



Scottish Information  
Commissioner

## **Decision 212/2006 Mr H and the Scottish Executive**

*Request for copies of cremation documentation*

**Applicant: Mr H**

**Authority: Scottish Executive**

**Case No: 200502668**

**Decision Date: 23 November 2006**

**Kevin Dunion  
Scottish Information Commissioner**

Kinburn Castle  
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## Decision 212/2006 Mr H and the Scottish Executive

***Request for documentation relating to a specified cremation – section 30(b)(i) free and frank provision of advice applied – section 30(c) prejudice to conduct of public affairs applied – section 32(1)(a) international relations applied - section 35(1)(c) administration of justice applied – section 38(1)(b) personal information applied – section 36(2) confidentiality applied – certain information found not to be exempt – certain information found not to be held (section 17)***

### Relevant Statutory Provisions and other Sources

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Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); 17 Notice that information is not held); 30(b)(i) and (ii) (Prejudice to effective conduct of public affairs); 30(c) (Prejudice to effective conduct of public affairs); 32(1)(a)(i) (International relations); 35(1)(c) (Law enforcement); 36(2) (Confidentiality); 38(1)(b) (Personal information).

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

### Facts

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Mr H sought documentation from the Scottish Executive (the Executive) relating to the cremation of a named individual. The Executive supplied certain information, some of which was provided in a redacted format. One document was withheld in its entirety. Mr H was dissatisfied with this response and sought an internal review. The Executive upheld its position on review.

Following an investigation, the Commissioner found that some further information should be released to Mr H but considered that other information had properly been withheld by the Executive. He also found that one item of information requested was not in fact held by the Executive.



## Background

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1. On 1 January 2005 Mr H made the following request for information to the Executive:
  - A copy of the interim/fact of death certificate together with copies of the documentation connected to the cremation of Elliot Colin Robertson/Double
2. The Executive responded to this request on 1 February 2005. The Executive supplied certain information but indicated that some information had been provided in a redacted format because this information was exempt under section 36(2), section 38(1)(b) and section 35(1)(c) of the Freedom of Information (Scotland) Act 2002 (FOISA). The Executive advised that one document had been withheld in its entirety on the basis of section 36(2). In respect of section 35(1)(c) the Executive set out its reasoning as to why the public interest in disclosing the information was outweighed by the public interest in withholding it.
3. Mr H was dissatisfied with this response and on 17 February 2005 sought a review of this decision. Mr H queried the redactions that had been made and confirmed that he was seeking a copy of the death certificate (which had not been provided). He sought access to all information that had not been supplied.
4. The Executive sought clarification on the specific matters which were the subject of review and responded substantively on 17 March 2006. The Executive identified 4 documents that had been supplied in a redacted form or not at all and also addressed the matter of the death certificate. In summary, the Executive advised the following:

*Form A – Application for Cremation, Glasgow City Council*
5. The Executive advised that certain information was redacted because it related to third parties and was exempt from release under section 38(1)(b).

*Section B of the Fax from the British Embassy in Dublin*
6. The Executive advised that information had been redacted from this form on the basis that it was exempt under section 35(1)(c), because its release would be likely to prejudice substantially the administration of justice. The Executive advised that on balance the public interest favoured withholding the information.



*Document relating to internal procedures and medical advice*

7. The Executive advised that the decision to withhold this document in its entirety was based, not on the content of the form, but because it was obtained in confidence from another person and its disclosure would constitute a breach of confidence actionable by that person. Therefore, section 36(2) applied.

*Redaction of names included in the Note for File referenced FP051510*

8. The Executive advised that one name had been redacted from this document. The Executive indicated that the name of this individual related to the provision of the information in confidence and to reveal that information would constitute a breach of confidence under section 36(2).

