



Scottish Information  
Commissioner

**Decision 078/2005 Mr W and NHS Borders**

*Request for information relating to the applicant regarding treatment received*

**Applicant: Mr W**  
**Authority: NHS Borders**  
**Case No: 200501648**  
**Decision Date: 15 December 2005**

**Kevin Dunion**  
**Scottish Information Commissioner**  
Kinburn Castle  
Doubledykes Road  
St Andrews  
Fife  
KY16 9DS



## **Decision 078/2005 – Mr W and NHS Borders**

**Request for information relating to applicant – information withheld under section 35(1) – whether information covered by DPA and exempt under section 38(1)(a) or FOISA – some information not held – certain information withheld under section 36(1)**

### **Facts**

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On 24 February 2005, Mr W made 15 requests for information to the FOI enquiries email at NHS Borders. In each case, Mr W requested copies of any letters, e-mails or anything held on computer in his name and then listed the specific information he sought. NHS Borders responded to this request on 31 March 2005. NHS Borders advised that it understood that Mr W had initiated legal proceedings against Borders General Hospital. Under these circumstances it advised that the information was exempt under section 35 (Law Enforcement) of the Freedom of Information (Scotland) Act 2002 (FOISA). Mr W requested a review of this decision on 8 April 2005. NHS Borders responded to the request for review on 28 April 2005. It upheld its original decision and advised that it was relying on section 35(1)(h) of FOISA. On 1 May 2005, Mr W applied to the Commissioner for a decision.

### **Outcome**

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The Commissioner finds that NHS Borders partially failed to comply with Part 1 of the Freedom of Information (Scotland) Act (FOISA) by failing to issue a refusal notice in accordance with section 16(1) of FOISA in that it:

- a) failed to disclose which information it held
- b) failed to specify which information was exempt by virtue of section 38(1)(a)
- c) failed to specify which information was exempt by virtue of section 36(1)
- d) wrongly applied section 35 as an exemption to the information



However, the Commissioner finds that NHS Borders complied with Part 1 of FOISA in withholding certain information from Mr W.

The Commissioner is also satisfied that NHS Borders does not hold certain information requested by Mr W.

NHS Borders should advise Mr W of the correspondence it holds between Mr W and NHS Borders and ask whether Mr W requires further copies of any of this correspondence.

## Appeal

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

## Background

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1. On 24 February 2005, Mr W sent six emails to the FOI enquiries email at NHS Borders. Each email contained a number of requests which amounted to 15 information requests in total. In each case, the email indicated that the request was for copies of any letters, email or anything held on computer in the name of Mr W. Mr W requested the following information:
  1. The information on the bed availability on 8/7/99
  2. Information exchanged between Dr S Calder and the Trust Management or its legal advisers between 8/7/99 to the end of 2000
  3. Information exchanged between Dr Crammond or Dr Johnston to or from the Trust Management from 8/7/99 to 2003
  4. Any information between anybody and Dr Ross Cameron from 8/7/99 onwards
  5. Any information held by the Trust management, in a file from 8/7/99 onwards
  6. Information exchanged between Mr Dennyson, Mr Tiemessen and the Trust Management from 8/7/99 onwards



7. Information exchanged between Susan Semple and the Trust Management "about Aug Sept 2000"
  8. Information exchanged between the Trust Management and its legal advisers from 8/7/99
  9. Information exchanged from Dr Glenfield to Mr Philips for an appointment on 25 February 2004 and further correspondence in March 2004
  10. Information exchanged from Mr Philips to the x-ray Dept for x-rays for the appointment on 25/2/04, and from Mr Philips requesting an MRI scan in March, and any reply to Mr Philips before or after the MRI scan.
  11. Information exchanged between Mr Philips and the Radiology Department from 2002 onwards
  12. Information exchanged between the Radiology Department and the Trust Management from 8/7/99 onwards
  13. Information exchanged between the Radiology Department and Mr Dennyson or Tiemessen from 8/7/99 onwards
  14. Information exchanged between Trust Management and the Complaints Officer from August 2000 onwards
  15. The information which advises Doctors in A&E not to treat a patient, and the information on who authorised this, from July 2002 onwards.
2. NHS Borders responded to Mr W's requests by email on 4 March 2005. It advised Mr W that the information he was seeking was about a named individual which was exempt by virtue of section 38. It indicated that if Mr W was the individual named in the request the authority would require proof of this. Mr W was advised to resubmit his request in the form of a signed letter giving NHS Borders permission to provide the information requested.
  3. In the same email, NHS Borders sought clarification on Mr W's request for bed availability on 8/7/99 (see question 1 above). It asked Mr W to confirm that he sought this information by speciality and ward.
  4. Mr W responded to this email on 7 March 2005. He indicated that he was sending a letter to give his permission to the release of the information requested and confirmed that he was the individual mentioned in the 6 emails. He further advised that he sought information about bed availability on the night of 8/7/99 following his accident.
  5. The letter from Mr W giving his permission to the release of the information was received by NHS Borders on 9 March 2005.



