



Scottish Information  
Commissioner

**Decision 075/2007 Mr Alexander Doherty and the  
Mental Welfare Commission for Scotland**

*Information relating to an enquiry conducted into the care,  
treatment and death of Joseph Doherty*

**Applicant: Mr Alexander Doherty  
Authority: The Mental Welfare Commission for Scotland  
Case No: 200501643  
Decision Date: 23 May 2007**

**Kevin Dunion  
Scottish Information Commissioner**

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## **Decision 075/2007 – Mr Alexander Doherty and the Mental Welfare Commission for Scotland**

***Request for information relating to an enquiry conducted into the care, treatment and death of Joseph Doherty – whether documents held lie within scope of request – information withheld by the Commission***

### **Relevant Statutory Provisions and Other Sources**

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

Mental Health (Care and Treatment) (Scotland) Act 2003: sections 7(a) (Duty to bring matters generally to attention of Scottish Ministers and others) and 9(1) and (2)(a) (Duty to give advice)

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

### **Facts**

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Mr Alexander Doherty asked the Mental Welfare Commission for Scotland (the Commission) for information it held relating to the enquiry which it had carried out into the care, treatment and death of his brother, Joseph Doherty. Joseph Doherty committed suicide whilst a patient at Gartnavel Royal Infirmary in Glasgow. The Commission subsequently investigated the incident at the request of the patient's family. Since that time, Mr Doherty and his family have been engaged in a dispute with the Commission over a number of aspects of the way in which the Commission conducted its enquiry.

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

Following an investigation, the Commissioner found that the Commission had been correct to withhold all but one document from Mr Doherty.



## Background

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1. Mr Doherty wrote to the Commission requesting copies of all of the documentation it held relating to its enquiry into the care, treatment and death of Joseph Doherty, his brother.
2. The Commission responded to Mr Doherty on 16 February 2005, disclosing a number of documents in response to his request. However, the Commission withheld other documents which it considered to be exempt from disclosure under sections 30, 36 and 38(1)(d) of the Freedom of Information (Scotland) Act 2002 (FOISA). (From the terms of its response, it is clear that the Commission was relying on the exemptions in sections 30(b)(i) and (ii), section 36(1) and section 38(1)(d) of FOISA.)
3. Mr Doherty was dissatisfied with the response which he received and wrote to the Commission requesting that it carry out a review of the way in which it had dealt with his information request. Before the review was carried out, Mr Doherty also notified the Commission that he did not require access to his brother's medical records (which had been withheld under section 38(1)(d) of FOISA), as he already had them.
4. The Commission carried out a review and notified Mr Doherty of the outcome on 18 March 2005. As a result of the review, the Commission agreed to release more information to Mr Doherty, but continued to withhold other documents. Of the remaining documents, the vast majority were, according to the Commission, exempt from disclosure by virtue of section 36(1) of FOISA, one was exempt by virtue of section 36(2) of FOISA and one document was exempted from disclosure under both section 30(b)(i) and (ii) of FOISA.
5. Mr Doherty remained dissatisfied with the Commission's response and he applied to me for a decision as to whether the Commission had dealt with his information request in line with FOISA. Mr Doherty's application was validated by establishing that he had made a request for information to a Scottish public authority, and had applied to me only after asking the authority to review its response to his request.



