

Decision Notice



Decision 066/2008 Mr W. Hunter Watson and the Scottish Commission for the Regulation of Care

Health records of a deceased third party

Reference No: 200701487
Decision Date: 17 June 2008

www.itspublicknowledge.info

Kevin Dunion
Scottish Information Commissioner

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



Summary

Mr W. Hunter Watson (Mr Watson) requested information from the care home records of the late Irene Duncan (Mrs Duncan) from the Scottish Commission for the Regulation of Care (the Care Commission). The Care Commission responded that the information was otherwise accessible and exempt in terms of section 25 of FOISA. Following a review, Mr Watson remained dissatisfied and applied to the Commissioner for a decision.

During the Commissioner's investigation, the Care Commission confirmed that it believed the exemption in section 38(1)(d) of FOISA to apply to the information requested. Following the investigation, the Commissioner found that the Care Commission was entitled to withhold the information sought because it was exempt in terms of section 38(1)(d) of FOISA on the basis that it constituted a deceased person's health record.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement), 2(2)(e)(i) (Effect of exemptions) and 38(1)(d) and 38(5)(Personal information)

Access to Health Records Act 1990 (the AHRA): sections 1(1) ("Health record" and related expressions); 2 (Health professionals) and 3(1)(f) (Right of access to health records)

Data Protection Act 1998 (the DPA): section 69 (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

1. On 27 August 2007, Mr Watson wrote to the Care Commission requesting information from the care home records of a deceased person held by the Care Commission. Mr Watson's indicated that he was acting as a representative of Mrs Duncan's son and requested:
 - a. Whether the deceased person had received or been prescribed a named medicine on 10 May 2002 (request 1);



- b. Whether the records refer to the deceased person experiencing severe pain on certain dates (request 2); and
 - c. The date on which a prescription for a named drug was issued to the deceased person (request 3).
2. On 20 September 2007, the Care Commission responded to Mr Watson stating that the information requested was otherwise accessible – “from the NHS, GP and Care Service” - and accordingly exempt in terms of section 25 of FOISA. The Care Commission referred Mr Watson to the Access to Health Records Act 1990 (“the AHRA”), enclosed a copy of this legislation, and stated that this statute provided certain persons with rights to access medical records after the death of a patient.
3. Mr Watson wrote on 22 September 2007 to the Care Commission requesting a review of its decision. In particular, Mr Watson indicated that the information could not be obtained from the NHS, the relevant GP, or the care home [within which the deceased person was treated].
4. On 22 October 2007, the Care Commission notified Mr Watson of the outcome of its review. The Review Panel of Care Commission upheld the exemption in section 25 of FOISA, i.e. that the information requested by Mr Watson was otherwise accessible and accordingly exempt. The Review Panel explained that under the AHRA, where a patient has died, the patient’s personal representative and any person who may have a claim arising out of the patient’s death, may make an application to the holder of the record for access to a health record, or to any part of a health record.
5. Mr Watson wrote to the Commissioner’s office on 5 November 2007, stating that he was dissatisfied with the outcome of the Care Commission’s review (in respect of requests 1 and 2) and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Watson had made a request 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 that request.

Investigation

7. On 20 November 2007, the Care Commission was notified in writing that an application had been received from Mr Watson and was asked to provide the Commissioner with specified items of information required for the purposes of the investigation. The Care Commission responded with the information requested, along with initial comments on the case, and the case was allocated to an investigating officer.



