

# Decision Notice

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## Decision 193/2016: Mr X and Lothian Health Board

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### Interview of member of staff

Reference No: 201601016

Decision Date: 14 September 2016



Scottish Information  
Commissioner

## Summary

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On 12 February 2016, Mr X asked Lothian Health Board (NHS Lothian) for information relating to the interview of a member of staff.

NHS Lothian refused to provide the information, as it considered this to be third party personal data, disclosure of which would breach the data protection principles. Following a review, Mr X remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that NHS Lothian partially failed to respond to Mr X's request for information in accordance with Part 1 of FOISA. While NHS Lothian was entitled to withhold the information requested under section 38(1)(b) of FOISA, it failed to inform Mr X of his right of appeal to the Court of Session.

The Commissioner did not require NHS Lothian to take any action as it had already taken action to update its review response letter template.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(e)(ii) (Effect of Exemptions); 21(10) (Review by Scottish public authority); 38(1)(b), (2)(a)(i), (2)(b) and (5) (definition of "the data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA) section 1(1) (Basic interpretative provisions) (definition of "personal data"); Schedule 1 (The data protection principles, Part 1 – the principles) (the first data protection principle); Schedule 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (conditions 1 and 6)

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

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1. On 12 February 2016, Mr X made a request for information to NHS Lothian. The information request was for all and any information, not amounting to personal data of which he was the subject, held in relation to his treatment on a specified occasion, and the formal interview of any NHS member of staff concerning his request to NHS personnel to contact a family member.
2. NHS Lothian responded on 3 March 2016. It informed Mr X that any information held concerning the interview of a member of staff would be exempt from disclosure under section 38 of FOISA. NHS Lothian considered disclosure would breach the DPA as it would not have the consent of the member of staff to disclose the information.
3. On 9 March 2016, Mr X wrote to NHS Lothian, requiring a review of its decision on the basis that he believed NHS Lothian had failed to explain why the exemption in section 38(1)(b) of FOISA applied to the personal data of a third party in this case. He was dissatisfied that NHS Lothian had failed to consider the legitimate purpose being pursued by the request, had

failed to explain why it would not have the member of staff's consent, and had not considered or explained why any interference with the privacy of the member of staff would be unwarranted in the particular circumstances of the request.

4. NHS Lothian notified Mr X of the outcome of its review on 13 March 2016, upholding its original decision without modification. It explained that section 38 was an absolute exemption, which provided for the exemption of any information meeting the criteria in that section. It confirmed that any information held about the management of an individual member of staff would be exempt from disclosure.
5. On 24 May 2016, Mr X wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. Mr X stated he was dissatisfied with the outcome of NHS Lothian's review because, in relation to any third party personal data withheld under section 38(1)(b), he believed that NHS Lothian had failed to carry out the balancing exercise required by statute. He was further dissatisfied that, in its review response, NHS Lothian had failed to give notice, in terms of section 21(10) of FOISA, of the right to appeal to the Court of Session (on a point of law only) against a decision of the Commissioner.

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that Mr X made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 20 June 2016, NHS Lothian was notified in writing that Mr X had made a valid application and was asked to send the Commissioner the information withheld from him. NHS Lothian provided the information and 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 Lothian was invited to comment on this application and answer specific questions, with particular reference to its application of section 38(1)(b) of FOISA and its alleged failure to include the required notice under section 21(10) of FOISA.
9. As NHS Lothian was withholding information under the exemption in section 38(1)(b), Mr X was also invited to comment on his legitimate interest in obtaining the information requested.
10. NHS Lothian provided submissions to the Commissioner. No further submissions were received from Mr X.

## **Commissioner's analysis and findings**

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11. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr X and NHS Lothian. She is satisfied that no matter of relevance has been overlooked.

### **Section 38(1)(b) of FOISA – Personal information**

12. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) (or, as appropriate, (2)(b)) exempts information from disclosure if it is "personal data", as defined in section 1(1) of the DPA, and its disclosure would contravene one or more of the data protection principles set out in Schedule 1 to the DPA.

13. In order to rely on this exemption, NHS Lothian must show, firstly, that any such information would be personal data for the purposes of the DPA and, secondly, that disclosure of those data would contravene one or more of the data protection principles to be found in Schedule 1.
14. This exemption is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.
15. NHS Lothian was asked to confirm whether it wished to continue to rely upon section 38(1)(b) of FOISA in respect of the withheld information, and to explain the basis on which it was doing so.

*Is the withheld information personal data?*

16. "Personal data" are defined in section 1(1) of the DPA as "data which relate to a living individual who can be identified from those data, or 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 Appendix 1).
17. NHS Lothian explained that the withheld information was contained in a meeting record concerning the conduct of a member of staff. The information formed part of the member of staff's personnel file. NHS Lothian confirmed it was continuing to withhold this information under section 38(1)(b) of FOISA.
18. The Commissioner has considered the submissions received from NHS Lothian on this point, along with the withheld information. In line with these submissions, she is satisfied that the information comprises the personal data of the member of staff. The information contains a record of the member of staff's actions relating to a specific matter, created as a result of an internal interview with that individual. Clearly, it is possible to identify a living individual from it. It is about that individual and so can be said to relate to that individual. It is therefore that individual's personal data, as defined by section 1(1) of the DPA. The Commissioner is not satisfied it would be possible to render the data in question fully anonymous, and thus deprive it of its character as personal data.