## The Investigation

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6. The investigating officer wrote to the Commission, notifying it of the application made by Mr Doherty and giving it an opportunity to comment on the application as a whole, and particularly on its reliance on the exemptions in sections 30 and 36. The investigating officer also asked the Commission to supply her with a copy of all of the information which it held in relation to Mr Doherty's application.
7. The Commission provided a full response. I will examine the arguments put forward by the Commission in my analysis, but summarise them in brief here.
8. With reference to section 30(b)(i) and (ii) of FOISA, the Commission argued that the one document withheld (which comprises of two versions of a letter drafted by the Scottish Executive for the Commission to comment on, plus an accompanying draft covering memorandum) was very sensitive. The Commission held that to release information of this type would inhibit it from commenting as candidly on such documents in future. This would result in the Scottish Executive's responses to enquiries submitted to it being less well informed. It also submitted that, in this instance, the public interest in withholding the information was greater than the public interest in disclosure. I will examine its arguments for this test in detail in my analysis and findings.
9. The Commission also refused to disclose certain information requested by Mr Doherty on the basis that it fell under the exemption contained in section 36(1) of FOISA. The vast majority of the information withheld from Mr Doherty was withheld under this exemption. Section 36(1) exempts information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings. The Commission argued that the information which it claimed fell under this exemption contained in some form advice passed between client and lawyer after court action was contemplated. The Commission argued that five categories of documents which it held requested fell under this exemption. These documents consisted of:
  - a) Correspondence directly between the Commission and its legal advisors at the Scottish Executive
  - b) Correspondence between the Commission and legal advisors at the Scottish Executive through an intermediary
  - c) Correspondence between persons who are not legal advisors but who made statements or wrote comments in contemplation of litigation in relation to the preparation of their case



- d) Correspondence between Dr James Dyer (then Director of the Commission) and external legal advisors in relation to contemplation of legal action, in respect of statements made and action taken by the applicant
  - e) Correspondence between Dr James Dyer or external legal advisors on his behalf, with legal advisors to external parties in contemplation in respect of actions taken by the applicant.
10. The Commission also provided arguments as to why the public interest would not be served by disclosure of the information in question.
  11. In addition, the Commission also argued that one document was exempt from disclosure as it fell under section 36(2) of FOISA.
  12. During the investigation, the Commission provided me with copies of a further two documents which it submitted were outwith the scope of Mr Doherty's request. During subsequent correspondence with the Commission on the subject of these two documents, the Commission decided that one of these documents did fall within the scope of the request and sent a copy of it to Mr Doherty. As a result, I will not consider the document in this decision.
  13. The Commission remain of the view that the second of these documents is outwith the scope of the request, but have argued that if I do consider that the document falls within the scope of the request, that I should consider whether the document is exempt in terms of section 36(1) of FOISA. I will discuss this document below.
  14. During the investigation, Mr Doherty provided my office with a copy of detailed comments he had made to the Commission in relation to a document which had been disclosed to him as a result of his initial request for information. While the comments from Mr Doherty are not all relevant to the investigation under FOISA, the comments contained some arguments as to why all of the information which he had requested should be disclosed. I have therefore considered Mr Doherty's comments in determining where the public interest lies in relation to this case.
  15. There followed further correspondence between all parties in order to clarify specific issues which arose during the course of the investigation. The contents of these communications have been taken into account in my consideration of the case.



## The Commissioner's analysis and findings

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16. In investigating the case, I found there to be a number of different issues raised by Mr Doherty's application to me. These are:
- a) the document which the Commission considers to be outwith the scope of Mr Doherty's request
  - b) the document which the Commission considers to be exempt from disclosure under FOISA by virtue of section 30(b)(i) and (ii)
  - c) the documents which the Commission considers to be exempt from disclosure under section 36(1) of FOISA
  - d) the document which the Commission considers to be exempt from disclosure under section 36(2) of FOISA.

### Information held to be outwith the scope of Mr Doherty's request

17. In its initial response to me, the Commission stated that it had not disclosed two documents (document numbers 266 and 281) to Mr Doherty, on the basis that they were outwith the scope of his request. As noted above, the Commission changed its mind in relation to one of these documents and released it to Mr Doherty during the investigation. I must now consider whether the second document (number 266) falls within the scope of Mr Doherty's request.
18. Document 266 is part of a minute of a meeting held by the Commission which describes legal advice given to the Commission in relation to Mr Doherty.
19. In order to determine whether the document in question is outwith the scope of Mr Doherty's request, I first examined the wording of that request, which was for copies of all documentation which the Commission holds in respect of the enquiry into the care, treatment, and death of Joseph Doherty. Within Mr Doherty's request, he specifically made reference to:
- a) copies of internal memos, notes to file, faxes, emails, internal commission minutes and correspondence between the Greater Glasgow Health Board and the Commission
  - b) correspondence between the Commission and the Scottish Executive's Department of Health
  - c) correspondence between the Commission and the doctor in charge of the care of Joseph Doherty
  - d) correspondence between the Commission and its legal advisors
  - e) correspondence between the Commission and the Crown Office



