



Scottish Information
Commissioner

**Decision 068/2007 Mr S and NHS Greater Glasgow
and Clyde**

Access to a deceased person's health records

Applicant: Mr S

Authority: Greater Glasgow and Clyde NHS Board

Case No: 200600457

Decision Date: 22 May 2007

**Kevin Dunion
Scottish Information Commissioner**

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Decision 068/2007 – Mr S and NHS Greater Glasgow and Clyde

Request for a copy of the health records of Mr S's deceased mother – failure to identify and locate records – section 38(1)(d) (personal information) applied – Commissioner concluded the records should not be considered to be held for the purposes of FOISA

Relevant Statutory Provisions and Other Sources

Freedom of information (Scotland) Act 2002: section 16(1) (Refusal of request); section 17(1) (Notice that information is not held); section 38(1)(d) (Personal information).

Scottish Executive NHS MEL (1993) 152 - Guidance for the Retention and Destruction of Health Records

The text of each of these is contained in the Appendix attached to this decision. The Appendix forms part of this decision.

Facts

Mr S requested a copy of the medical records relating to his late mother from Greater Glasgow and Clyde NHS Board (NHS Greater Glasgow) under the Freedom of Information (Scotland) Act 2002 (FOISA). Mr S had previously been informed by NHS Greater Glasgow that the records in question could not be located. Despite being informed of the appropriate route for access to such information, Mr S stated that he wished to pursue his request for access under FOISA, in the hope that any subsequent investigation would confirm whether or not the requested records were in fact held by NHS Greater Glasgow.

Following investigation, the Commissioner concluded that the requested records were not held for the purposes of FOISA.



Background

1. On 3 March 2006, Mr S submitted the following information request to NHS Greater Glasgow:

"I would like to request a copy of my late mother's medical records under the Freedom of information (Scotland) Act 2002."

Mr S's request went on to supply details of the name and date of birth of his late mother.

2. Mr S's request was made as part of ongoing communications between Mr S and NHS Greater Glasgow regarding the care of Mr S's late mother, who died in 1965 while receiving treatment from NHS Greater Glasgow's predecessor, the Western Regional Hospital Board. During the course of these communications Mr S had previously been informed that the requested medical records could not be located.
3. NHS Greater Glasgow's response to Mr S's request, dated 4 April 2006, informed him that his information request was being refused on the grounds of section 38(1)(d) of FOISA (Personal information). Section 38(1)(d) of FOISA exempts information which constitutes a deceased person's health record. This response was accompanied by a separate letter, which informed Mr S that, despite extensive searches, NHS Greater Glasgow had been unable to locate the records in question. NHS Greater Glasgow's response went on to document the various areas searched in an attempt to locate relevant records.
4. Mr S requested that NHS Greater Glasgow review its decision on 4 May 2006. In this correspondence, Mr S provided correspondence from NHS Greater Glasgow, dated 1991, which indicated that the requested records were accessed by NHS Greater Glasgow at that time, and indicated that he considered that the requested information was still held and accessible by NHS Greater Glasgow.
5. NHS Greater Glasgow's response, dated 12 June 2006, informed Mr S that its initial response was confirmed without modification. NHS Greater Glasgow provided Mr S with a full copy of its review report.
6. On 20 June 2006, my Office received an application for a decision from Mr S. The case was assigned to an investigating officer and the application validated by establishing that Mr S had made a valid information request to a Scottish public authority (NHS Greater Glasgow) and had applied to me only after having asked that authority to review its handling of his information request.



The Investigation

7. Prior to the submission his request of 3 March 2006, Mr S had been in contact with my Office for advice on exercising his rights under FOISA. During these communications Mr S was informed that, if held, the records in question would be absolutely exempt from release under FOISA, on the grounds of section 38(1)(d). Mr S asserted, however, that he nevertheless wished to exercise his right to bring an application under FOISA, arguing that such an application would benefit him regardless. In doing so, Mr S asserted that such an application would require an objective assessment of whether the requested information was held by NHS Greater Glasgow.
8. In his application to my office Mr S indicated that he was dissatisfied that the requested information could not be retrieved and supplied to him. Mr S stated that he considered that NHS Greater Glasgow was under a legal obligation to retain the data, and set out that he believed that the requested information was held, but was being concealed from him.
9. In later communications with my investigating officer, Mr S made clear that he considered that the circumstances surrounding his mother's death were suspicious, and set out that he was seeking access to her health records in an attempt to shed light on those circumstances. Mr S also went on to express his view that the requested information was either held by NHS Greater Glasgow and was being concealed from him, or had been purposefully and inappropriately destroyed by a member of Board staff at some point since 1991 (when NHS Greater Glasgow acknowledge that relevant records were held).
10. In the initial stages of the investigation, the correspondence received from NHS Greater Glasgow referred to searches for psychiatric records relating to Ms S. My investigating officer sought clarification from NHS Greater Glasgow on the reason for this. In response, NHS Greater Glasgow informed my office that the search for records had been limited to psychiatric records for the reason that Mr S had indicated in initial conversations prior to the drafting of his request that he was interested in psychiatric records only, and that his request was made to NHS Greater Glasgow's Mental Health Service. Mr S, however, subsequently informed my office that his intention was to seek access to all medical records held, and not just those relating to Ms S's psychiatric treatment. Given this assertion, and the fact that Mr S's request sought access to "medical records", NHS Greater Glasgow was asked to extend its search to cover any non-psychiatric medical records which related to Ms S.



