

Decision Notice 084/2020

Post-mortem Report: Robin Cook MP

Applicant: The Applicant

Public authority: NHS Highland

Case Ref: 202000908



Scottish Information
Commissioner

Summary

NHS Highland was asked for a copy of the post-mortem report on the death of Robin Cook MP in 2005. NHS Highland withheld the information as it constituted a deceased person's health record.

Following investigation, the Commissioner found that NHS Highland had failed to comply with the technical requirements of FOISA in responding to the request. He accepted, however, that NHS Highland was entitled to withhold the information requested.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(e)(i) (Effect of exemptions); 16(1) and (6) (Refusal of request); 19 (Content of certain notices); 21(4), (5) and (10) (Review by Scottish public authority); 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 2018 (the DPA 2018) section 204 (Meaning of "health professional" and "social work professional")

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 26 June 2020, the Applicant made a request for information to Highland Health Board (NHS Highland). The Applicant wrote that he was filing a "FOIA request" to obtain a copy of the post-mortem report on the death of Robert Finlayson Cook (Robin Cook) MP who died on 6 August 2005, pronounced dead at Raigmore Hospital, where the post-mortem took place.
2. On 28 June 2020, NHS Highland responded and informed the Applicant that the information he requested came under the AHRA. It asked the Applicant to complete an Access to Health Records application.
3. On 11 July 2020, the Applicant wrote to NHS Highland, requesting a review of its decision and submitting that the AHRA was irrelevant. He noted that the facts of the case were already established in media reports and claimed that disclosure was in the public interest.
4. NHS Highland notified the Applicant of the outcome of its review on 12 July 2020. It advised that "section 38(d)" of FOISA exempts information from release if it constitutes a deceased persons health record. As a result, it submitted, the request fell to be considered under the AHRA (and so the Applicant would have to provide evidence that he was entitled to receive the information under the AHRA).
5. On 12 August 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of NHS Highland's review because he considered the investigation to the death to be a public matter.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 31 August 2020, NHS Highland was notified in writing that the Applicant had made a valid application. 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 Highland was invited to comment on this application and to answer specific questions. These related to the overall handling of the Applicant's request and its reliance on any provision or exemption in FOISA to withhold the information requested (including section 38(1)(d), if considered applicable).
9. In its submissions to the Commissioner, NHS Highland accepted that it did not handle the Applicant's request correctly in terms of FOISA and apologised for this. It submitted that the information requested was exempt from disclosure under section 38(1)(d) of FOISA.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both the Applicant and NHS Highland. He is satisfied that no matter of relevance has been overlooked.
11. In its submissions to the Commissioner, NHS Highland maintained that the information requested by the Applicant was exempt under section 38(1)(d) of the FOISA, as the information requested was part of a Health Record.

Section 38(1)(d) – deceased person's health record

12. Section 38(1)(d) exempts information from disclosure if it constitutes a deceased person's health record. Under section 2(2)(e)(i) 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.
13. 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 (Right of access to health records) 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.
14. Disclosure under FOISA, on the other hand, is generally considered to be disclosure to the world at large.
15. Section 38(5) of FOISA states that "health record" has the meaning assigned to it by section 1(1) of the AHRA. This defines "health record" 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.

16. By virtue of section 2 of the AHRA, "health professional" has the same meaning as in section 204 of the DPA 2018. Section 204 includes within the definition of "health professional" a registered medical practitioner (section 204(1)(a)).
17. The Commissioner notes that in *Decision 020/2012*¹ (Post Mortem and Toxicology Reports) and *Decision 237/2014*² (Significant Case Review), it was found that specific information that had been obtained as a result of a post-mortem, including the date and cause of death, fell within the scope of section 38(1)(d).
18. The Commissioner considers that, by definition, a post-mortem report is made by or under the direction of a pathologist, and, as in the previous decisions, the Commissioner is satisfied a pathologist is a registered medical practitioner and a "health professional" for the purpose of section 2 of the AHRA.
19. The Commissioner considers it well established that the information contained in health records is regarded as confidential and that there is restricted access to certain applicable individuals via the AHRA. The inclusion of section 38(1)(d) in FOISA recognises that confidentiality continues after the death of an individual.
20. While the equivalent legislation for the rest of the United Kingdom (the Freedom of Information Act 2000) does not have an equivalent to section 38(1)(d) of FOISA, the Commissioner has given consideration to the guidance provided by the (UK) Information Commissioner (the ICO) relating to access to "Information about the deceased"³. In that guidance, the ICO recognises it is likely that the exemption for confidential information is likely to apply and that the personal representatives of a patient who has died may have rights to access the information under the AHRA.
21. The ICO guidance further states:

A significant amount of case precedent has been developed regarding the applicability of the exemption for confidential information to requests for medical records of deceased persons. This has established that the information contained in medical records will generally be confidential, whether it is held by the doctor or clinician treating the patient, or has been provided by that person to another person (such as an NHS trust, a court or the police in connection with a criminal investigation). We consider that the duty of confidence will continue to apply after the death of the person concerned.
22. Further, the Commissioner has found nothing in guidance issued by the Crown Office and Procurator Fiscal Service on the investigation of deaths in Scotland to suggest that post-mortem reports should be treated as generally accessible.
23. In coming to a decision on this matter, therefore, the Commissioner has given consideration to the wording of the applicable legislation and the practice of accessing information relating to a deceased person, including the cause of death of an individual.
24. The Commissioner is satisfied that a post-mortem report should be treated as a medical record. He is satisfied that it is accepted by the medical professions that a post-mortem can be considered to be a significant medical examination, aiming to find out about the cause of a person's death and their medical condition at the time.

¹ <https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2012/201101878.aspx>

² <https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2014/201400159.aspx>

³ <https://ico.org.uk/media/1202/information-about-the-deceased-foi-eir.pdf>

25. The Commissioner considers that, in practice, such reports are treated as a medical record. If not, then the rights conferred on the personal representative of a patient, under the AHRA, to obtain details surrounding the death of an individual would not be available in relation to such records (which appears not to be the practice).
26. The Commissioner is therefore satisfied that “information relating to the physical ... health of an individual” can include information in a post-mortem report; and that “in connection with the care of that individual” is sufficiently wide to include the care of a deceased individual – i.e. the care of the body, contrasting with care “for” an individual.
27. Being satisfied that the post-mortem report requested by the Applicant properly falls to be considered as a medical record, and taking account of previous decisions, Commissioner is satisfied that the exemption in section 38(1)(d) of FOISA applies to the information held by NHS Highland. As indicated above, this exemption is absolute and therefore is not subject to the public interest test.
28. The Commissioner therefore accepts that NHS Highland was entitled to withhold the information under section 38(1)(d) of FOISA.

Handling of the request

29. As noted above, the Commissioner accepts that NHS Highland was entitled to rely on section 38(1)(d) of FOISA to withhold the information falling within the scope of the Applicant’s request. However, there are a number of aspects of NHS Highland’s handling of the request which, while not raised specifically by the Applicant, are of sufficient significance to merit further consideration here.
30. The Commissioner notes that, in responding to the Applicant’s request and requirement for review, NHS Highland made no reference to any section of FOISA, except a reference to “section 38(d)” (properly section 38(1)(d)) in the review outcome). In its submissions to the Commissioner, NHS Highland accepted that it did not handle the FOISA request correctly. It apologised for the poor handling of this request and review, stating staff had been advised on how to handle such requests in the future.

Section 16 (and 19) of FOISA – content of notices

31. Section 16(1) of FOISA states that where an authority holds information which is subject to a request under section 1(1) of FOISA, and which it intends to withhold under any exemption, the authority must give the applicant notice in writing to the effect that the information is held, and specify which exemption it considers applies to the information (with reasons). Section 16(6) of FOISA also makes it clear that a notice in terms of section 16(1) is subject to section 19 of FOISA, which requires that an applicant is informed of their rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1) respectively.
32. In this case, it is apparent that the Applicant made a valid request under section 1(1) of FOISA for information held by NHS Highland. The Commissioner notes that the request specifies that the Applicant is submitting the request under the freedom of information regime. In responding to this request, NHS Highland had a duty to provide the Applicant with a response in terms of section 16 of FOISA.
33. In its response to the Applicant, NHS Highland failed to notify the Applicant that it held the information requested and that it was relying on an exemption, with reasons, in relation to that information. Neither did NHS Highland inform the Applicant of his rights under section 20(1) and 47(1), as required by section 19 of FOISA. By failing to do so, the Commissioner

finds that NHS Highland's response of 28 June 2020 did not comply with the requirements of sections 16 and 19 of FOISA, as outlined above.