*Death Certificate*

9. The Executive advised that it had not been supplied with the death certificate and therefore it was not possible to provide this information to Mr H. The Executive apologised that this matter had not been addressed in its original response to Mr H's request.
10. Mr H was dissatisfied with this response and on 19 September 2005 Public Interest Lawyers (PIL) contacted my office on his behalf to apply for a decision. In subsequent correspondence with my office PIL confirmed that Mr H wished my office to investigate all 5 information requests. The case was allocated to an investigating officer and the application validated by establishing that Mr H 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 investigation**

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11. The officer formally contacted the Executive on 16 January 2006 in terms of section 49(3) of FOISA, asking it to comment on the application as a whole and to provide the information supplied to Mr H and the information withheld. The Executive was also asked to supply a more detailed analysis of its application of the exemptions claimed to the information withheld.
12. The Executive responded to this letter on 15 February 2006. It supplied the information requested and set out its submissions in respect of the information withheld and the information not held. I will refer to the principal relevant submissions in my analysis and findings below. All relevant submissions from both Mr H and the Executive have been considered in reaching my decision on this matter.



13. The Executive provided some background to the information held relevant to this request. In this case the deceased had died in Ireland. The Executive explained that in the event that an individual dies outwith Scotland and is to be repatriated to Scotland for cremation, the cremation cannot proceed until authorisation is granted by the Executive. This procedure is not necessary if burial is to occur instead of cremation. The Executive advised that the relevant legislation is Regulation 13 of the Cremation (Scotland) Regulations 1935 (the 1935 Regulations).
14. The Executive indicated that given that the cremation cannot proceed until authorisation is granted, it aims to process applications for cremation as quickly as possible to minimise the generation of any additional distress for the bereaved family. The Executive advised that it can refuse such authorisations but will only deny such authorisations in extreme circumstances as such a refusal is usually extremely upsetting for a bereaved family.
15. The Executive indicated that to assist the application process, it relied heavily on contacts abroad, including British Embassies, foreign police, foreign governments, the deceased's GP and doctors in the UK. The Executive indicated that it was vital that it retained good relations with these bodies as it regularly received information in confidence to facilitate the granting of authorisation. The Executive indicated that the information was often sensitive and it was important that its contacts abroad had confidence that it would handle this information appropriately.
16. The Executive advised that the current application concerned a request for information with regard to the cremation of Mr Robertson, who was killed in the Republic of Ireland in October 1998. Upon receipt of the application for cremation from the funeral director appointed by the next of kin and the various other papers, authorisation was granted by the Executive and the deceased was cremated.
17. The Executive further advised that in November 2002, Mr H and another were convicted of the manslaughter in an Irish court in relation to Mr Robertson's death. I mention this only because this information is relevant to one of the exemptions the Executive is seeking to rely on.



## The Commissioner's Analysis and Findings

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18. The Executive supplied Mr H with a series of documents relating to the cremation of Mr Robertson. It withheld some parts of certain documents and withheld one document in its entirety. I will consider each of these documents in turn. I consider it helpful to emphasise at the outset of my analysis that the cremation documentation in this case is highly unusual in that it relates to the death of an individual the circumstances of which were subsequently the subject of a criminal trial. As a result, the identity of the deceased and some information about the circumstances surrounding his death are already in the public domain. In many cases, I accept that the family of the deceased would expect such documentation to remain a private matter between themselves and the Executive. As I have said, however, this is an unusual case and as such, my findings relate to the specific circumstances.

### Document 1: Application for cremation, Glasgow City Council

19. The Executive had supplied Document 1 to Mr H but had redacted certain information on the basis that the information was exempt by virtue of section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i), in that the information was third party personal data and its disclosure would be in breach of the data protection principles. The Executive advised that in retrospect certain information had been redacted which could, in fact, be released. This information was the deceased's name, address, occupation, age, sex and marital status (at the top of page 1), together with the day, date and hour proposed for cremation (question (1), page 2). The Executive made specific submissions in respect of the remainder of the redacted information which I will address below.
20. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i), states that information is exempt if it constitutes personal data and its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles (i.e. the principles set out and interpreted in Schedule 1 to the Data Protection Act 1998 (the DPA)). Section 38(5) of FOISA states that the definition of "personal data" is that contained in section 1(1) of DPA. That section defines personal data as:

"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.”