11. Further relevant submissions were sought and received from both NHS Greater Glasgow and Mr S throughout the course of the investigation.

The Commissioner's Analysis and Findings

The scope of the investigation

12. As set out above, Mr S's request for copies of his late mother's medical records was made as part of ongoing communications with NHS Greater Glasgow regarding its care of his late mother, who died in 1965. In his communications with my office, Mr S has expressed his belief that the circumstances surrounding his mother's death were suspicious, and has set out that he is seeking access to her health records in the hope that this will shed light on those circumstances.
13. While NHS Greater Glasgow has asserted that the records in question cannot be located, Mr S has expressed his view that they are either being deliberately withheld from him, or have been purposefully destroyed in order to prevent access.
14. As a result of the particular circumstances of this case, the investigation principally focussed on the issue of whether the records sought by Mr S were held by NHS Greater Glasgow. Should it be concluded that the requested information was indeed held, then that information would, as stated, almost certainly be exempt under section 38(1)(d) of FOISA. Section 38(1)(d) of FOISA absolutely exempts information which constitutes a deceased person's health record, as access to such information is provided for separately under the Access to Health Records Act 1990.
15. While Mr S has been made aware of this, Mr S has also made it clear in his communications with this Office that he nevertheless wished to fully exercise his rights under FOISA in relation to the information requested, in order to determine whether NHS Greater Glasgow had responded to his information request appropriately. Mr S indicated that he considered that such an action might also serve to confirm whether the requested information was in fact held by NHS Greater Glasgow – an issue which has not previously been confirmed to his satisfaction in communications with NHS Greater Glasgow.



Is the requested information held by NHS Greater Glasgow?

16. As set out above, NHS Greater Glasgow conducted searches for both psychiatric and non-psychiatric records relating to Ms S. I will discuss NHS Greater Glasgow's conclusions in relation to each of these searches below.

Non-psychiatric records relating to Ms S

17. With regard to relevant non-psychiatric records, NHS Greater Glasgow informed my office that paper records relating to Ms S had been destroyed after being transferred to microfiche on 1 June 1996, and that these microfiche records were subsequently destroyed on 15 December 1997. NHS Greater Glasgow pointed out that this destruction took place in accordance with relevant guidance issued by the Scottish Executive, the *Guidance for the Retention and Destruction of Health Records (NHS MEL(1993)152)*, which sets out that general hospital and community health service health records are required to be retained for a period of 6 years following the date of the last recorded entry, or 3 years after death.
18. NHS Greater Glasgow supplied my office with a copy of an index record detailing the date of transfer of Ms S's health records to microfiche, and confirming the date of the subsequent destruction of that microfiche record.
19. Having considered the information supplied by NHS Greater Glasgow in relation to Ms S's non-psychiatric records, I am satisfied that those records are no longer held by NHS Greater Glasgow, having been destroyed in 1997.

Psychiatric records relating to Ms S

20. In its submissions to this office, NHS Greater Glasgow has stated that it is unable to confirm whether it holds psychiatric records relating to Ms S. NHS Greater Glasgow states that, despite extensive searches of its premises and its external archive, it has been unable to locate the records in question. NHS Greater Glasgow, however, acknowledged that NHS MEL (1993)152 advises that psychiatric records containing entries made on or before 31 December 1960 should be held indefinitely.
21. NHS Greater Glasgow also acknowledged that it held correspondence which indicated that the requested information was in NHS Greater Glasgow's possession in 1991, and stated that this information might still be held. NHS Greater Glasgow went on to indicate its belief that the relevant psychiatric records had been lost as opposed to destroyed. Indeed, NHS Greater Glasgow indicated, in telephone conversations with my investigating officer, that it considered the most likely scenario to be that the records in question had been misfiled at some point since 1991.



