

Decision Notice



Decision 021/2005 Mr Michael Collie and the Common Services Agency for
the Scottish Health Service

Childhood leukaemia statistics in Dumfries and Galloway

Reference No: 200500298
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www.itspublicknowledge.info

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Summary

This decision replaces Decision 021/2005 *Michael Collie and the Common Services Agency for the Scottish Health Service* issued by the Commissioner in August 2005.

In 2005, shortly after the Freedom of Information (Scotland) Act 2002 (FOISA) came into force, Mr Collie made an information request to the Common Services Agency for the Scottish Health Service (the CSA) for childhood leukaemia statistics for the Dumfries and Galloway area. The CSA refused to disclose the statistics on the basis that the disclosure could lead to the identification of the children involved. The Commissioner agreed that disclosure would lead to identification, and instead required the CSA to disclose the statistics, but in a way which was designed to protect against identification of individuals.

The CSA appealed the Commissioner's decision to the Court of Session and then to the House of Lords. The House of Lords allowed a number of the CSA's grounds of appeal, quashed the decision and remitted the case back to the Commissioner for further investigation.

Following further investigation, the Commissioner found that the CSA partially failed to deal with Mr Collie's request for information in accordance with Part 1 of FOISA. While he agreed that the information which was the subject of Mr Collie's information request was exempt under section 38(1)(b) of FOISA, on the basis that the statistics in question were sensitive personal data, the disclosure of which would breach the first data protection principle, he also found that the CSA failed to comply fully with the duty under section 1(1) of FOISA by failing to provide the statistical information to Mr Collie in a form which would not lead to the identification of the individuals in question, when such disclosure was possible. The Commissioner has agreed with the CSA the form in which this information should be disclosed.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA): section 1(1), (4) and (6) (General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions) and 38(1)(b), (2)(a)(i) and (5) (definitions of "data protection principle", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA): sections 1(1) (Basic interpretative provisions – the definition of "personal data"); 2(e) (Sensitive personal data) and 4(1) and (4) (The data protection principles); Schedule 1 Part 1 (the first data protection principle); Schedule 3 (conditions 1, 5 and 7)



Data Protection (Processing of Sensitive Personal Data) Order 2000: condition 9 of the Schedule
The National Health Service (Functions of the Common Services Agency) (Scotland) Order 1974:
paragraph 3(c) and (j)

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.

House of Lords judgment: Common Services Agency v Scottish Information Commissioner [2008]
UKHL 47 [http://www.bailii.org/cgi-
bin/markup.cgi?doc=/uk/cases/UKHL/2008/47.html&query="freedom+of+information+scotland+act+2
002"&method=boolean](http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKHL/2008/47.html&query=freedom+of+information+scotland+act+2002) (the Collie judgment)

The Commissioner's briefing on the section 38 exemption, "Personal information"
<http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.asp>

Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and
on the free movement of such data

Background to original decision

1. On 11 January 2005, under section 1(1) of the Freedom of Information (Scotland) Act 2002 (FOISA), Mr Collie asked the CSA to provide him with statistics on the incidences of childhood leukaemia for both sexes, in the age range 0 -14, by year, from 1990 to 2003, for the Dumfries and Galloway area by census ward.
2. The CSA responded to Mr Collie on 19 January 2005. It refused to release the information to Mr Collie on the basis that the numbers for each of the years 1990 to 2001 were so small that disclosure could lead to the identification of individuals. As a result, it considered that this information fell within the definition of personal data contained in section 1(1) of the Data Protection Act 1998 (the DPA). The CSA advised Mr Collie that it had a long standing rule of scrutinising any data containing small numbers before it is released and of suppressing cells in tables containing less than five cases where it is considered that there is a significant risk of indirect identification of living individuals. The CSA advised Mr Collie that this policy was applied by a number of organisations, similar to the CSA, which hold personal data.
3. The CSA also advised Mr Collie that the data it held for 2002 and 2003 was incomplete.
4. Mr Collie was dissatisfied with this response and sought a review of this decision from the CSA. The CSA upheld its decision on review and offered to provide (but did not provide) Mr Collie with data for the Dumfries and Galloway area in a different format.