21. The Executive indicated that the form was completed by the deceased's nearest surviving relative and that the name, home address and occupation of the individual completing the form, together with the answers to questions 7, 8 and 9 (which were the opinions of the individual concerned), were that individual's personal data and that disclosure of this information would be in breach of the first data protection principle.
22. The Executive also withheld information about the details of the funeral which appeared on the application form. The Executive argued that this information revealed information about the religious denomination of the surviving relative and other family members and as this information revealed the religious beliefs was their sensitive personal data by virtue of section 2(c) of the DPA and must be protected. The Executive argued that the other details of the funeral, as chosen by the nearest surviving relative, constituted the personal data of that individual. The Executive argued that release of this data would be unfair and therefore contrary to the first data protection principle. The Executive considered the reasonable expectations of the data subject in relation to how the information they imparted would be likely to be used or disclosed and concluded that the data subject concerned would not have anticipated that the personal data they provided on the cremation application form would be released to the public and therefore disclosure would be unfair.
23. I accept that the name, home address and occupation of the person completing this form amounts to their personal data and that they would not normally expect such information to be disclosed to any member of the public who requested it. I am satisfied that disclosure of this information would be in breach of the first data protection principle in that it would be unfair. Likewise, I accept that the opinions of the nearest relative are those of a private individual and, as such, will amount to their personal data. Again, I accept that disclosure of this information would be unfair and in breach of the first data protection principle.



24. The Executive argued that certain details about the funeral service amounted to the relative's sensitive personal data in that this information revealed details of that individual's religious views. I accept this to be the case here but would simply add that frequently details about funeral arrangements are published in the local press to notify members of the public who might wish to attend. Therefore it seems to me that this kind of information will need to be addressed on a case by case basis. In this particular case, there is no evidence to indicate that such information was made public. In the circumstances, I accept that the information redacted constitutes the personal data of the nearest relative and that it would be unfair to disclose this information to a member of the public who requests it. Likewise I accept that other information about the funeral arrangements included on the application form amounts to the personal data of the deceased's relatives and accept that the disclosure of this information to any member of the public who requests it would be unfair.
25. The redacted information that the Executive now considers can be released to Mr H (set out in paragraph 19 above) should be supplied to him.

#### **Document 2: section B of the fax from the Embassy in Dublin**

26. A fax from the British Embassy (Document 2) was supplied to Mr H. However, paragraph B of this document had been redacted. The redacted paragraph concerns the circumstances surrounding the death of Mr Robertson, and records a conversation between an official from the Consular Section of the British Embassy and the Irish Garda. The Executive relied on a number of exemptions to withhold this information.

#### ***Section 30(b)(ii) – free and frank exchange of views***

27. The Executive submitted that section 30(b)(ii) applied to the redacted information in Document 2. Section 30(b)(ii) states that information is exempt if its disclosure under this Act:
- would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.
28. The Executive argued that release of this information could inhibit substantially the free and frank provision of views by external bodies to the Executive, with regard to cremation applications. The Executive argued that release would harm the future candid flow of sensitive information of this nature between the Irish Garda and the Embassy. Consequently, the relationship between the Executive and the Embassy would be jeopardised, as the Embassy would be reluctant to share information of this nature freely with the Executive in the future, which would have detrimental consequences for the Executive's resolution of cremation applications.