- f) correspondence between the Commission and its member Commissioners
  - g) correspondence between the Commission and the Health Secretary
  - h) correspondence between all other parties and the Commission in relation to the enquiry.
20. It is clear that Mr Doherty had intentionally made his request to the authority as broad as possible, presumably to ensure all information relating, directly, or indirectly, to the enquiry held by the Commission would be brought within the terms of the request.
21. The Commission has commented that document 266 does not contain information directly related to the enquiry, but rather that it relates to actions taken by Mr Doherty following the conclusion of the enquiry.
22. While the request which Mr Doherty has made was broad, it did specifically state that the information requested should be related to the enquiry carried out by the Commission. Having had sight of the document in question, I find that it does not contain information which directly relates to that enquiry. I consider, therefore, that the document does not fall within the scope of Mr Doherty's request.

#### **Information withheld under section 30(b)(i) and (ii) of FOISA**

23. The Commission withheld document number 209B from Mr Doherty, stating that it falls under the exemptions contained in sections 30(b)(i) and (ii) of FOISA.
24. Document 209B comprises two versions of a letter drafted by the Scottish Executive for the Commission to comment on, plus an accompanying draft covering memorandum. Document 210 is a copy of the document 209B with an additional covering letter, fax cover sheet and some manuscript changes. As a result, I have also considered the exemptions contained in sections 30(b)(i) and (ii) of FOISA in relation to document 210. While I am entitled to take account of exemptions not relied upon by a public authority in deciding whether a request for information has been dealt with in accordance with Part 1 of FOISA, I will generally only consider the application of those exemptions on which a public authority has sought to rely. I have departed from this practice in this case due to the fact that the contents of the documents are almost identical.



25. Section 30(b)(i) of FOISA exempts information from release if its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice. Section 30(b)(ii) exempts information if its disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. The standard to be met in applying the tests (i.e. *substantial* inhibition) in sections 30(b)(i) and (ii) is high. In applying these exemptions the chief consideration is not whether the information constitutes advice or opinion, but whether the release of the information would, or would be likely to, inhibit substantially the provision of advice or the exchange of views.
26. The Commission has argued that if information of this nature were subject to release under FOISA, the Scottish Executive would cease to request comments from expert sources, or that those comments received would become so diluted that they would be meaningless. The quality of responses to enquirers that the Scottish Executive produces in future would suffer in quality as a result. This, it argues, would cause real harm to the Scottish Executive's ability to exchange advice and views with third parties. It would also preclude the Commission from offering its candid opinion on matters upon which it was asked to comment.
27. The Commission also submitted that, under section 9(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (the 2003 Act) it may be obliged to comment on draft ministerial correspondence relating to its functions.
28. Section 9(1) of the 2003 Act imposes a duty on the Commission to give advice to the Scottish Ministers on any matter arising out of the 2003 Act which has been referred to the Commission, with its agreement, by the Ministers.
29. In addition, section 7 of the 2003 Act imposes a duty on the Commission to bring to the attention of the Scottish Ministers any matter of general interest or concern as respects the welfare of any persons who have a mental disorder which is a matter that the Commission considers ought to be brought to their attention.
30. It could therefore be argued that, as these obligations are enshrined in statute, disclosure of advice given to the Scottish Ministers by the Commission would not affect the ability of the Commission to provide comment on issues brought before it by the Scottish Ministers in the future or, indeed, to bring matters to the attention of the Scottish Ministers.