5. On 27 January 2005, Mr Collie wrote to the Commissioner, stating that he was dissatisfied with the outcome of the CSA's review 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 Collie 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.
7. The CSA was subsequently notified of the application in terms of section 49(3)(a) of FOISA and was invited to comment on the application.
8. Following an investigation, the Commissioner found that the actual statistics which Mr Collie had requested were exempt from disclosure under section 38(1)(b) of FOISA, on the basis that the statistics amounted to personal data, the disclosure of which would breach the first data protection principle. However, towards the end of the investigation, the CSA had supplied the Commissioner with draft guidance which suggested to the Commissioner that the statistics could be disclosed without identifying individuals if they were to undergo a process known as "barnardisation", a statistical tool which can be used in certain circumstances to "disguise" actual statistics (and thus ensure that individuals cannot be identified from the disclosure of the statistics), while still providing an indication of the actual numbers contained in the statistics.
9. The Commissioner found that, in failing to offer to barnardise the statistics in line with its draft guidance, the CSA had failed to comply with its duty to provide advice and assistance in line with section 15(1) of FOISA. He therefore ordered the CSA to disclose the statistics to Mr Collie either in a barnardised format or by aggregating the census ward figures. Mr Collie was to advise the CSA which was his preferred option. In the event that Mr Collie did not make a choice, the information was to be disclosed in a barnardised format. Mr Collie did not elect one option over the other, and so the effect of the Commissioner's decision was to order the CSA to disclose the statistics in a barnardised format to Mr Collie.
10. The CSA subsequently appealed the Commissioner's decision to the Court of Session, in terms of section 56(b)(ii) of FOISA, and then to the House of Lords. The Lords delivered their judgment in July 2008. The Lords found that the effect of the Commissioner's decision was to treat the provision of the barnardised data as an appropriate response in terms of section 15. The Lords quashed this decision, finding that the effect of the Commissioner's decision was to require the CSA to release information to Mr Collie, not just to give him advice and assistance. The Lords stated in their judgment that this was an error of law. They considered that the release of information would only have been appropriate if the Commissioner was satisfied that the barnardised information was not personal data in the hands of the CSA as the data controller, or that it was personal data, but that disclosure in this barnardised format would not contravene any of the data protection principles set out in the DPA.
11. The Lords considered that, from the original decision, it appeared that the Commissioner had not directed his mind to answering four questions of fact and that, accordingly, the case should be remitted back to him for further consideration. The four questions of fact for the Commissioner to reconsider were:



- whether the requested information in a barnardised format was personal data
- whether data relating to incidences of childhood leukaemia fell within the subset of sensitive personal data
- whether disclosure of the information in barnardised form would comply with the data protection principles
- whether conditions in Schedules 2 and 3 of the DPA could be met

These questions are all considered below. The final two are considered together, given that the CSA has argued that disclosure would breach the first data protection principle, which would require a condition in Schedule 2 (and, if the barnardised statistics are found to be sensitive personal data, a condition in Schedule 3) to be met.

12. In light of the Lords' judgment, the Commissioner has subsequently carried out further investigations, has had further discussions with the CSA in relation to the case and has reconsidered the matter. This decision takes account of the exemptions currently being cited by the CSA and does not address matters which are no longer relevant to the decision.
13. The Commissioner wishes to note, however, that his role is to consider, in line with section 47(1) of FOISA, whether, as at 26 January 2005 (the date on which the CSA notified Mr Collie of the outcome of its review), the CSA dealt with Mr Collie's request for information in line with Part 1 of FOISA.

Commissioner's analysis and findings

Are the barnardised statistics personal data?

14. "Personal data" is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified (a) from those data or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the full definition is set out in the Appendix).
15. Barnardisation is a technique used to anonymise statistical counts prior to publication. It involves the random addition of 0, +1 or -1 to all non-zero cell counts in the main body of a table, followed by the recalculation of the table row and column totals to fit the modified interior cell counts. As far as the Commissioner has been able to ascertain, it is a UK-specific term first used within the UK Census community to describe a method of cell modification applied by the Office for National Statistics (ONS) in the 1971, 1981 and 1991 Census.