29. I accept that the redacted information constitutes the views of the Garda in respect of the circumstances surrounding the death. I accept too that this information can be described as “free and frank” in that the views expressed are unequivocal, open and significant.
30. In order to reply on section 30(b)(ii) of FOISA, however, an authority must demonstrate that disclosure of the information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.
31. I have continually stated that the standard to be met in applying the harm test in section 30(b)(ii) is high. Public authorities must be able to show not only that the release of the information would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation, but also that such inhibition would be of a substantial nature. The Executive’s 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 to be made, or would be made in a more reticent or circumscribed fashion, or would be less inclusive.
32. While I accept that the comments are free and frank and are significant in content I consider that the timing of these remarks to be pertinent when assessing the impact that disclosure would (or would be likely to) have on any future deliberations of this kind. I recognise that disclosure of these comments around the time of death or even leading up to or surrounding the subsequent trial might lead to less free and frank views being expressed by those bodies with which the Executive has contact on such matters in the future. However, I consider relevant the timing of these remarks as well the extent to which these matters have been debated in the public domain.
33. In the course of the investigation my office referred the Executive to a 2002 press article which discussed the court case in which Mr H was convicted of manslaughter. The article (which was published on the internet) reported the sentencing hearing, including comments from a police officer about the circumstances surrounding the death of Mr Robertson. These comments are similar to those redacted from the fax, albeit attributed to a different police officer.
34. The redacted information dates from 1998 and since that time the circumstances surrounding the death of Mr Robertson have been discussed in court and in the media. In the circumstances, I am unable to see how disclosure of these comments at the time of Mr H's request (which was made some seven years later in 2005) would inhibit substantially the free and frank exchange of views for the purposes of deliberation. In all the circumstances I do not uphold the use of section 30(b)(ii) to withhold the redacted paragraph.



### **Section 30(c) – prejudice to effective conduct of public affairs**

35. The Executive submitted that, in retrospect, section 30(c) also protected against the release of this information as disclosure would be likely to prejudice substantially the effective conduct of public affairs. The Executive argued that release of this information could be detrimental to the rapport established between the Executive and various foreign individuals and bodies. The Executive argued that any erosion of these often precarious relationships would be prejudicial to the effective conduct of public affairs because it would prolong the resolution of cremation applications. The Executive argued that it was imperative that it preserved external cooperation in order to swiftly process applications for cremation and thereby protect the time-pressured and sensitive procedure followed by the Executive from grinding to a halt.
36. I have considered carefully the Executive's arguments in respect of section 30(c). I have no desire for the process in such cases to be delayed and accept that this could result in harm and distress to the family of the deceased. On the other hand, a process has been put in place by legislation to facilitate the authorisation of cremations in these circumstances and this process provides for checks and balances to ensure that the rights of individuals who might be affected by this step are protected. Therefore, it seems to me, that at the very least the process followed in any given case should be transparent even if the particular circumstances might need to be protected to preserve the privacy of the deceased and their family. In such circumstances, I find it surprising that the Executive wishes to assure all those external bodies with which it has contact during this process that information supplied will be treated in confidence.
37. The Executive's submissions also seem to assume that the external bodies with which it has contact are co-operating with this process merely out of goodwill. I was surprised that the Executive described these relationships as "often precarious". It seems to me that, at least in this particular case, all bodies had an interest in contributing to the process. The Irish Garda presumably wished to ensure that no future prosecution would be jeopardised. The British Embassy must have a pivotal role in cases where a Scottish national dies abroad and will itself be dependent on co-operation by the Executive in such cases.
38. As I said in respect of section 30(b)(ii), I would have more sympathy with this argument if the information was recent and had not, in essence, since come into the public domain. In conclusion, therefore, while I have no wish for the authorisation of cremations to be unduly delayed this needs to be balanced against the need for transparency. In the circumstances, I am reluctant to protect a whole process where the rights of others (in addition to those of the family of the deceased) could be affected. In my view, it would be inappropriate to signal to external bodies that any information of substance supplied by them will always be protected.