31. The ability of the Executive to seek comment and advice from the Commission is not in question. The issue hinges on whether disclosure of documents 209(b) and 210 would, or would be likely to, inhibit substantially the Ministers from seeking such advice, and whether the quality of the advice given in response would be compromised. In other words, would disclosure of the information, while not affecting the Executive's power to seek advice from the Commission, affect the frequency of occasions on which its views are sought, and inhibit the free and frank nature of those views?
32. As noted above, I accept that the Commission is obliged to provide its views on matters raised with it by the Executive. I am also of the view that the disclosure of the information in question would not affect the Executive's ability to seek advice and views from the Commission in future, due to the obligations imposed on the Commission by the 2003 Act.
33. However, having had regard to the specific contents of documents 209(b) and 210 I am of the view that the release of the sensitive information contained therein would, or would be likely to, inhibit substantially the Executive from seeking the views of the Commission on future documents of that type. I also agree that, even if the Executive were to continue to seek views from the Commission in future, the candour of the advice and views given in response would, or would be likely to be, inhibited substantially. I therefore find that that the information contained in 209(b) and 210 is exempt in terms of section 30(b)(i) and (ii) of FOISA.
34. These exemptions are subject to the public interest test required by section 2(1)(b) of FOISA. I must therefore now go on to consider whether, in all the circumstances of the case, the public interest in the disclosure of the information contained in the documents is outweighed by the public interest in the maintenance of the exemptions.

### **Section 30(b)(i) and (ii) and the Public Interest**

35. In considering the public interest, I have taken into account the arguments raised by both Mr Doherty and the Commission. I have considered arguments in favour of release of the information and arguments in favour of maintaining the exemptions. It should be noted that, in upholding the exemptions, I have already found that the release of the information would substantially inhibit both the Executive and the Commission in their dealings with one another.
36. Mr Doherty considers that, due to the controversial nature of the treatment which his brother received and the questions surrounding the issues of consent and appropriate investigation of regulatory authorities, there is a significant public interest in the information which the Commission holds being disclosed.



37. The Commission itself notes that there is a public interest in the disclosure of information in that it would increase the transparency of the decision and policy making process, and of the relationship between the Scottish Executive and non departmental public bodies.
38. However, the Commission has gone on to state that it is imperative that the Scottish Executive should be free to consult external organisations on draft correspondence, and to be able to access expert opinions, without fear of misinterpretation upon disclosure. It also argued that it was essential for both organisations that a line of communication remained open between the Scottish Executive and experts within external organisations on information which is, by its very nature, sensitive.
39. If the disclosure of the information contained in documents 209B and 210 were to throw new light on the care, treatment or death of Joseph Doherty, then I would accept this as an argument in favour of release of the documents. However, the documents in question do not, to my mind, do this. Therefore, I cannot accept Mr Doherty's argument that the public interest in disclosure of these documents would further the public debate on the wider issues which have been raised by him.
40. It is important that authorities can consult with external bodies in order to gain expert opinion on sensitive matters and that those organisations should be free to give candid advice. Were the information requested to highlight fundamental weaknesses in either the Scottish Executive's or the Commission's treatment of the issues raised within the draft document, I would be much more inclined to agree that the public interest would be served in disclosure of the documents. However, that is not the case here. I also agree with the Commission's argument that should such discussion between parties be stopped by the fear of disclosure, no discussions would be likely to be recorded at all, or would be so diluted as to become meaningless, decreasing the transparency of decision making within Scottish public authorities. With these considerations in mind, I consider the public interest in this case to lie in favour of maintaining the exemptions in section 30(b)(i) and (ii) exemptions to documents 209(b) and 210.
41. Given that I have upheld the reliance on the exemptions contained in section 30(b)(i) and (ii) to document 210, I am not required to go on to consider whether it is also exempt in terms of section 36(1) of FOISA.

### **Information withheld under section 36(1) of FOISA**

42. Section 36(1) of FOISA exempts information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. There are two types of legal communications which fall into this definition: communications between a legal advisor and client and communications made post litem motam. (The latter is considered in more detail below.)



43. The information requested by Mr Doherty which the Commission holds to be exempt under section 36(1) of FOISA comprises of a series of correspondence between the Commission, legal advisors and third parties about various legal actions initiated by Mr Doherty and his family in relation to the death of his brother.
44. A total of 59 documents were withheld from Mr Doherty by the Commission on the basis that they were exempt by virtue of section 36(1) of FOISA. A number of different issues are raised surrounding the application of section 36(1) of FOISA. I will address these issues in turn.