16. It appears that the CSA's use of barnardisation differs slightly from that used by the ONS in that (i) it is applied only to counts of 1-4 and (ii) counts of 1 are subject only to a possible change of +1 or 0. No mention is made of how row and column totals are handled, although it can probably be assumed that column/row totals are in fact derived from the sum of the modified interior cell counts; otherwise the danger of being able to reverse engineer the cell modifications would be disproportionately high.
17. The Commissioner originally took the view that the barnardised data were not personal data, on the basis that the individuals involved could not be identified from the data presented in that format, although he accepts that no finding in fact was made on this point in his original decision.
18. In reconsidering this matter, the Commissioner has taken account of the guidance offered by Lord Hope in paragraphs 22 to 27 of the Collie judgement on the interpretation of "personal data" in section 1(1) of the DPA, particularly when read in light of Directive 95/46/EC.
19. As Lord Hope noted, the barnardised statistics will be personal data if, either on their own, or taken together with the other information held by the CSA, they enable a living individual or living individuals to whom the data relates to be identified. Each of these two components must have a contribution to make to the result. If the original information is incapable of adding anything and the barnardised data by themselves cannot lead to identification, the definition will not be satisfied.
20. The Commissioner has considered the manner in which the barnardised information would be provided to Mr Collie (i.e. by providing him with a table setting out the numbers of incidents of childhood leukaemia in each of the Dumfries and Galloway postal areas broken down by census ward and, further, by year from 1990 to 2001) and has come to the view that the barnardised data, by themselves, can lead to identification, and that the effect of barnardisation on the actual figures, at least as deployed by the CSA, does not have the effect of concealing or disguising the data which he had originally considered that it would. Given this finding, the Commissioner has not had to consider the second part of the definition of personal data, i.e. whether a living individual can be identified from the barnardised statistics together with other information which is in the possession of, or is likely to come into the possession of, the CSA.
21. Given that the statistics have the individuals as their focus, are biographical in nature and clearly relate to the individuals involved, the Commissioner has come to the conclusion that, in this particular case, the barnardised statistics are personal data.

Are the barnardised statistics sensitive personal data?

22. The CSA submitted that the barnardised statistics are sensitive personal data for the purposes of section 2 of the DPA. This is an important distinction to make, given that, as the Commissioner has noted in his briefing on the exemption in section 38 of FOISA, the processing of sensitive personal data is subject to much tighter restrictions than non-sensitive personal data and, unless the data subject has given explicit consent to the disclosure of the information, or the information has been made public as a result of steps taken by the data subject, it is unlikely that it will be lawful to disclose sensitive personal data under FOISA.



23. In this case, the Commissioner is satisfied that the statistics amount to sensitive personal data in terms of section 2(e) of the DPA, given that they are personal data consisting of information as to data subjects' physical health or condition.

Would disclosure of the barnardised statistics breach the first data protection principle?

24. As noted above, the CSA has argued that disclosure of the barnardised statistics requested by Mr Collie would breach the first data protection principle. This requires that personal data shall be processed (in this case, disclosed into the public domain as a result of Mr Collie's information request) fairly and lawfully and that they shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met. Given that the Commissioner has already determined that the barnardised statistics are sensitive personal data, he will firstly consider whether there are any conditions in Schedule 3 which would permit the sensitive personal data to be processed.
25. The Commissioner has considered all of the conditions in Schedule 3, including those in the Data Protection (Processing of Sensitive Personal Data) Order 2000 (the 2000 Order) made by the Secretary of State for the purposes of condition 10 of Schedule 3.
26. The Commissioner has noted that neither condition 1 of Schedule 3 (explicit consent to the processing of the personal data by the data subject), nor condition 5 of Schedule 3 (information made public as a result of steps deliberately taken by the data subject) (see the comment in paragraph 20 above) apply here.
27. The Commissioner has considered in some detail condition 7(1)(b) of Schedule 3 which permits sensitive personal data to be processed where the processing is necessary for the exercise of any functions conferred on any person by or under an enactment.
28. The Commissioner notes that paragraph 3 of the National Health Service (Functions of the Common Services Agency) (Scotland) Order 1974 deals with the release of information held by the CSA. (It should be noted that this Order was repealed by the National Health Service (Functions of the Common Services Agency) (Scotland) Order 2008. The Commissioner has focussed on the 1974 Order, given that this was the Order which was in force when the CSA reviewed Mr Collie's information request in 2005. In any event, the CSA's functions under both Orders are similar, and so the Commissioner's findings on this point would be the same regardless of whether he were to consider the 1974 Order or the 2008 Order.)
29. Paragraph 3(c) of the 1974 Order states that it shall be the duty of the CSA to provide information, advisory and management services in support of the functions of the Secretary of State and Health Boards except in certain specified circumstances. Paragraph 3(j) of the 1974 Order states that it shall be the duty of the CSA to collect and disseminate epidemiological data and to participate in epidemiological investigations.
30. In considering the scope of the duty set out in paragraph 3 of the 1974 Order, Lord Hope noted in paragraph 42 of the Collie judgment:



“The disclosure of the information to Mr Collie would not fall within head (c) of paragraph 3, which deals with the provision of information in support of the functions of the Secretary of State and Health Boards. But it is arguable that it would fall within head (j) of the paragraph. The question is whether its disclosure to Mr Collie can be said to be “necessary” for the performance of that function, as condition 7(1)(b) of schedule 3 requires. This is a question of fact which only the Commissioner is in a position to determine ...”

31. It is clear to the Commissioner that it is a function of the CSA to collect and disseminate epidemiological data and to participate in epidemiological investigations. However, he does not take the view that the disclosure of the statistics to Mr Collie in response to his information request under FOISA can be viewed as *necessary* for the exercise of those functions. The CSA has exercised these functions on other occasions without the need to make a disclosure under FOISA to a specific applicant.
32. The Commissioner has also considered in detail the 2000 Order referred to in paragraph 23 above. In the Collie judgment, Lord Rodger considered that it was at least conceivable that paragraph 9 of the Schedule to the 2000 Order would allow the personal data to be disclosed, but made no finding on this point.
33. Paragraph 9 of the Schedule to the 2000 Order allows personal data to be processed where four conditions are fulfilled, i.e. the processing:
 - is in the substantial public interest;
 - is necessary for “research purposes” (as defined by section 33 of the DPA, i.e. includes statistical or historical purposes)
 - does not support measures or decisions with respect to any particular data subject otherwise than with the explicit consent of that data subject; and
 - does not cause, nor is likely to cause, substantial damage or substantial distress to the data subject or any other person.
34. The Commissioner notes the very high tests required for these conditions to apply, notably that the processing (in this case, the disclosure of the information) must be in the *substantial* public interest. While he agrees with Lord Rodger that it is conceivable that these conditions apply depending on the circumstances of a particular case, he has come to the conclusion that the tests cannot be met here. There is, undoubtedly, a public interest in the disclosure of the information (see Lord Hope’s comments in paragraph 8 of the Collie judgment), but the Commissioner does not consider that the public interest is so substantial as to outweigh the privacy rights of the patients in this case.
35. In coming to these conclusions on the application of the 2000 Order and on paragraph 7(1)(b) of Schedule 3 to the DPA, the Commissioner has taken account of the comments made by Lord Hope in the Collie case on the relationship between FOISA and the DPA. In paragraph 7, he comments:



“In my opinion there is no presumption in favour of the release of personal data under the general obligation that FOISA lays down. The references which [FOISA] makes to provisions of [the DPA] must be understood in the light of the legislative purpose of [the DPA], which was to implement Council Directive 95/46/EC¹. The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data ... Recital 34 and article 8(1) recognise that some categories of data require particularly careful treatment. Section 2 [of the DPA], which defines the expression “sensitive personal data”, must be understood in the light of this background.”

36. The Commissioner has therefore concluded that there are no conditions in Schedule 3 to the DPA which would permit the sensitive personal data requested by Mr Collie to be disclosed to him in a banded format. As a result, he has not found it necessary to go on to consider whether there are any conditions in Schedule 2 which would permit the sensitive personal data to be disclosed to Mr Collie, or whether the disclosure of the information is otherwise fair and lawful. However, as a result of finding that there are no conditions in Schedule 3 which can be fulfilled, he must find that the disclosure of the information would breach the first data protection principle and, consequently, that the statistics are exempt from disclosure in terms of section 38(1)(b) of FOISA, as read with section 38(2)(a)(i).

Complying with Mr Collie’s request – other options

37. As noted in paragraph 10 above, the Commissioner originally found that, by failing to provide Mr Collie with the information he had sought in a suitable form which was not exempt under section 38(1)(b) of FOISA, the CSA had failed to comply with the duty contained in section 15(1) of FOISA. However, it is clear that the Lords considered that the duty to disclose information in a form which will enable it to be released consistently with the data protection principles is, more appropriately, to be viewed as part of the duty contained in section 1(1) of FOISA.