39. As a result, I do not uphold the use of section 30(c) to the information redacted in Document 2.

***Section 32(1)(a)(i) – international affairs***

40. The Executive also submitted that section 32(1)(a)(i) applied to the redacted information in that disclosure of the information would or would be likely to prejudice substantially relations between the United Kingdom and any other State. The Executive submitted that the Irish Garda was an agency set up by the Irish Parliament and considered itself to be an organ of the State. The Executive argued that as a result it considered section 32(1)(a)(i) to apply to this information. I accept that it is reasonable to regard a State's national police service (such as the Garda) as an organ of that State's government.
41. The Executive did not provide additional submissions as to how disclosure of this information would substantially prejudice relations between the Garda and the Executive but rather referred me to its submissions in respect of section 30(b)(ii) and section 30(c). As I have said above, in considering the harm that might be caused by disclosure of this information I need to take into account the timing of the request and the extent to which the information is now in the public domain. In the absence of further submissions from the Executive I am of the view that it has not demonstrated why this information falls within the scope of section 32(1)(a)(i) and why disclosure of the information at the time of Mr H's request would or would be likely to substantially prejudice relations between the United Kingdom and any other State. In the circumstances I do not uphold the use of section 32(1)(a)(i) in respect of this information.

***Section 35(1)(c) – prejudice to the administration of justice***

42. The Executive further submitted that release of this information was exempt by virtue of section 35(1)(c) of FOISA in that disclosure would be likely to prejudice substantially the administration of justice. The Executive advised that the decision to withhold this information was reached after consultations with the British Embassy in Dublin and the Foreign and Commonwealth Office (FCO) in London. The Embassy had also contacted the Irish Garda, who advised that an appeal in respect of the manslaughter of Mr Robertson by Mr H, amongst others, was pending and that release of this paragraph could prejudice substantially any future proceedings.
43. Section 35(1)(c) protects information the disclosure of which would or would be likely to prejudice substantially the administration of justice. I accept that disclosure of information discussing the circumstances of death in this case would raise concerns about possible prejudice to any prospective appeal or further proceedings and that given the advice received from the Garda it was appropriate for the Executive to consider carefully the impact that disclosure of this information might have on those proceedings.



44. However, to rely on section 35(1)(c) an authority needs to demonstrate that disclosure would be likely to prejudice substantially those proceedings. In considering this issue it seemed to me appropriate to take into account the extent to which the information withheld is already in the public domain. It seemed to me that if that information had already been publicised then its subsequent release in response to a FOISA request could not be an impediment to any possible future legal proceedings.
45. As I indicated in paragraph 33 above, my office referred the Executive to a 2002 press article which discussed the court case in which Mr H was convicted of manslaughter. The comments in the article were similar to those redacted from the fax, albeit attributed to a different police officer. The Executive argued that while the information was similar it was not the same (the redacted paragraph covering matters not dealt with in the article) and had not been provided in the same context.
46. I have considered the Executive's submissions in respect of this matter. I accept that the comments are more detailed and precise than those that appeared in the article and are attributed to a different officer. Given all the circumstances of this particular case and the possibility of future legal proceedings I have decided to uphold the Executive's reliance on section 35(1)(c) and accept that disclosure of the information would be likely to prejudice substantially the administration of justice.
47. Section 35(1)(c) is subject to the public interest test and therefore I must go on to consider whether the public interest in disclosing the information is outweighed by the public interest in withholding it.
48. In its submissions to my office the Executive argued that any public interest in release of the speculation of the Irish Garda was outweighed by the public interest in the successful resolution of all legal proceedings relating to this case. It submitted that release of these comments could potentially harm any ongoing criminal appeal proceedings by the applicant and others, in Ireland.
49. I have considered carefully the public interest considerations in respect of section 35(1)(c). Where I have concluded that release of the information would prejudice substantially the administration of justice it seems to me that there would need be compelling reasons for the release of such information. I have considered the content of the redacted paragraph and the arguments fore and against disclosure and in all the circumstances do not consider that the information is such that its disclosure would be of real benefit to the public. Further I have no wish for disclosure of these comments to harm any future legal proceedings. That, it seems, to me would not be in the public interest. In all the circumstances, I am satisfied that the public interest in disclosure of the information is outweighed by the public interest in withholding it.