*Would disclosure contravene the first data protection principle?*

19. In its submissions, NHS Lothian argued that disclosure of the withheld personal data would contravene the first data protection principle. This requires that personal data are processed fairly and lawfully. The processing in this case would be the disclosure of the information into the public domain, in response to Mr X's request.
20. The first principle also states that personal data shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met. In the case of sensitive personal data (as defined by section 2 of the DPA) at least one of the conditions in Schedule 3 to the DPA must also be met. The Commissioner is satisfied that the personal data in question are not sensitive personal data for the purposes of section 2 of the DPA, so it is not necessary for her to consider the conditions in Schedule 3.
21. The Commissioner will now consider whether there are any conditions in Schedule 2 to the DPA which would permit the withheld personal data to be disclosed. If any of these conditions can be met, she must then consider whether the disclosure of the information would be fair and lawful.
22. There are three separate aspects to the first data protection principle:

- (i) fairness
- (ii) lawfulness, and
- (iii) the conditions in the schedules

These three aspects are interlinked. For example, if there is a specific condition in Schedule 2 which permits the personal data to be disclosed, it is likely that disclosure will also be fair and lawful.

*Can any of the conditions in Schedule 2 be met?*

- 23. Condition 1 applies when the data subject (i.e. the individual to whom the data relate) has consented to the disclosure of the information.
- 24. NHS Lothian explained that, while the member of staff (the data subject) had given their consent to release the meeting record, NHS Lothian was not satisfied that this was sufficient in the circumstances to permit disclosure under FOISA.
- 25. In considering the data subject's consent to the disclosure of their personal data under FOISA, the Commissioner must be satisfied that this consent was specific to the circumstances, fully informed and freely given. The data subject must be fully aware of the implications of public disclosure of their personal data under FOISA which is, effectively, a disclosure "to the world". In this case, having considered the submissions from NHS Lothian, the Commissioner is not persuaded that any consent given by the data subject was fully informed.
- 26. Accordingly, the Commissioner does not consider that condition 1 in Schedule 2 has been met in this case, in relation to the data subject's consent to disclosure of their personal data under FOISA.
- 27. In the circumstances, it appears to the Commissioner that condition 6 in Schedule 2 is the only other one which might permit disclosure of the information to Mr X. In any event, neither Mr X nor NHS Lothian argued that any other condition would be relevant.
- 28. Condition 6 allows personal data to be processed if that processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject (the individual(s) to whom the data relate).
- 29. There are, therefore, a number of tests which must be met before condition 6 can apply. These are:
  - (i) Does Mr X have a legitimate interest in obtaining the personal data?
  - (ii) If so, is the disclosure necessary to achieve those legitimate interests? In other words, is the processing proportionate as a means and fairly balanced as to ends, or could these legitimate interests be achieved by means which interfere less with the privacy of the data subject?
  - (iii) Even if the processing is necessary for Mr X's legitimate interests, would it nevertheless be unwarranted, in this case, by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

30. There is no presumption in favour of disclosure of personal data under the general obligation laid down by section 1(1) of FOISA. The legitimate interests of Mr X must outweigh the rights and freedoms or legitimate interests of the data subject before condition 6 will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that NHS Lothian was correct to refuse to disclose the personal data to Mr X.

*Does Mr X have a legitimate interest in obtaining the personal data?*

31. In his application to the Commissioner, Mr X was concerned that NHS Lothian had initiated a formal procedure against a member of staff who may have acted contrary to the authority's policy. Believing the member of staff to have acted on a legitimate interest, Mr X was concerned this individual may have thus been victimised. Mr X stated that he wished to have the information, as it might assist in informing a complaint he was pursuing against a separate public authority.
32. NHS Lothian confirmed it had not asked Mr X if he had a legitimate interest. Whilst it acknowledged he might have an interest in having the information, it did not view this to be a legitimate interest.
33. The Commissioner has considered all relevant submissions she has received on this point, along with the withheld personal data.
34. The Commissioner accepts that Mr X might have a specific personal interest in knowing what was contained in the record of interview of the member of staff. She can also identify a broader public interest in transparency, so that the public can have confidence in NHS Lothian's policies and any actions taken to investigate any possible breaches of staff conduct. This would be addressed, at least in part, by the disclosure of the information withheld in this case. In this regard, therefore, the Commissioner accepts that Mr X has a legitimate interest in obtaining the withheld personal data.