38. As Lord Rodger commented in paragraph 73 of the Collie judgment:

“... even if the information does constitute “personal data”, the [CSA] will still be obliged to supply it, if that can be done without contravening the data protection principles in Schedule 1 to the [DPA]. And, if supplying the information in one form would contravene those principles, in my opinion, section 1(1) of [FOISA] obliged [the CSA] to consider whether it could comply with its duty by giving the information in another form...”

¹ Directive 95/46/EC relates to the protection of individuals with regard to the processing of personal data and on the free movement of such data



39. The Commissioner notes that the CSA offered to provide Mr Collie with data on the number of childhood leukaemia cases for the whole of Dumfries and Galloway for the combined period 1990 to 2001 and, at a later date, to supply aggregated results such as rates for aggregates of postcode sectors. He also notes that the CSA twice offered to discuss Mr Collie's concerns with him with a view to providing a bespoke analysis which would avoid the need for personal data to be disclosed. Mr Collie did not take up these offers, but instead applied to the Commissioner for a decision on the matter, presumably to establish whether he was entitled to the actual statistics he had requested and in the hope therefore that the Commissioner would order these statistics to be disclosed to him.
40. While the Commissioner accepts that the CSA took steps to suggest how some information might be provided to Mr Collie, he considers that, in line with the view taken by Lord Rodger (see paragraph 38 above), the CSA remained under an obligation to supply information to Mr Collie in a form which did not contravene the data protection principles in Schedule 1 to the DPA.
41. The Commissioner recognises that the CSA might feel aggrieved at this outcome and, indeed, would have some sympathy with this. After all, as noted above, they offered to provide Mr Collie with aggregated figures and to discuss his concerns with him, but Mr Collie did not take up these offers. However, this is perhaps understandable if seen from Mr Collie's point of view. He was under no obligation to enter into correspondence with the CSA on an alternative form of information provision as he wanted to be given the actual statistics, rather than aggregated figures. He knew he had the right to make an application to the Commissioner for a decision as to whether he was entitled, under FOISA, to be given those statistics.
42. The fact remains that, although Mr Collie did not take up the CSA's offers, the CSA remained under a duty to provide information to Mr Collie in a form which would not breach the data protection principles. Subsequent discussions with the CSA (see below) have shown that the information could have been provided to Mr Collie in a format which did not breach the data protection principles.
43. Given the breadth of the duty under section 1(1) of FOISA, and the range of options open to the CSA in complying with this duty, the Commissioner discussed with the CSA whether it would be possible to provide Mr Collie with the actual statistics for the whole Dumfries and Galloway Health Board area for each of the years 1990 to 2001, on the basis that, in the view of the Commissioner, aggregating the statistics in this way would render them fully anonymous and, therefore, capable of disclosure. (In coming to this view, the Commissioner has again taken account of the guidance offered by Lord Hope in paragraphs 22 to 27 of the Collie judgment.)
44. The guidance from Lord Hope focussed, of course, on the effect of barnardisation. Compiling aggregate statistics in the way suggested by the Commissioner does not involve the barnardisation of these figures. However, the Commissioner believes that the guidance provided by Lord Hope is also relevant to the aggregation of the statistics as, with barnardisation, it is a means of presenting the information, albeit in a different format.



