within the Executive are able to refer to full legal advice. If such advice were to be disclosed it would not be given so candidly in future.
36. There has already been extensive scrutiny of the issues raised by the death of Joseph Doherty, which, it has been claimed, has led to improvements in the practice of public authorities. As a result of this scrutiny, the public has already been provided with access to information about the regulatory functions undertaken by the bodies concerned with investigating the death of Joseph Doherty. A large volume of information has been released into the public domain by a number of authorities in response to Mr Doherty's requests for information.



37. As with previous decisions, I note Mr Doherty's arguments in favour of releasing the information which has been withheld on the basis of legal professional privilege. 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.
38. However, the information which has been withheld under section 36 does not relate to this type of material, but instead relates to other matters. Having examined the documents, I am of the opinion that release would not provide sufficient insight into the matters set out above to override the compelling public interest in maintaining the right to legal professional privilege provided for by section 36(1) of FOISA.
39. 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 therefore 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.
40. 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 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.
41. Some of the documents withheld by the Executive were withheld on the basis that they were exempt under sections 30(b)(i) and (ii) and section 36(1) of FOISA. Where I have found that the Executive was correct to withhold information under section 36(1), I will not go on to consider whether the Executive was correct to apply the exemptions in section 30(b)(i) or (ii) to the information.

The application of section 30(b)(i) and (ii) to the information requested by Mr Doherty

42. Information is exempt from release under section 30(b)(i) and (ii) if its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views, respectively. In the vast majority of cases, the Executive has applied both of these exemptions to the same information.
43. As with section 36(1), the exemptions under section 30(b) of FOISA are subject to the public interest test required by section 2(1)(b) of FOISA.



44. In its submissions, the Executive argued that disclosure of internal communications in this case would substantially inhibit the provision and quality of future internal dialogue, and also discussions between the Executive and third parties. It also argued that disclosure of the information would inhibit the frankness and candour of those who offer advice in future and that the good relationships between the Executive and the third parties, who provide rigorous advice to the Executive, would diminish as a result of disclosure of such information. Officials within the Executive need to be able to engage frankly and constructively with others in order to engage in open relationships with external bodies. The candour of discussions with external bodies would be negatively affected if it were to disclose the information which Mr Doherty has requested.
45. The standard to be met in applying the tests contained in sections 30(b)(i) and 30(b)(ii) is high. In applying these exemptions, the chief consideration is not whether the information constitutes advice or opinion, but whether the release of the information would, or would be likely to, inhibit substantially the provision of advice or the exchange of views. The Executive's own guidance to its staff on the application of section 30(b) points out that the word 'inhibit' suggests a suppressive effect, so that communication would be less likely, more reticent or less inclusive.
46. Following the preparation of this draft decision, the Executive submitted additional, general submissions on the arguments that it was relying on in justifying its conclusions that the exemptions in section 30(b) of FOISA apply to the information which has been withheld in various cases, including this one, which are subject to my consideration.
47. I have addressed these additional, general submissions already in paragraphs 23 to 31 of another decision (089/2007, Mr James Cannell and Historic Scotland). As these new arguments which have been submitted by the Executive are not specific to the information under consideration, I do not intend to discuss these further here, other than to say that I have considered these fully, together with the original submissions that the Executive have provided, in reaching my decision on the applicability of the exemptions in section 30(b) of FOISA to the information under consideration here.
48. Again, I have divided the information withheld from Mr Doherty under the exemptions in section 30(b)(i) and (ii) into various categories, as follows:
- a) Advice and views exchanged between the Executive and the Mental Welfare Commission relating to matters raised by Mr Doherty
 - b) Comments on a draft response to a letter written to the Scottish Office by Tony Worthington, MP
 - c) Records of discussions etc. following on from a question raised during a parliamentary debate



d) A reference note on the background of the case for use in another matter

a) Advice and views exchanged between the Executive and the Mental Welfare Commission relating to matters raised by Mr Doherty

49. Some of the information withheld by the Executive relates to requests for advice from the Mental Welfare Commission on how to proceed in relation to particular actions taken by Mr Doherty, together with notes of internal discussions on these issues and the actual advice given to the Mental Welfare Commission.
50. As I have noted in decision 075/2007, section 7 of the Mental Health (Care and Treatment) (Scotland) Act 2003 imposes a duty on the Mental Welfare Commission to bring to the attention of the Scottish Ministers any matter of general interest or concern as respects the welfare of any persons who have a mental disorder which is a matter that the Commission considers ought to be brought to their attention.
51. In that decision, I found that disclosure of the exchange of advice and views exchanged between the Executive and the Mental Welfare Commission on this particular matter, whilst not affecting the ability enshrined in statute of the Mental Welfare Commission to discuss matters of this type with the Executive, would affect the frequency of occasions on which its views are sought and inhibit the free and frank nature of those views.
52. Having examined the contents of the documents withheld under this category, I am also of the opinion here that the release of the information in the documents would, or would be likely to, inhibit substantially the candour of the advice and views exchanged between the two organisations, for the reasons set out by the Executive.

b) Comments on the draft response from the Scottish Office to Mr Tony Worthington, MP

53. Document number 41 of file 1 and its associated enclosures comprise correspondence between the Scottish Office, its internal advisors and third parties relating to the drafting of a response to a letter sent to the Scottish Office by Mr Tony Worthington, MP on Mr Doherty's behalf.