50. In conclusion, I accept that the redacted paragraph 2 is exempt information by virtue of section 35(1)(c) of FOISA.

**Document 3: document relating to internal procedures and medical advice**

51. The Executive withheld Document 3 in its entirety.
52. The Executive advised that Document 3 was a form completed by a medical practitioner as part of the process by which an individual applies for authorisation of the cremation where the death has occurred abroad. The Executive advised that in such cases the medical practitioner attests to the cause of death in accordance with Regulation 13 of the 1935 Regulations. In its correspondence with Mr H the Executive had originally relied on section 36(2) to withhold Document 3. In its submissions to my office the Executive withdrew its reliance on this exemption and instead applied a further series of exemptions. I will examine each of these below.

***Section 38(1)(b) – personal data of a third party***

53. The Executive submitted that, in retrospect, section 38(1)(b) applied to the name of the medical practitioner on this document, as it was personal data of a third party and disclosure would breach the first data protection principle.
54. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i), exempts information if that information constitutes personal data and its release would breach any of the data protection principles. The first data protection principle states that personal data must be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 of the Data Protection Act 1998 (DPA) is met.
55. Section 38(5) of FOISA states that the definition of “personal data” is that contained in section 1(1) of DPA. That section defines personal data as:
- “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.”



56. In considering whether this information constitutes the medical practitioner's personal data I have also taken into account the decision of *Durant v the Financial Services Authority* [2003] EWCA Civ 1746. In that decision, the Court of Appeal held that if information is to be viewed as personal data, the information has to be biographical in a significant sense, i.e. go beyond the recording of the individual's involvement in a matter or event that has no personal connotations. The individual also has to be the focus of the information, rather than some other person with whom that individual may have been involved. The Court of Appeal summarised these two aspects as information affecting a person's privacy, whether in his personal or family life, business or professional capacity.
57. In this particular instance, the Executive advised that the medical practitioner was an employee of the Scottish Executive's Health Department. I am content that the name of the medical practitioner amounts to their personal data in that it relates to them.
58. However, personal information may be disclosed providing that its disclosure would not breach any of the data protection principles. The Executive advised that in considering whether the first principle would be breached by release of the information, it had considered the reasonable expectations of the data subject in relation to how the information imparted would be likely to be used or disclosed.
59. The Executive accepted that it was not expressly stated on the face of the document that the information it contained was given in confidence; however, it advised that the Scottish Executive's Health Department had been granting authorisations since 1935 and that there was a long term understanding that such advice was given in confidence by the medical practitioner and was provided on the understanding that this information would be held in confidence. Therefore, the expectation of the medical practitioner named on this document was that the form would be used wholly for internal purposes and would not be released to the public. The Executive advised that the medical practitioner would not have anticipated that the personal data provided on the form would be released to the public, and in fact, the medical practitioner in this case was not content for the personal data to be released. The Executive argued that release would therefore contravene the fairness element of the first data protection principle.



60. I understand that the medical practitioner was completing this form in a professional capacity in that they were attesting to the cause of death. Medical practitioners sign a whole range of documents as part of their professional duties. In some cases, they are obliged by law to complete certain documents in relation to the health of their patients. In other cases, this role may be undertaken on a voluntary basis. On occasions (although not in these cases) the professional may receive payment for such services. Society has changed substantially since 1935, including medical practitioners' expectations about the information they record, particularly in relation to their patients. The introduction of the Data Protection Act in 1998 permitted patients, fully retrospectively, to view their medical records, including comments made by health professionals in respect of them. There has also been considerable public scrutiny of medical practitioners and their role in the certification of death. Further, as stated above, medical professionals sign all kinds of documentation that often have legal consequences, relating to insurance, employment, firearms and social security benefits. In short, I am surprised that the medical advisers who undertake this role for the Executive expect, and indeed require, anonymity.
61. Medical practitioners are completing these forms in a professional capacity and are attesting to the cause of death in respect of another individual. In the circumstances, it does not appear to me that disclosure of this information would be unfair.
62. As mentioned in paragraph 54 above, one of the conditions in Schedule 2 must also be capable of being complied with before I can consider the processing of this personal data to be fair and lawful. It is my view that the disclosure of personal information relating to these matters is permitted by condition 6 in Schedule 2 of the DPA. This condition allows information to be processed (in this case, disclosed) 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.”
63. I must apply two tests to establish whether condition 6 supports disclosure of personal data in this case. The first test is whether it can be established that the third party to whom the data are to be disclosed has a legitimate interest in the release of personal data. I must then consider whether disclosure can be seen to be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject (in this case the medical practitioner).