6. On 31 March 2005, NHS Borders responded substantively to Mr W's request for information. It advised that it understood that Mr W had initiated legal proceedings against Borders General Hospital. In these circumstances, NHS Borders advised that it was not obliged to provide him with the information requested as it considered the request to be exempt under section 35 (Law Enforcement) of FOISA.
7. On 8 April 2005, Mr W requested a review of this decision. He indicated that he was requesting a review because the authority had not supplied him with the information requested, for not replying within 20 working days and for not stating which part of section 35 applied.
8. NHS Borders acknowledged this request for review on 8 April 2005 and replied substantively on 28 April 2005. NHS Borders advised that the review panel had reviewed the decision and other issues raised in his request.
9. NHS Borders advised that it upheld its decision that section 35 applied to the information requested. It indicated that although the notice did provide a reason for refusal and referred to the relevant section of FOISA, it accepted that further details might have been helpful. For clarification, NHS Borders advised that section 35(1)(h) applied. This states that information is exempt if its disclosure would prejudice substantially any civil proceedings brought and arising out of an investigation conducted for any such purposes by or on behalf of any such authority by virtue either of Her Majesty's prerogative or of powers conferred by or under any enactment.
10. The Review Panel acknowledged that the response had not been made within the statutory 20 working days. It advised that this error occurred due to a miscalculation of the period in which the clock was stopped while seeking clarification. NHS apologised for this error and indicated that it would ensure that administrative processes were improved.
11. Mr W was dissatisfied with this response and applied to me for a decision.
12. The case was allocated to an Investigating Officer.

## **The investigation**

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13. Mr W's appeal was validated by establishing that he had made a request to a Scottish public authority, and had appealed to me only after asking the authority to review its refusal to supply the information requested.



14. The Investigating Officer had telephone contact with Mr W on 10 and 11 May 2005. Mr W advised that he had made the same requests for information to NHS Borders under the Data Protection Act 1998 (DPA) and was still waiting for a response. He had also requested additional information from his medical records.
15. At this stage, my Office advised Mr W that all or some of the information he was requesting was likely to fall under DPA in that it would be his personal data. Mr W was advised that I was unable to take any action where the information constituted Mr W's own personal data.
16. The Investigating Officer contacted NHS Borders on 19 May 2005, giving notice that an appeal had been received and that an investigation into the matter had begun. NHS Borders was asked to comment on the issues raised by Mr W's case in terms of section 49(3)(a) of FOISA and to provide supporting documentation for the purposes of the investigation.
17. Mr W subsequently provided my Office with copies of information he had received in response to his request for his medical records.
18. The Investigating Officer contacted NHS Borders again on 1 June 2005 to enquire about the relationship between Mr W's request under DPA and his request under FOI. At this stage, the Investigating Officer had not seen the information requested but it seemed likely from the requests alone that some information held would amount to Mr W's own personal data.
19. At the same time, the Investigating Officer queried the reliance by NHS Borders on section 35(1)(h) of FOISA to withhold the information requested by Mr W. NHS Borders had advised that section 35 applied because Mr W had initiated legal proceedings against the authority.
20. Section 35(1)(h) applies where the release of information would or would be likely to prejudice substantially any civil proceedings brought or arising out of an investigation conducted, for any purposes, by or on behalf of any such authority by virtue either of Her Majesty's prerogative or of powers conferred by or under any enactment. The Investigating Officer advised that section 35(1)(h) applies only where the proceedings have been brought by the authority and only then where the authority is acting under specific powers. Therefore section 35(1)(h) does not apply where an action has been brought against an authority.
21. NHS Borders responded to the first letter on 2 June 2005. It provided copies of the information requested by Mr W and a schedule. It also expanded on its application of the exemption.