45. The aggregated statistics will be personal data if, either on their own or, taken together with the other information held by the CSA, they enable a living individual or living individuals to whom the data relates to be identified. As Lord Hope notes, each of these two components must have a contribution to make to the result. If the original information is incapable of adding anything and the aggregated data by themselves cannot lead to identification, the definition will not be satisfied. The original information will have no part to play in the identification. The same result would follow if the aggregated data have been put in a form from which the individual or individuals to whom they relate cannot be identified at all, even with the assistance of the other information from which they were derived. In that situation, a person who has access to both sets of information will find nothing in the aggregated statistics that will enable him to make the identification. It will be the original information and not anything in the aggregated data, which will lead to the identification. The effect of aggregating the statistics would be to conceal or disguise information about the number of incidences of leukaemia in each census ward. Instead of considering the number of cases in a particular ward (generally a small geographical area with a small population), account needs to be taken of a much larger geographical area (the whole of Dumfries and Galloway) and, accordingly, of a much larger population.
46. The Commissioner is satisfied that the effect of aggregation would be to put the statistics into a form from which the individual or individuals to whom they relate cannot be identified, even with the assistance of the original information from which they were derived. A person with access to both the aggregated data and the original data will find nothing in the aggregated data that will enable identification of the individual children involved. It will be the original information only, and not anything in the aggregated data, that will enable identification.
47. As noted above, the Commissioner asked the CSA to consider whether it considered that the aggregated data fell outwith the definition of personal data and was therefore no longer exempt under section 38(1)(b) of FOISA. The CSA subsequently confirmed that it agreed that this is the case and that it is willing to disclose the information in this aggregated form to Mr Collie.
48. The Commissioner finds that, by failing to provide Mr Collie with information in another form, the CSA failed to comply with section 1(1) of FOISA.
49. The Commissioner notes that the CSA has volunteered to provide aggregated figures to Mr Collie for the years 2002 to 2003, despite the fact that the Commissioner has no power to require it to do so, given that the CSA did not hold this information at the time of Mr Collie's request.



DECISION

The Commissioner finds that the Common Services Agency for the Scottish Health Service (the CSA) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Collie.

The Commissioner finds that the CSA was entitled to withhold the statistics requested by Mr Collie on the basis that they comprise sensitive personal data, the disclosure of which would breach the first data protection principle. Accordingly, the statistics are exempt from disclosure under section 38(1)(b) of FOISA.

However, in failing to disclose the information to Mr Collie in a form which was not exempt under section 38(1)(b), when such a form was available, the Commissioner finds that the CSA failed to comply with Part 1 of FOISA, and with section 1(1) in particular.

The Commissioner therefore requires the CSA to disclose to Mr Collie aggregated statistics for the whole Dumfries and Galloway Health Board area for each of the years 1990 to 2001, by Friday 14 July 2010.

Appeal

Should either Mr Collie or the Common Services Agency 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
26 May 2010



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.
...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
...
- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
...
 - (e) in subsection (1) of section 38 –
...
 - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.



38 Personal information

- (1) Information is exempt information if it constitutes-
- ...
- (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;
- ...
- (2) The first condition is-
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
- (i) any of the data protection principles; or
- ...
- (5) In this section-
- "the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;
- "data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;
- ...



Data Protection Act 1998

1 Basic interpretative provisions

In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

2 Sensitive personal data

In this Act “sensitive personal data” means personal data consisting of information as to-

...

(e) his physical or mental health or condition,

...

4 The data protection principles

(1) References in this Act to the data protection principles are to the principles set out in Part 1 of Schedule 1.

...

(4) Subject to section 27(1), it shall be the duty of a data controller to comply with the data protection principles in relation to all personal data with respect to which he is the data controller.



Schedule 1 – The data protection principles

Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
 - (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

Schedule 3 – Conditions relevant for purposes of the first principle: processing of sensitive personal data

- 1 The data subject has given his explicit consent to the processing of the personal data.
...
- 5 The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.
...
- 7 (1) The processing is necessary –
...
for the exercise of any functions of the Crown, a Minister of the Crown or a government department.
...



**The Data Protection (Processing of Sensitive Personal Data) Order 2000
Schedule: Circumstances in which sensitive personal data may be processed**

- 9 The processing -
- (a) is in the substantial public interest;
 - (b) is necessary for research purposes (which expression shall have the same meaning as in section 33 of the Act);
 - (c) does not support measures or decisions with respect to any particular data subject otherwise than with the explicit consent of that data subject; and
 - (d) does not cause, nor is likely to cause, substantial damage or substantial distress to the data subject or any other person.

The National Health Service (Functions of the Common Services Agency) (Scotland) Order 1974

3 Functions of the Agency

It shall be the duty of the Agency to undertake the following functions:

...

- (c) the provision of information, advisory, and management services in support of the functions of the Secretary of State and Health Boards other than where the Health Protection Agency is exercising functions under the Health Protection Agency (Scottish Health Functions) Order 2006;

...

- (j) the collection and dissemination of epidemiological data and participation in epidemiological investigations.