### **Records of legal advice sought**

45. 24 of the 59 documents withheld are letters from the Commission to the solicitors acting for it within the Scottish Executive requesting advice about the various matters. I am satisfied that this correspondence comprises information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result, these records are covered by the exemption contained within section 36(1) of FOISA.

### **Communications from legal advisors to the Commission**

46. Of the 59 documents withheld by the Commission, a further 20 comprise of correspondence from solicitors acting on behalf of the Commission to the Commission, providing advice on the various matters relating to the death of Joseph Doherty.
47. In relation to these documents, I am satisfied that this correspondence comprises information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings and that the information is therefore exempt from release.

### **Correspondence between the Scottish Executive and the Commission containing legal advice**

48. The Commission took legal advice from the Solicitor to the Secretary of State and latterly from the Office of the Solicitor to the Scottish Executive (OSSE). On occasion, members of other departments within the Scottish Executive sought advice from OSSE on the Commission's behalf, and passed it to the Commission. Additionally, the Commission wrote to employees of the Executive, who gave the Commission general (i.e. non-legal) advice on issues raised by Mr Doherty, to inform them of legal advice which it had received from solicitors.
49. I am satisfied that the documents within this category fall under the exemption contained in section 36(1) of FOISA.



## **Communications made in anticipation of legal action being brought by the Commission against Mr Doherty**

50. Document 127 is a letter received by the Commission from a third party in anticipation of a court action being brought against the Commission. Documents 264 and 269 are letters from the Commission to third parties in anticipation of Court action being taken by the Commission against Mr Doherty.
51. In its submissions to me the Commission argued that these documents were created “post litem motam” (i.e. in contemplation of litigation). It argued that such documentation constituted information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings.
52. The Department of Constitutional Affairs has issued guidance on Confidentiality of Communications in Scotland (which can be found here: [http://www.dca.gov.uk/foi/guidance/exguide/sec42/annex\\_b.htm](http://www.dca.gov.uk/foi/guidance/exguide/sec42/annex_b.htm) ). In considering what the privilege of communications made post litem motam covers, it states:
- a) the information must constitute communications which take place in anticipation of civil litigation
  - b) litigation need not have started, but there should be a threat of litigation, and the privilege subsists even if litigation never in fact takes place or is concluded
  - c) the privilege covers any communication to or by a litigant in connection with the preparation of his case.
  - d) the communications should have some substance, as a chance remark about a case is not privileged.
53. As I have set out above, the documents falling within this category are letters from the Commission to third parties in anticipation of court action being taken by the Commission against Mr Doherty. Although the Commission never pursued the matter in court, the letters were created at a time when there was a threat of litigation raised by the Commission against Mr Doherty. Although the letters are not between a client and advisor, they are focused on any upcoming court action and so do not constitute a chance remark on possible future litigation.
54. Having examined the documents, I am satisfied that they constitute communications made post litem motam. I am therefore satisfied that the documents fall under the exemption contained within section 36(1) of FOISA



## Section 36(1) and the Public Interest

55. The Courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal advisor and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and Others v Governor and Company of the Bank of England* (2004) UK HL 48 (<http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm>).
56. In Decision 023/2005 (*Mr David Emslie and Communities Scotland*) I concluded that there will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client. As a result, while I will consider each case on an individual basis, I am likely only to order the release of such communications in highly compelling cases. Many of the same considerations apply to communications made post litem motam, and I will consider both aspects of the privilege together.
57. The public interest issues in favour of releasing the information might include enhancing scrutiny of the legality of the actions of a public body and, by extension, effective oversight of expenditure of public funds and obtaining value for money.
58. It might also be in the public interest to order disclosure where it would make a significant contribution to debate on a matter of public interest.
59. However, in favour of maintaining the exemption, I must consider the public interest in allowing an authority to communicate its position to its advisers fully and frankly in confidence, in order to obtain the most comprehensive legal advice to defend its position adequately should that become necessary. I must also consider the public interest in allowing a public authority to receive comprehensive legal advice about its proposed actions.
60. Mr Doherty has a clear interest in the release of the documentation which has been withheld from him under this exemption. He believes that there have been a number of failings in the Commission's investigation into the care and treatment of his brother. Disclosure, for him, would allow him to examine in more detail whether this has been the case.
61. The Commission argues that to disclose the information would inhibit its conduct of future investigations.
62. I agree that it is in the public interest for the public to be able to scrutinise the actions of the organisations which serve them. It is also in the public interest to ensure that investigations into the conduct of public authorities are carried out thoroughly.



