

# Decision Notice



Decision 020/2012 Ms Hollie Greig and the University of Aberdeen

Post Mortems and Toxicology Reports

Reference No: 201101878

Decision Date: 2 February 2012

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**Kevin Dunion**

Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
Tel: 01334 464610



## Summary

Ms Greig requested from the University of Aberdeen (the University) specified information relating to two post mortems and related toxicology reports. The University responded by advising that it did not hold certain of the information and withholding what it did hold under exemptions including that in section 38(1)(d) of FOISA (which relates to a deceased person's health record). Following a review, which upheld this decision, Ms Greig remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the University had dealt with Ms Greig's request for information in accordance with Part 1 of FOISA, being satisfied that the University did not hold certain information and that the remainder was properly withheld under section 38(1)(d).

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(a) and (2)(e)(i) (Effect of exemptions); 17(1) (Notice that information is not held); 38(1)(d) and (5) (definition of "health record") (Personal information)

Access to Health Records Act 1990 (the AHRA) sections 1(1) ("Health record" and related expressions) and 2 (Health professionals)

Data Protection Act 1998 (the DPA) section 69(1) (Meaning of "health professional")

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

## Background

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1. On 28 August 2011, Ms Greig wrote to the University requesting detailed information relating to two named deceased persons, one of whom was a family relative. Specifically, she requested the following:
  - a) The codes used to classify cause of death, known as "ICD 10 Codes", in each case
  - b) Whether a portion of the deceased relative's liver had been retained



- c) Whether the medical records of either deceased had been examined and where these records were located
  - d) Recommendations made in relation to further investigating either death
  - e) Steps being taken to review the cause of death of the deceased relative
  - f) Toxicology report for the deceased relative.
2. The University responded on 16 September 2011. It advised Ms Greig that it did not hold any information falling within the scope of requests a), d) or e). Information falling within the scope of the remaining requests was withheld under section 38(1)(d) of FOISA, as information forming part of a deceased person's health record, and also (in the case of requests b) and f)) under section 34(2)(b)(ii) of FOISA. The University provided explanations by way of advice and assistance and also (in relation to request a) contact details for the Registrar General for Scotland, who it explained compiled the relevant codes.
  3. On 16 September 2011 Ms Greig wrote to the University, requesting a review of its decision to withhold information under section 38(1)(d) of FOISA.
  4. The University notified Ms Greig of the outcome of its review on 10 October 2011, upholding its original decision and confirming the reasoning provided in its initial response.
  5. On the same day (10 October 2011) Ms Greig wrote to the Commissioner, stating that she was dissatisfied with the outcome of the University's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
  6. The application was validated by establishing that Ms Greig had made requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to those requests. The case was then allocated to an investigating officer.

## Investigation

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7. On 21 October 2011 the University was notified in writing that an application had been received from Ms Greig. On 28 October 2011, the investigating officer contacted the University, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the University was asked to provide details of the searches it had undertaken to locate the information, and to provide submissions in respect of its application of section 38(1)(d) of FOISA.
8. The University replied on 10 November 2011 with its submissions, confirming that it continued to consider section 38(1)(d) of FOISA applicable to the information covered by requests b), c) and f). The relevant submissions received from both the University and Ms Greig will be considered further in the Commissioner's analysis and findings below.



## Commissioner's analysis and findings

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9. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Ms Greig and the University and is satisfied that no matter of relevance has been overlooked.
10. In her application to the Commissioner, Ms Greig asked that the Commissioner determine whether the University had complied with FOISA in withholding the requested information. While neither the request for review nor the application to the Commissioner mentioned specifically the information the University claimed not to hold, the Commissioner will consider this aspect of the requests for the sake of completeness.

### Section 17 – Notice that information is not held (requests a, d and e)

11. Section 17(1) of FOISA requires that, where an authority receives a request for information that it does not hold, it must give the applicant notice in writing to that effect. In order to determine whether the University dealt with Ms Greig's request correctly, the Commissioner must be satisfied as to whether, at the time it received Ms Greig's request, the University held any information which would fall within the scope of her request (see section 10(4) – reproduced below).
12. In responding to Ms Greig's requests and during the investigation, the University confirmed that the codes referred to in request 1 were compiled by the Registrar General for Scotland and also that it did not hold any details of the codes applied in a particular case, which were not passed back to the pathologist carrying out the post-mortem. It also advised that no information was held which fell within the scope of request d) or request e), explaining that these were matters for the procurator fiscal and not the pathologist.
13. During the investigation, the University also provided details of the searches carried out for the information, detailing the relevant record keeping procedures and resources.
14. Having considered carefully the submissions he has received, the Commissioner is satisfied with the explanations provided by the University in respect of the information it did not hold. He is also satisfied that the University carried out searches which were adequate in the circumstances, with a view to locating any relevant information. Consequently, he accepts that the University was correct to respond to requests a, d and e by way of a notice in terms of section 17(1) of FOISA.