22. In terms of establishing where the relevant record may be located, NHS Greater Glasgow pointed out that it currently held 250,000 'active' records of the type requested by Mr S, along with an additional 400,000 records which had been archived at an external facility. In addition, NHS Greater Glasgow stated that similar records archived between 1977 and 1985 were separately held by Glasgow University.
23. NHS Greater Glasgow stated that it had carried out extensive checks in order to attempt to locate the records in question from the above sources, but these checks had not identified the record in question. NHS Greater Glasgow estimated (with a supporting breakdown) that it had dedicated approximately 52 hours of staff time to search for the records in question, and set out that this search had included the following activity:
 - Search of electronic database of Medical Records Department;
 - Search of CD Rom index of files held at the external facility;
 - Review of the manual catalogue of files held at Glasgow University;
 - Search of the Glasgow University Archives by Medical Records staff;
 - Search of approximately 360 records held by the external facility where relevant information might have been misfiled;
 - Search of relevant office areas and filing cabinets in the NHS Greater Glasgow area which might have held the relevant information;
 - Search of areas within Gartnavel Royal Hospital where the requested information might have been inadvertently filed.
24. NHS Greater Glasgow indicated that the above searches had uncovered some peripheral information which had been supplied to Mr S during a meeting with a representative of NHS Greater Glasgow's staff in October 2005. This information included copies of admission records from 1957 and 1958 relating to Mr S's mother, along with records of physical checks made on Ms S following her admission. However, NHS Greater Glasgow stated that it had been unable to locate a copy of the actual psychiatric records.
25. Given the nature of Mr S's concerns (and specifically his stated belief that the requested information was either deliberately destroyed or was being purposefully concealed from him) NHS Greater Glasgow was asked to provide copies of documentation which demonstrated that the above searches had indeed been undertaken.



26. In response, NHS Greater Glasgow supplied copies of all relevant available documentation. This included copies of correspondence sent at the time of particular search requests; copies of document request forms submitted to the external records facility; a taxi record used by staff when attending and searching relevant Board archives; and testimonies from individual members of staff responsible for searching relevant file areas which supported NHS Greater Glasgow's assertion that such searches had been undertaken.
27. As noted above, Mr S made clear in his communications with my office that he wished to pursue an application to me on the basis of his belief that the requested records were either being wilfully concealed from him, or had been inappropriately destroyed. I have, however, found no evidence during the course of this investigation to support this assertion. Having reviewed the information provided by NHS Greater Glasgow, I am of the view that appropriate and relevant searches for information have indeed been undertaken by NHS Greater Glasgow, and that these searches were carried out in good faith, in a genuine attempt to locate, retrieve and provide the information sought. Unfortunately, however, no relevant information (beyond that described in paragraph 24 above) has been identified or located as a result of these searches.
28. FOISA provides a right of access to information which is held by Scottish public authorities at the time a request is received. Information will not be considered to be held by an authority if it is not accessible to it in some way and capable of being utilised for the purpose of carrying out its activities and functions.
29. In the case of Mr S's request, NHS Greater Glasgow has clearly stated in its submissions to my Office that it is unable to confirm whether or not it holds the requested information, for the reason that the records sought have effectively been lost. NHS Greater Glasgow has indicated in its communications that it considers that the most likely cause is that the record has been misfiled at some point since 1991. That said, however, NHS Greater Glasgow has also been unable to entirely discount the possibility that the requested record has been inadvertently or prematurely destroyed.
30. Regardless of what exactly has happened to the records in question, it is clear to me, having reviewed the search activity undertaken by NHS Greater Glasgow and the relevant submissions made to this Office, that NHS Greater Glasgow is unable to locate the records in question and, as such, those records are not retrievable and cannot be used by NHS Greater Glasgow for the purpose of its activities.
31. As such, I am of the view that the requested records are also not held by NHS Greater Glasgow for the purposes of FOISA.



