

Decision Notice

Decision 047/2016: Press and Journal and Grampian Health Board

Report on general surgery service

Reference No: 201500449

Decision Date: 2 March 2016



Scottish Information
Commissioner

Summary

On 17 November 2014, the Press and Journal asked Grampian Health Board (NHS Grampian) for the report carried out by the Royal College of Surgeons on the general surgery service at Aberdeen Royal Infirmary.

NHS Grampian responded by disclosing a redacted version of the report on its website. Following a review, the Press and Journal remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that NHS Grampian had incorrectly withheld some information under sections 30(c) (Prejudice to effective conduct of public affairs) and 36(2) (Confidentiality) of FOISA. She required NHS Grampian to provide the Press and Journal with the information it had wrongly withheld.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(c) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs); 36(2) (Confidentiality); 38(1)(b), (2)(a)(i), (2)(b) and (5) (definitions of "data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA) section 1(1) (Basic interpretative provisions) (definition of "personal data")

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 17 November 2014, the Press and Journal made a request for information to NHS Grampian. The information requested was the report of the review carried out by the Royal College of Surgeons (RCS) of the general surgery service at Aberdeen Royal Infirmary.
2. NHS Grampian responded on 2 December 2014, citing section 25 of FOISA (Information otherwise accessible) as it considered the information the Press and Journal sought was available on its website. It provided a weblink.
3. On 15 January 2015, the Press and Journal wrote to NHS Grampian requesting a review of its decision on the basis that it had failed to fully address the request. The Press and Journal complained that the information online was simply an abridged version of the report, noting that it was seeking the full contents the report in its entirety. It confirmed that it was not looking for personal information, such as the names of those interviewed.
4. NHS Grampian notified the Press and Journal of the outcome of its review on 2 March 2015, apologising for its lateness in conducting the review. NHS Grampian disclosed a redacted version of the full report. It withheld information under section 38(1)(b) of FOISA.
5. On 6 March 2015, the Press and Journal wrote to the Commissioner. It applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Press and Journal

stated it was dissatisfied with the outcome of NHS Grampian's review because it had not received the full report. It did not believe section 38(1)(b) of FOISA could be applied to all the withheld information.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Press and Journal made a request to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 17 March 2015, NHS Grampian was notified in writing that the Press and Journal had made a valid application. NHS Grampian was asked to send the Commissioner the information withheld from the Press and Journal. NHS Grampian provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. NHS Grampian was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.
9. Submissions were received from NHS Grampian. After the investigating officer sought clarification of these, NHS Grampian provided additional submissions applying the exemptions in sections 30(c), 34(1) and (4) (Investigations by Scottish public authorities, etc.) and 36(2) of FOISA to elements of the redacted information. NHS Grampian also provided a limited amount of information to the Press and Journal during the investigation.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both the Press and Journal and NHS Grampian. She is satisfied that no matter of relevance has been overlooked.
11. In its requirement for review, the Press and Journal stated it was happy to receive a version that is redacted of personal information, such as names of those interviewed. The Commissioner has taken this into account in her analysis.
12. In all other respects, the Press and Journal sought the same information as that requested in the case which led to *Decision 046/2016 Ms Fiona Stalker and Grampian Health Board*. NHS Grampian has provided the same submissions in respect of both requests and the Commissioner's analysis and conclusions are set out in full in that decision. That decision does not, in any event, involve the disclosure of any personal data in addition to that disclosed voluntarily by NHS Grampian.
13. In all the circumstances of this case, the Commissioner can identify no reason for reaching conclusions different from those reached in *Decision 046/2016*. The same reasoning applies in both cases. Therefore, the Commissioner requires NHS Grampian to disclose to the Press and Journal the same information as it is required to disclose to Ms Fiona Stalker.

Decision

The Commissioner finds that Grampian Health Board (NHS Grampian) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Press and Journal.

The Commissioner finds that NHS Grampian was entitled to withhold information under the exemptions in sections 30(c) and 36(2) of FOISA.

However, by incorrectly withholding other information in the report under exemptions in sections 36(2) and 30(c), NHS Grampian failed to comply with Part 1 (and in particular section 1(1)) of FOISA. The information is described in paragraphs 30, 31 and 52 of *Decision 046/2016 Ms Fiona Stalker and Grampian Health Board*, and will also be identified in a marked-up copy of the report which will be supplied to NHS Grampian.

The Commissioner therefore requires NHS Grampian to provide the Press and Journal with the incorrectly withheld information, by 18 April 2016.

Appeal

Should either the Press and Journal or NHS Grampian wish to appeal against this decision, they have the right to 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.

Enforcement

If NHS Grampian fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that NHS Grampian has failed to comply. The Court has the right to inquire into the matter and may deal with NHS Grampian as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

2 March 2016

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.

...

- (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
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (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 –

...

- (c) section 36(2);

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

36 Confidentiality

...

- (2) Information is exempt information if-
- (a) it was obtained by a Scottish public authority from another person (including another such authority); and
 - (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

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

...

(b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

...

(5) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;

"data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;

...

Data Protection Act 1998

1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

“personal data” means 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;

...

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