Section 21 of FOISA – Review by Scottish public authority

34. Section 21(4) states that the authority may do the following in respect of the initial request for information, in response to a requirement for review:
 - (a) confirm the decision complained of, with or without such modifications as it considers appropriate;
 - (b) substitute a different decision for the original decision; or
 - (c) reach a decision, where the complaint is that no decision has been reached.
35. Section 21(5) then requires the authority to give the applicant notice in writing of what it has done under subsection (4), with a written statement of its reasons for so doing. In this case, as mentioned above, the Commissioner notes that NHS Highland advised the Applicant that the information was exempt from disclosure under "section 38(d)" of FOISA.
36. Section 21(10) of FOISA states that a Scottish public authority's response to the applicant (under section 21(5)) following a review carried out under section 21 must contain particulars about the rights of application to the Commissioner and of appeal to the Court of Session conferred by sections 47(1) and 56 respectively.
37. The Commissioner notes that NHS Highland's response to the Applicant's requirement for review of 12 July 2020 did not contain particulars about his rights of application to the Commissioner and of appeal to the Court of Session, as required by section 21(10).
38. As mentioned above, in correspondence with the Commissioner, NHS Highland accepted that it had not handled the Applicant's request for review correctly.
39. In conclusion, the Commissioner finds that NHS Highland failed to comply with the technical requirements of sections 16(1), 19 and 21(10) of FOISA, as outlined above, in responding to the Applicant's request for information. He would also urge NHS Highland, in responding to similar requests for information, to be absolutely clear as to which legislative regime it is responding under at any given point.
40. While the Commissioner does not require NHS Highland to take any action regarding these failures, in considering NHS Highland's failure to comply with the requirements of FOISA, as outlined above, the Commissioner would draw the authority's attention to his Self-Assessment Toolkit⁴. The Commissioner would ask NHS Highland to consider whether there are steps it can take to monitor compliance with its responsibilities and adjust practice, to minimise the likelihood of failing to comply with FOISA in dealing with requests in the future.

Decision

The Commissioner finds that, in respect of the matters specified in the application, NHS Highland complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) being entitled to withhold the information requested.

⁴<https://www.itspublicknowledge.info/ScottishPublicAuthorities/Self-AssessmentToolkit/Self-AssessmentToolkitIntroduction.aspx>

However, the Commissioner finds that NHS Highland failed to comply with Part 1 of FOISA, by failing to comply with sections 16(1), 19 and 21 in responding to the Applicant's request and requirement for review. Given that the Applicant received a response on review and was able thereafter to apply to the Commissioner for a decision, the Commissioner does not require NHS Highland to take any action in respect of these failures, in response to the application under consideration here.

Appeal

Should either the Applicant or NHS Highland 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.

Daren Fitzhenry
Scottish Information Commissioner

08 December 2020

Appendix 1: 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.

...

- (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

...

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.

...

- (6) Subsections (1), (4) and (5) are subject to section 19.

19 Content of certain notices

A notice under section 9(1) or 16(1), (4) or (5) (including a refusal notice given by virtue of section 18(1)) or 17(1) must contain particulars-

- (a) of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and
- (b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).

21 Review by Scottish public authority

...

- (4) The authority may, as respects the request for information to which the requirement relates-
 - (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
 - (b) substitute for any such decision a different decision; or
 - (c) reach a decision, where the complaint is that no decision had been reached.
- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

...

- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.

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 (see section 204 of that Act).

...

Data Protection Act 2018

204 Meaning of "health professional" and "social work professional"

(1) In this Act, "health professional" means any of the following—

- (a) a registered medical practitioner;

...

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