8. The Care Commission submitted that the information was exempt in terms of section 25(1) of FOISA since the information was available through AHRA by way of the NHS, the GP or the Care Service Provider. Although it did not state in its initial response or review, the Care Commission also submitted at this stage that the information was also exempt in terms of section 35(1)(g) (Law enforcement).
9. The investigating officer subsequently contacted the Care Commission, providing it with an opportunity to comment on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions
10. In particular, the investigating officer noted that although the Care Commission had referred Mr Watson to the terms of the AHRA, it had not cited the exemption in section 38(1)(d) of FOISA in refusing to supply the information requested. Section 38(1)(d) is an absolute exemption that applies to information which constitutes a deceased person's health record. Information that could be the subject of a request under AHRA would also be exempt under the section 38(1)(d) of FOISA and so it was noted that the Care Commission's responses to Mr Watson suggested that this exemption would be relevant.
11. In its response, the Care Commission confirmed that due to an oversight, the exemption in section 38(1)(d) (Personal information) had not been cited in its responses to Mr Watson. The Care Commission indicated at this stage that it believed that this exemption applied to the information under consideration.
12. Mr Watson said that the information was not otherwise obtainable since only the Care Commission held it. Mr Watson explained that he was acting as the representative of the son of the deceased person, and wished to examine whether the Care Commission had fulfilled its responsibility in ensuring that residential care home staff follow best practice guidance when administering medication.
13. Mr Watson provided the Commissioner with documents that he had already received in respect of Mrs Duncan. He drew the Commissioner's attention to the fact that he had been provided, on 7 September 2007, with information from the Care Commission in respect of his request and that this information dealt with information which may be said to fall within the terms of the definition of a "health record" contained within the AHRA.
14. The Care Commission supplied the Commissioner's office with the withheld information which included records of administering and recording certain medicines and a prescription for a certain medicine.

Commissioner's analysis and findings

15. In coming to a decision in this matter, the Commissioner has considered all the information and submissions presented to him by the Care Commission and Mr Watson and is satisfied that no matter of relevance has been overlooked.



16. Mr Watson asked that the Commissioner investigate only requests 1 and 2 since he had received the information sought in respect of request 3.
17. Section 38(1)(d) of FOISA specifically exempts information if it constitutes a deceased person's health record, and this prevents health records of the deceased being put into the public domain in response for a request under the terms of FOISA. The exemption lasts for 100 years. 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.
18. 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. Under FOISA, any person is entitled to access information unless an exemption applies. Disclosure to one person under FOISA would suggest that, by and large, the same information should be made available to any other person.
19. The AHRA provides a separate, limited access regime under which certain persons have rights to obtain access to the health records of deceased persons. In particular, section 3(1)(f) of 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.
20. Section 38(5) of FOISA states that, for section 38, "health record" has the meaning assigned to that term by section 1(1) of the AHRA.
21. According to section 1(1) of the AHRA, "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.
22. "Health professional" is defined in section 2 of the AHRA which establishes that the definition of "health professional" is to be given the same definition as that in section 69 of the Data Protection Act 1998. Section 69 (reproduced in full in the Appendix) of the DPA includes within the definition of health professional a registered medical practitioner and a registered nurse.
23. Having studied the documents withheld by the Care Commission, the Commissioner is of the view that these documents fall within the definition of health records. These records identify the deceased person and contain daily notes, nursing notes and issues relating to care planning. The documents are records which have been made by or on behalf of a health professional in connection with the care of the deceased person. In consequence, the documents fall within section 38(1)(d) of FOISA.



24. Having decided that the information withheld falls within section 38(1)(d) and is absolutely exempt, the Commissioner will not consider whether the Care Commission was correct to rely on sections 25(1)(Information otherwise accessible) of 35(1)(g)(law enforcement) of FOISA.
25. During the investigation, it was drawn to Mr Watson's attention that the AHRA provides a mechanism for certain persons to be able to access the health record of a deceased person. He was advised that he should consider AHRA and the rights of access which this legislation may give him, or any person he represents, to access information in respect of the deceased person. It should be noted that the Commissioner has no powers in respect of AHRA, and would only observe that Mr Watson should, if necessary seek independent advice about his rights, or those of the deceased person's family, in terms of AHRA, in respect of the information which falls within the scope of section 38(1)(d) of FOISA.

DECISION

The Commissioner finds that Scottish Commission for the Regulation of Care was entitled to withhold the information requested by Mr Watson in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) on the basis that is exempt from disclosure in terms of section 38(1)(d) of FOISA.

Appeal

Should either Mr Watson or the Scottish Commission for the Regulation of Care 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.

Kevin Dunion
Scottish Information Commissioner
17 June 2008



Appendix

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

...

- (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); ...

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.

3 Right of access to health records

- (1) An application for access to a health record, or to any part of a health record, may be made to the holder of the record by any of the following, namely –

...

- (f) where the patient has died, the patient's personal representative and any person who may have a claim arising out of the patient's death.

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.