64. It seems to me that there is a legitimate and significant interest in disclosing information relating to the process by which cremations are authorised by the Executive. In this case the circumstances surrounding the death of the deceased were the subject of a criminal trial. I believe that both the applicant and the general public have a legitimate interest in knowing that the process by which the cremation was authorised was properly followed.
65. I do not consider that release of the name of the medical practitioner would prejudice that person's rights and freedoms or legitimate interests, given that they were completing this form in a professional capacity and were attesting to the cause of death.
66. In all the circumstances, I have found that the legitimate interests of the applicant and the general public outweigh the interests of the medical practitioner. I do not regard disclosure as being unwarranted by reason of prejudice to the medical practitioner's rights, freedoms or legitimate interests, and therefore find that condition 6 of Schedule 2 of the DPA supports disclosure of the personal data.

***Application of section 30(b)(i)***

67. The Executive also argued that the whole document was exempt by virtue of section 30(b)(i) as release of this information could inhibit substantially the free and frank provision of advice. The Executive submitted that the medical practitioners who attest to the cause of death of individuals who die abroad, in accordance with the 1935 Regulations, perform a crucial function and they must be afforded an open and secure space within which to provide free and frank advice.
68. The Executive accepted that the information contained in this document might appear to be a limited form of advice. However, it argued that the test under section 30(b)(i) was whether release would inhibit substantially the provision of such advice in the future. The Executive argued that it was extremely clear that this would be the case. The Executive advised that medical practitioners had indicated that if this type of advice was released, they would not continue to provide such advice in the future. The Executive argued that this would have serious consequences on all future cremation applications. It submitted that it would lead to substantial delays in authorisations being granted in many cases and to an increase in the number of cremation applications which were refused. The Executive emphasised that the role of the medical adviser in this case is not to authorise cremations and the medical practitioner only has an advisory role, based on the written medical information made available in each particular case. The Executive indicated that this was an additional role that some practitioners undertook voluntarily.





69. While I recognise that a refusal to accede to a family's or deceased's wishes for a cremation would be very distressing, I need to be satisfied that section 30(b)(i) actually applies to the information withheld in this case. In *Decision 151/2006* I indicated that in order to rely on section 30(b)(i) the information withheld should amount to the provision of advice. It is difficult to see how information not falling within this type of information would engage the exemption in section 30(b)(i), given that the authority must demonstrate that future practice in this area would be inhibited by disclosure.
70. The primary purpose of the form is to attest to the cause of death and I am not convinced that this in itself amounts to the provision of "advice". In fact, in this case, I have struggled to identify the advice that has been provided. While I can see that there may be cases where significant advice is provided by the medical adviser which is recorded on the form I am unable to identify such advice in this case. In the circumstances, I am unable to accept that disclosure of the information in this particular case would, or would be likely to, inhibit the provision of free and frank advice in the future.