22. NHS Borders advised that while collating the information to respond to Mr W's requests, it had discovered that Mr W had initiated legal proceedings against the Borders General Hospital. This had been confirmed by NHSScotland Central Legal Office (CLO). The CLO was provided with copies of the request and had advised that the information requested would be likely to become evidence as part of the legal process and that NHS Borders would not be obliged to disclose the information whilst this action was ongoing.
23. NHS Borders provided information about the process followed by the review panel and also internal correspondence relating to the consideration of these requests. NHS Borders advised that in reaching its decision it had relied on advice from the CLO and on the Commissioner's briefing note on section 35.
24. NHS Borders also commented on the way it had handled the request. It accepted that the initial response was overdue and advised that this was entirely due to a clerical error. NHS Borders reported that it had put in place mechanisms to address this issue. NHS Borders advised that it was in the process of adopting a more advanced database which would automatically calculate timelines and generate reminders.
25. NHS Borders reported that it had received further legal advice and had established that not all of the information requested would be considered for evidence in the action and accepted that some information might already have been released. However, it held that items 3, 6, 7, 12 and 14 would be withheld as the information was confidential in contemplation of litigation. It advised that Mr W had already received copies of his medical records and therefore the information requested in items 9, 10, 11 and 13. It considered item 8 to be subject to legal professional privilege and would not be prepared to disclose it.
26. NHS Borders responded to the later letter of 1 June 2005 on 15 June 2005. It advised that it had again consulted the CLO who had reviewed its decision and now felt that section 36 would be the appropriate exemption in this case.
27. NHS Borders advised that it had been aware that the initial request under FOISA sought information which might be exempt under DPA. However, the advice given by the CLO suggested that all the information requested would be exempt because of the pending legal proceedings. It was considered that this would also apply to any application made for the same information under DPA.
28. NHS Borders advised that it now recognised that some of the information might have now been released. It advised that the Records Department had conferred with the CLO in providing a response to Mr W's request for the same information under DPA (a copy of this response was attached).



29. NHS Borders' response to the DPA request acknowledged that certain information would have been provided to Mr W as part of his request for his medical records. The remainder of the information was withheld on the basis that it was "privileged information" (i.e. subject to legal professional privilege) or that "information was confidential in contemplation of litigation."
30. NHS Borders supplied copies of the information withheld as well as a schedule which set out the information held relevant to each of Mr W's requests. From the schedule it was apparent that NHS Borders did not, in fact, hold some of the information requested by Mr W. However, this had not been made clear by NHS Borders in its responses to Mr W's requests under FOISA or under DPA. Rather, it had exempted all information.
31. It was also not clear from the information provided to the Investigating Officer whether NHS Borders was dealing with each request under DPA or under FOISA.
32. As a result, the Investigating Officer contacted NHS Borders again. The letter noted that the same information requests had been made under DPA and FOISA and that Mr W had been provided with information contained in his medical records. The letter also noted that some of the information requested by Mr W was not held by NHS Borders. The Investigating Officer asked NHS Borders to indicate in relation to each information request:
  - whether the information requested fell under FOISA or DPA
  - where NHS Borders considered that information fell under FOISA to indicate:
    - whether NHS Borders held the information
    - where NHS Borders held the information whether it would be released or withheld
    - where information was to be withheld to identify the exemption that applied (sub-section/paragraph), why it applied and set out its submissions in relation to the public interest test (where appropriate).
33. The Investigating Officer advised Mr W that a letter had been sent to NHS Borders and the above information requested.
34. In response, NHS Borders provided a table which:
  - identified the information request
  - indicated whether it fell under FOI or DPA
  - indicated whether the information had been released
  - indicated whether it would be released



- indicated whether the information was held
  - indicated which exemption applied.
35. NHS Borders also set out its submissions in relation to the public interest test.
36. From this table it was possible to set out the position as follows:
- NHS Borders advised that it did not hold information in relation to information requests 1, 2, 3, 4, 6, 7, 14 and 15.
  - Information in relation to request 5 would be released (Mr W had copies of several items already)
  - Information in relation to requests 9, 10 and 11 had already been supplied to Mr W. This was information contained in his medical records
  - Information in relation to requests 8, 12 and 13 was withheld on the basis of section 36(1) of FOISA as it was information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings.
37. In respect of request 1 (see first bullet point) NHS Borders advised that it kept bed management statistics, that is, the number of beds utilised at the point of bed count on any particular day. However, it was not possible to say whether a bed would be available to a specific individual in retrospect as this would be dependent on a number of factors, such as the patient's condition, clinical assessment and hospital activity at the time.
38. In relation to the information withheld, NHS Borders advised that request 8 fell under DPA and that requests 12 and 13 could fall under either FOI or DPA.
39. With the agreement of NHS Borders this table was supplied to Mr W. On receipt of the table Mr W advised the Investigating Officer of the following that:
- he would like to receive the bed statistics for the time and date of 8/7/99.
  - he would like to know what steps were taken by NHS Borders to determine what information it might hold in response to requests 2, 3, 4, 6, 7 and 14
  - he had not received the copies of the correspondence in relation to request 5. He considered that there were far more documents than 5 letters in his file.
  - he had not received the information in relation to question 10 and 11 and asked to be supplied with copies.
  - he disputed that NHS Borders did not hold any information in relation to question 15.