NHS Greater Glasgow's handling of the request

32. Given that the requested information is not accessible to NHS Greater Glasgow, and should therefore be considered not to be held for the purpose of FOISA, it would have been appropriate for NHS Greater Glasgow to respond to Mr S's explicitly stated information request under FOISA by issuing a refusal notice under section 17, informing him that the requested records were not held.
33. Instead, however, NHS Greater Glasgow issued a refusal notice under section 16(1) of FOISA, informing Mr S that the information requested was exempt under section 38(1)(d) (personal information). While I acknowledge that this response was based on the view that, were the records accessible, then they would almost certainly fall within the scope of section 38(1)(d), this response was not appropriate in terms of FOISA.
34. Section 16(1) of FOISA sets out that an authority is required to issue a refusal notice in circumstances where it holds the information requested, but the information is considered to be exempt. Section 16(1)(a) also sets out that any such refusal notice must disclose that the authority holds the information.
35. As set out above, it is clear that NHS Greater Glasgow should not be considered to hold the requested information for the purposes of FOISA. In these circumstances it was therefore clearly not appropriate for NHS Greater Glasgow to issue a notice under section 16(1) in relation to that information. Indeed, the issuing of such a notice led NHS Greater Glasgow to apply an exemption to information which it had neither accessed nor considered in terms of FOISA.
36. While it is the case that NHS Greater Glasgow separately issued a letter to Mr S confirming that it could not locate the records in question, it is my view that the simultaneous issuing of the section 16 notice and the letter served only fuel Mr S's suspicions that the records in question were in fact held, but were being purposefully concealed from him. This was compounded in the notice by NHS Greater Glasgow's statement to Mr S that it did "*not believe that the authority should provide the information you seek, as it is exempt from [NHS Glasgow's] obligation to supply the information.*"
37. As set out above, therefore, it is my view that the appropriate way in which to respond to Mr S's FOISA request would have been to confirm, through the issue of a section 17 notice, that the records in question were not considered to be held for the purposes of FOISA. As such, I find that NHS Greater Glasgow's failure to issue such a notice represented a breach of section 17(1) of FOISA.



Decision

I find that the information requested by Mr S should not be considered to be held by Greater Glasgow and Clyde NHS Board (NHS Greater Glasgow), for the reason that the relevant records cannot be identified, retrieved and utilised by NHS Greater Glasgow for the purpose of its activities.

I therefore find that NHS Greater Glasgow's failure to issue a notice to Mr S that the information was not held represents a failure in terms of section 17(1) of FOISA and consequently that NHS Greater Glasgow failed to deal with Mr S's request in accordance with Part 1 of FOISA.

I do not require NHS Greater Glasgow to take any action in relation to this failure.

Appeal

Should either Mr S or NHS Greater Glasgow wish to appeal against this decision, there is a right of appeal to the Court of Session on a point of law only. Any such appeal must be made with 42 days of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
22 May 2007



APPENDIX

Freedom of Information (Scotland) Act 2002:

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-
- (a) discloses that it holds the information;
 - (b) states that it so claims;
 - (c) specifies the exemption in question; and
 - (d) states (if not otherwise apparent) why the exemption applies.

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.



NHS MEL (1993) 152 - Guidance for the Retention and Destruction of Health Records – APPENDIX A

EXPLANATION OF RECOMMENDED MINIMUM RETENTION PERIODS

1. For the purposes of this guidance records contained on "non-paper" media (e.g. microfilm, computer files, slides and specimens) should be treated in the same way as paper records with the same minimum retention periods applying to them (but see paragraph 19).

2. At the conclusion of periods set out in this guidance the records may be destroyed but there is no obligation to do so. Destruction of health records should be based on appropriate health professional advice.

[...]

4. It will be for Health Boards, Consultants, GPs, Dentists, Pharmacists, Opticians, Occupational Health Services, Cancer Registries, Nurses, Midwives, Health Visitors, Community Nurses, and as appropriate NHS Trusts, to decide which of their records should be retained for clinical or research purposes.

General Hospital and Community Health Service Health Records

5. There will be no change in the present minimum retention period of 6 years following the date of the last recorded entry or 3 years after death. All records must be kept in the original form for at least the first 3 years of the period but may be microfilmed or transferred to other media thereafter and held in that form for the remainder of the period.

[...]

Psychiatric Records

9. The retention periods for psychiatric records will change and differentiate between those containing entries made on or before 31 December 1960 and those containing only entries made after that date. This date has been chosen on the grounds that new admission procedures under the Mental Health (Scotland) Act 1960 came into operation on 1 January 1961.

10. There will be no change in the retention of psychiatric records containing entries made on or before 31 December 1960 and these should continue to be retained indefinitely. However psychiatric records with the first entry made on or after 1 January 1961 should be retained for the lifetime of the patient and 3 years after death.



11. These proposals do not prevent retention for longer periods and because of the unique time series of psychiatric records held in Scotland there may be grounds for retaining certain records in perpetuity.