#### ***Application of section 30(c)***

71. The Executive was also of the view that section 30(c) applied to this information and referred back to its arguments set out in relation to Document 2 above. Section 30(c) provides that information is exempt if its disclosure would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.
72. I understand that the key thrust of the Executive's argument in respect of section 30(c) is that medical advisers would refuse to provide this service if this type of information was released. This, in turn, the Executive advises would lead to a delay in processing applications for cremation and cause distress to the family of the deceased. The Executive indicated that medical advisers have been supplying this service in confidence since 1935 and have always understood that this confidentiality would be maintained.
73. While I am, of course, concerned about delays to the application process in such cases I have real difficulties in protecting medical advisers in this way and the documents they sign. As I said in paragraph 59 above, society has changed substantially since 1935, including medical practitioners' expectations about the information they record.



74. The medical practitioners are signing a document in a professional capacity in such cases, which even if it does not have legal bearing may well have legal consequences. They are discharging a public function as part of a statutory process. The Executive is, in essence, asking me to protect the process by which a medical professional attests to the cause of death in such cases. While I have no wish for delays to occur in the process by which cremations are authorised, the need for swift throughput must be balanced against the need for transparency. As I said, there may be cases where the content of such forms deserve some protection; for example, where the form contains sensitive information about the deceased or information that might cause distress to the family. However, in the absence of such information in this case I am unable to protect from public scrutiny a process which may have legal consequences.
75. As a result, I do not accept that section 30(c) applies to this information. As a consequence this document should be released to Mr H.

**Document 4: information contained in the note for the file reference FP051510**

76. Document 4 was supplied to Mr H. However, the name of the medical adviser had been redacted. The Executive advised that it had withdrawn its reliance on section 36(2) in respect of this information. Rather it relied on two other exemptions namely, section 30(c) and section 38(1)(b). I consider I have addressed the application of these exemptions to the identity of the medical adviser above. Given the reasoning set out above, I do not accept that either exemption applies to this information. Consequently it should be released to Mr H.

**Document 5: the Death Certificate**

77. Finally, Mr H requested a copy of the Death Certificate for Mr Robertson. The Executive advised in its notice of review that it did not hold a copy of this information. The Executive has expanded on this explanation in its submissions to me. It indicated that all papers relating to the cremation of Mr Robertson were held together in a single file, as is the practice within the relevant division for all cremation casework. A thorough search conducted both at the initial application stage and again independently at the review stage found no death certificate or copy of the death certificate on file.
78. By way of explanation, the Executive advised that the death must be registered in the country in which it occurs and it is for the authorities in that country to issue a death certificate, according to their prevailing law, rather than Scottish or British authorities. To the best of its knowledge, in Ireland, a final death certificate is not issued until all police and legal proceedings have been fully concluded. The Executive suggested that if Mr H was planning an appeal against his manslaughter conviction, then this might account for the delay in the issuing of a final death certificate by the Irish authorities.



79. Having considered all circumstances in this case I am satisfied that the Executive has taken all reasonable steps to ascertain that it does not hold a copy of the Death Certificate in this case.

## **Decision**

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I find that the Scottish Executive failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in that I find that certain information withheld from Mr H was not exempt information. Accordingly, it did not comply with section 1(1) of FOISA in refusing to release that information.

The following information should be supplied to Mr H within 45 days of receipt of this decision notice:

Document 1 – deceased's name, address, occupation, age, sex and marital status (at the top of page 1), together with the day, date and hour proposed for cremation (question (1), page 2).

Document 3 – entire document

Document 4 – redacted name

I find that the Scottish Executive complied with Part 1 of FOISA in withholding the remainder of the information withheld and in advising Mr H that it did not hold a copy of the Death Certificate.

## **Appeal**

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Should either the Executive or Mr H wish to appeal against this decision, there is a right to 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**  
**23 November 2006**



## Appendix

### Relevant Statutory Provisions

#### Freedom of Information (Scotland) Act 2002

##### 30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

- (a) would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers;
- (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; or
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

##### 32 International relations

(1) Information is exempt information if-

- (a) its disclosure under this Act would, or would be likely to, prejudice substantially-
  - (i) relations between the United Kingdom and any other State;

##### 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



(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress); and