### Information withheld under section 38(1)(d) – requests b), c) and f)

15. Section 38(1)(d) of FOISA specifically exempts information if it constitutes a deceased person's health record. Under the terms of section 2(2)(e) of FOISA, section 38(1)(d) is an absolute exemption and so a public authority is not required to consider the public interest test for information which falls within its terms.



16. The effect of section 38(1)(d) is to leave unchanged the more limited rights of access to the health records of deceased persons provided by the AHRA. In particular, section 3(1)(f) of the AHRA gives the personal representative of a patient who has died a right to apply to access the patient's health record. The same right is given to any person who may have a claim arising out of the patient's death.
17. Disclosure under FOISA, on the other hand, is generally considered to be disclosure to the world at large.
18. Section 38(5) of FOISA states that, for the purposes of section 38, "health record" has the meaning assigned to that term by section 1(1) of the AHRA. Here, "health record" is defined as a record which:
  - (a) consists of information relating to the physical or mental health of an individual who can be identified from that information, or from that and other information in the possession of the holder of the record; and
  - (b) has been made by or on behalf of a health professional in connection with the care of that individual.
19. By virtue of section 2 of the ARHA, "health professional" is assigned the same meaning as in section 69 of the DPA. Section 69 (reproduced in full in the Appendix) includes within the definition of "health professional" a registered medical practitioner. A pathologist is a registered medical practitioner.
20. The Commissioner has considered requests b), c) and f) in the context of this definition and is satisfied that the exemption in section 38(1)(d) of FOISA would apply to any recorded information held by the University and falling within the scope of these requests. As indicated above, this exemption is absolute and therefore is not subject to the public interest test.
21. Having decided that the information was properly withheld under section 38(1)(d) of FOISA, the Commissioner does not consider it necessary to (and will not) consider whether the University was correct to rely on section 34(2)(b)(ii) of FOISA in respect of any of the information Ms Greig requested.

## DECISION

The Commissioner finds that the University of Aberdeen responded to Ms Greig's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002.



## Appeal

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Should either Ms Greig or the University of Aberdeen wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

**Margaret Keyse**  
**Head of Enforcement**  
**2 February 2012**



## Appendix

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### 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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

##### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
- (a) the provision does not confer absolute exemption; and
- ....
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
- ...
- (e) in subsection (1) of section 38 –
- (i) paragraphs (a), (c) and (d); and
- ...

##### 17 Notice that information is not held

- (1) Where-



- (a) a Scottish public authority receives a request which would require it either-
  - (i) to comply with section 1(1); or
  - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

### 38 Personal information

- (1) Information is exempt information if it constitutes-

...

- (d) a deceased person's health record.

...

- (5) In this section-

...

"health record" has the meaning assigned to that term by section 1(1) of the Access to Health Records Act 1990 (c.23); and

...

## Access to Health Records Act 1990

### 1 "Health record" and related expressions

- (1) In this Act "health record" means a record which-
  - (a) consists of information relating to the physical or mental health of an individual who can be identified from that information, or from that and other information in the possession of the holder of the record; and
  - (b) has been made by or on behalf of a health professional in connection with the care of that individual;





...

## 2 Health professionals

In this Act "health professional" has the same meaning as in the Data Protection Act 1998.

### Data Protection Act 1998

#### 69 Meaning of "health professional"

- (1) In this Act "health professional" means any of the following-
- (a) a registered medical practitioner,
  - (b) a registered dentist as defined by section 53(1) of the Dentists Act 1984,
  - (c) a registered dispensing optician or a registered optometrist within the meaning of the Opticians Act 1989,
  - (d) a registered pharmacist or registered pharmacy technician within the meaning of the Pharmacists and Pharmacy Technicians Order 2007 or a registered person as defined by Article 2(2) of the Pharmacy (Northern Ireland) Order 1976,
  - (e) a registered nurse or midwife,
  - (f) a registered osteopath as defined by section 41 of the Osteopaths Act 1993,
  - (g) a registered chiropractor as defined by section 43 of the Chiropractors Act 1994,
  - (h) any person who is registered as a member of a profession to which the Health Professions Order 2001 for the time being extends,
  - (i) a clinical psychologist or child psychotherapist, and
  - (k) a scientist employed by such a body as head of a department.

...