54. The issues surrounding disclosure of these documents are similar to those arising from disclosure of communications between the Scottish Office and the Mental Welfare Commission. Here, matters being discussed are complex and extremely sensitive. In order to ensure that the letter sent to Mr Worthington, MP was as full, clear and accurate as possible, the comments on the draft versions of the letter are candid and fulsome in themselves. I can accept that, while the Executive may seek comments on such matters from its employees in the future should these documents be released, there is a strong argument to support the fact that the comments received would be likely to lose the candour and frankness which they had possessed in the past. I further accept that, in cases such as these, this would adversely affect the quality of responses sent to enquiries of this type in the future.
55. I am therefore satisfied that the information which has been withheld under this category is exempt in terms of section 30(b)(i) and (ii) of FOISA.

c) Records of discussions etc. following on from a question raised during a parliamentary debate

56. A number of the documents which have been withheld from Mr Doherty relate to the drafting of a background note and response to a Minister following on from a question being raised during a parliamentary debate.
57. The same issues arise here as for the comments on the draft response to the letter from Tony Worthington MP. For the reasons set out above, I am satisfied that disclosure of this correspondence is exempt in terms of section 30(b)(i) and (ii) of FOISA.

d) A reference note on the background of the case for use in another matter

58. One remaining document has been withheld by the Executive by virtue of sections 30(b)(i) and (ii). The document is a reference note for another case which raised similar issues to the Doherty case. The Doherty case is discussed in order to inform decisions taken in the other matter.
59. The document contains a candid assessment of whether the matters raised by the investigation into the care, treatment and death of Joseph Doherty bore relevance to another, similar case. There is no compulsion for the Executive to reference the issues brought up by the care, treatment and death of Joseph Doherty in evaluating similar matters, but clearly it is good practice for it to do so. I agree that if this type of information were to be released, it would, or would be likely to, significantly reduce the chance of this type of work being carried out or recorded in the future. I am therefore satisfied that the documents falls under the exemptions contained in sections 30(b)(i) and (ii) of FOISA.



60. As noted above, these exemptions are subject to the public interest test required by section 2(b) of FOISA.

The public interest test

61. In considering the public interest, I have taken into account the arguments raised by both Mr Doherty and the Executive. I have considered arguments in favour of release of the information and arguments in favour of maintaining the exemptions. It should be noted that, in upholding the exemptions, I have already found that release of the information would or would be likely to inhibit substantially the free and frank exchange of views and provision of advice.
62. Mr Doherty advises me that due to the controversial nature of the treatment which his brother received, and the questions surrounding the issues of consent and appropriate investigation of regulatory authorities there is a significant public interest in the information which the Executive holds being disclosed.
63. The Executive has advanced the following arguments to justify its stance that the public interest in disclosing the information is outweighed by that in maintaining the exemption:
- that there is a strong public interest in maintaining the integrity of the process of giving free and frank advice in this sort of case
 - that the knowledge of possible disclosure might inhibit provision of advice in the future and impair the candour and freedom within which papers are prepared, deliberated and revised in future
 - that the public interest in protecting frank communications also concerns any underlying effects likely to suppress effective future communications
64. There is a strong general public interest in withholding the information requested by Mr Doherty as, as I have demonstrated above, disclosure of the information requested would or would be likely to cause substantial inhibition to the Executive's ability to freely discuss matters of this nature with third parties and internally in the future. In order for the public interest in withholding the information to be overridden, either party would have to demonstrate to me a specific reason for this information to be disclosed.
65. If the disclosure of the information contained in the documents which I have withheld were to throw new light on to the care, treatment or death of Joseph Doherty, then I would accept this as an argument in favour of release of the documents. As I have set out in previous decisions on this subject, however, I am of the opinion that the issues raised by the care, treatment, and death of Joseph Doherty have been scrutinised in detail by both the courts and other investigatory bodies in the time that has passed since Joseph Doherty died.



66. I do not consider that the documents in question raise anything new which would contribute to the debate on the matters raised by Mr Doherty. I cannot, therefore, accept Mr Doherty's argument that the public interest in disclosure of these documents would further the public debate on the wider issues which have been raised by him.
67. It is important that authorities can consult with external bodies in order to gain expert opinion on sensitive matters and that those organisations should be free to give candid advice. Were the information requested to highlight fundamental weaknesses in either the Executive's or any other body's treatment of the issues raised by the care, treatment or death of Joseph Doherty, I would be much more inclined to agree that the public interest would be served in disclosure of the documents. However, I do not consider that that is not the case here.
68. As I set out in decision number 75/2007, my view in this case is that should such discussion between parties be stopped by fear of disclosure, no discussions would be likely to be recorded at all, or would be so diluted as to become meaningless, decreasing the transparency of decision making within Scottish public authorities. With these considerations in mind, I consider the public interest in this case to lie in favour of maintaining the exemptions in sections 30(b)(i) and (ii).
69. Again, I understand that this will be disappointing for Mr Doherty, given that the issue is of such personal significance to him. As I have noted previously, 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.

Decision

I find that the Scottish Executive (the Executive) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to Mr Doherty's request for information.



Appeal

Should either Mr Doherty or the Executive 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
28 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 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.

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act –

...

- (b) would, or would be likely to, inhibit substantially –
 - (i) the free and frank provision of advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation ...

36 Confidentiality

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



The Mental Health (Care and Treatment) (Scotland) Act 2003

7 Duty to bring matters generally to attention of Scottish Ministers and others

The Commission shall bring to the attention of –

(a) the Scottish Ministers

...

any matter of general interest or concern as respects the welfare of any persons who have a mental disorder which is a matter that the Commission considers ought to be brought to their attention.