*Is disclosure necessary to achieve those legitimate interests?*

35. The Commissioner must now go on to consider whether disclosure of the withheld personal data would be necessary to meet the legitimate interest she has identified above. This will include consideration of whether the legitimate interest might be met by alternative means which interfered less with the privacy of the data subject.
36. The Commissioner has considered all relevant submissions she has received carefully, together with the withheld information. In this case, she notes that NHS Lothian has already confirmed that a member of staff was interviewed in relation to conduct.
37. The Commissioner has already accepted that Mr X might have a personal interest in having the information. She cannot identify any other viable means of meeting the legitimate interests identified which would interfere less with the privacy of the data subject other than providing the withheld personal data. For this reason, the Commissioner is satisfied that disclosure of the information is necessary for the purposes of Mr X's own legitimate interests.

*Would disclosure nevertheless be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?*

38. The Commissioner is satisfied that disclosure of the withheld personal data is necessary to fulfil Mr X's legitimate interests, but must now consider whether that disclosure would still cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject. This involves a balancing exercise between Mr X's legitimate interests and those of

the data subject. Only if Mr X's legitimate interests outweigh those of the data subject can the information be disclosed without breaching the first data protection principle.

39. NHS Lothian submitted that the disclosure of the personal data under FOISA would prejudice the rights of the data subject. The information related to the conduct of a member of staff and was held in that individual's personnel file: it submitted that it did not disclose information from personnel files under FOISA.
40. The Commissioner has taken account of the submissions by both parties, and of her own briefing on the exemptions relating to personal data<sup>1</sup>, published on her website. In that briefing, the Commissioner notes a number of factors which should be taken into account in carrying out the balancing exercise.
41. The Commissioner has already addressed the matter of the data subject's consent earlier in this Decision Notice. She considers disclosure of the personal data being considered in this case would likely cause distress to the data subject, who would have a reasonable expectation of privacy in relation to personal data relating to their conduct. The employee in question is relatively junior.
42. The Commissioner has concluded, on balance, that disclosure would be disproportionately intrusive and would cause unwarranted prejudice to the rights, freedoms and legitimate interests of the data subject.
43. The Commissioner accepts that, in the circumstances, there is considerably more weight to be attributed to the rights and freedoms or legitimate interests of the data subject than to Mr X's legitimate interests. Consequently, she finds that condition 6 in Schedule 2 to the DPA is not met.
44. For the reasons given above, the Commissioner also finds that disclosure would be unfair. In addition, since the Commissioner has found that no condition in Schedule 2 can be met, she would consider disclosure to be unlawful. It therefore follows that disclosure of the personal data under consideration here would breach the first data protection principle. Accordingly, the Commissioner accepts that this information is exempt from disclosure, and that NHS Lothian was entitled to withhold it under section 38(1)(b) of FOISA.

### **Section 21(10) of FOISA – Review by Scottish public authority**

45. In his application to the Commissioner, Mr X raised his concern that NHS Lothian had not provided information setting out his rights of appeal to the Court of Session (on a point of law only) if dissatisfied with a decision issued by the Commissioner.
46. Section 21(10) of FOISA requires that 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.
47. In its submissions to the Commissioner, NHS Lothian conceded that its review responses had never previously contained this advice, and only included information on making an application to the Commissioner if dissatisfied with the review response. NHS Lothian explained it had previously believed that the onus was on the Commissioner to provide this advice to applicants, once an application for a decision had been made to the Commissioner.

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<sup>1</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>

48. NHS Lothian confirmed that, following discussions with staff from the Commissioner's office in May 2016 on this matter, it had amended its review templates to include information on making a subsequent appeal to the Court of Session.
49. Having examined NHS Lothian's review response to Mr X, it is a matter of fact that this did not provide Mr X with details of his right of appeal to the Court of Session (on a point of law only) if dissatisfied with a decision made by the Commissioner. Therefore, the Commissioner has concluded that NHS Lothian failed to comply with section 21(10) of FOISA in responding to Mr X's requirement for review.
50. The Commissioner notes, and welcomes, the steps taken by NHS Lothian to revise its review templates to include the information required by section 21(10) of FOISA. For this reason, she does not require NHS Lothian to take any further action in relation to this failure.

## Decision

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The Commissioner finds that Lothian Health Board (NHS Lothian) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to Mr X's information request.

The Commissioner finds that NHS Lothian was entitled to withhold the information requested under section 38(1)(b) of FOISA, and so complied with Part 1.

However, by failing to include the correct notice informing Mr X of the right of appeal to the Court of Session, as required by section 21(10) of FOISA, in its review outcome, NHS Lothian failed to comply with Part 1.

For the reasons given in this Decision Notice, the Commissioner does not require NHS Lothian to take any action in respect of this failure, in response to Mr X's application.

## Appeal

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Should either Mr X or Lothian Health Board 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.

**Rosemary Agnew**  
**Scottish Information Commissioner**

**14 September 2016**

### 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 –

...

(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.

...

#### 21 Review by Scottish public authority

...

(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-

...

(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

...

(b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

...

(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

(1) 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;

...

## 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

...

### Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

1. The data subject has given his consent to the processing.

...

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**