63. In this case, the Commission has already released a large proportion of the information it holds to Mr Doherty. According to the Commissioner, it decided to withhold information only where it had serious concerns that disclosure would inhibit the conduct of its investigations.
64. There is an established means of scrutinising the legality of the decisions of public bodies, i.e. through judicial review in the courts. As noted above, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications on administration of justice grounds and there would require to be compelling countervailing arguments for disclosure to outweigh that public interest.
65. While I note that there is an interest in the scrutiny of the Commission's investigation, especially when it tackled such a controversial and sensitive issue, I also note that Mr Doherty has already received a large proportion of documentation relating to its investigation from the Commission. While I fully understand Mr Doherty's interest in understanding the investigation into his brother's death, I do not consider that disclosing the remaining information would greatly further the public debate on the matters addressed by the Commission's investigation, or the public scrutiny of the Commission's actions sufficiently to outweigh the strong public interest in maintaining the section 36(1) exemption in this case.
66. I do understand that this will be disappointing for Mr Doherty, given that the issue is of such personal significance to him, but I must consider the wider public interest here and not in its significance, however relevant, to one individual.
67. Having considered the public interest in favour of disclosure of the information and the public interest in favour of maintaining the exemption in section 36(1), and having balanced the two, I am satisfied that the public interest in disclosing the information which has been withheld in terms of section 36(1) of FOISA is outweighed by the public interest in maintaining the exemption.
68. The Commission also applied the exemption in section 36(2) to document 127. However, given that I have found that the information is exempt in terms of section 36(1) (and that the exemption should be maintained), I am not required to go on to consider whether the exemption in section 36(2) also applies to the document.

### **The Remaining Documents**

69. Given that I have considered document 210 above, only one document which withheld by the Commission on the basis of section 36(1) of FOISA remains to be considered.



70. As I have set out above, certain conditions must be met in order for information which the authority argues falls under section 36(1) of FOISA to be withheld from disclosure.
71. Document 237 is a handwritten note from an employee of the Commission to the Director of the Commission regarding the whereabouts of correspondence received from Mr Doherty. For information to fall under the section 36(1) exemption, it must be between a legal advisor and a client in the context of a professional relationship or must be privileged post litem motam. I do not consider that the document is exempt in terms of section 36(1). The Commission did not apply any other exemptions to this document and it should therefore be released.

## **Decision**

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I find that the Mental Welfare Commission for Scotland (the Commission) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to Mr Doherty's request for information except in relation to document 237. I find that the Commission was wrong to withhold this document in terms of section 36(1) of FOISA. In withholding this document, I find that the Commission failed to comply with Part 1 of FOISA in that it failed to comply with section 1(1).

I now require the Commission to release the document to Mr Doherty within 45 calendar days of receipt of this decision notice.

## **Appeal**

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Should either the Commission or Mr Doherty wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**23 May 2007**



## APPENDIX

### Relevant Statutory Provisions

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

##### **1 General entitlement**

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

##### **2 Effect of exemptions**

- (1) To information which is exempt by virtue of any provision of Part 2, section 1 applies only to the extent that –
  - (a) the provision does not confer absolute exemption; and
  - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

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

Information is exempt information if its disclosure under this Act –

...

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

##### **36 Confidentiality**

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





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

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

The Commission shall bring to the attention of –

(a) the Scottish Ministers

...

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

### **9 Duty to give advice**

(1) The Commission shall give advice to any person mentioned in subsection (2) below on any matter arising out of this Act which has been referred to the Commission, with its agreement, by that person.

(2) These persons are:  
(a) the Scottish Ministers

...