40. In relation to the information withheld under section 36(1), Mr W indicated that he had issued a writ against NHS Borders (but was considering withdrawing it). He advised that he wanted this information on public interest grounds so that he could pass it on to the Scottish Parliament and raise the issues he has had with NHS Borders.
41. These points were raised with NHS Borders.

### **Submissions from NHS Borders**

#### Information supplied

42. NHS Borders responded to the points made by Mr W. It indicated that it would supply the information in relation to requests 5, 10 and 11 directly to Mr W.
43. NHS Borders advised that in relation to request 5 there was certain information in Mr W's file that it was withholding under section 36. It further advised that there were also copies of the letters received from Mr W and the associated responses to him, which NHS Borders did not consider necessary to include. It advised that it was unaware of the existence of the 200 pieces of correspondence Mr W referred to.
44. NHS Borders advised that in relation to requests 10 and 11 this information was contained in Mr W's medical notes and Mr W had copies of these. However, NHS Borders indicated that Mr W might not recognise the items that it was referring to and therefore it was sending Mr W copies of these.
45. Mr W subsequently advised that the information supplied to him in response to request 10 was not what he was seeking. He advised that he sought Mr Philips' request to the Radiology Department for his x-rays. NHS Borders advised that it did not hold this information. This is addressed below in paragraphs 49 to 50.
46. In respect of request 1 NHS Borders indicated that it would supply the bed statistics for the date 8/7/99 for the time when Mr W was at the hospital with an explanatory note. The daily bed count is carried out at midnight and is only an indication of the number of beds occupied and not the number of beds available. It is not possible to say whether a bed was unavailable for any individual at a particular time as this depended on a number of factors, including shift patterns, hospital activity levels and staffing levels as well as the consultant's assessment of clinical need for that individual.



### Information not held

47. NHS Borders had stated that it did not hold information in relation to requests 1, 2, 3, 4, 6, 7 and 14. NHS Borders subsequently advised that it did not hold the specific document sought by Mr W in respect of request 10 (see paragraph 45 above).
48. Request 1 is addressed in paragraphs 37 and 46 above.
49. In respect of request 10 NHS Borders advised that it did not hold any request from Mr Phillips to view the x-rays. NHS Borders explained that prior to a clinic the Radiology Department is sent a list of patients attending the clinic. The Radiology Department then retrieves the patients x-ray file and the whole file is sent to the clinic. The list is not kept on file.
50. NHS Borders advised that in addition to this, any x-rays taken after April 2001 were taken using a digital system. This allows the consultants to view x-ray images electronically using a computer terminal in the clinic room without the need to contact the Radiology Department.
51. NHS Borders advised that in relation to the other requests listed (that is 2, 3, 4, 6, 7 and 14) the process for determining what information it held was the same for each of these questions. For each request, the individual members of the former Borders General Hospital Management Team and their personal assistants/secretaries were asked to provide any information held, either as electronic or hard copy files, which might relate to the information requested.
52. Staff also conducted a search using key words on their computers and server folders for emails and documents which may not have been filed. The same process was carried out by Dr Cameron and by the Complaints Officer.
53. NHS Borders advised that its Freedom of Information Officer also spoke to individuals within this group to ensure that the requests, and the range of information to which the requests might apply, were understood, that searches were being carried out thoroughly and that no records had been archived outwith the department.
54. Once the files had been produced, the Freedom of Information Officer conducted a search of the information to identify the items which responded to each specific request. Where no information could be found, the Freedom of Information Officer spoke to the relevant Director or Manager to confirm that no information existed.



55. In relation to request 15, NHS Borders advised that there was no information advising doctors in the A&E department not to treat Mr W. It advised that no order of this kind had ever been made. NHS Borders indicated that the NHS has a statutory obligation to provide access to appropriate advice or medical care to anyone attending an A&E department. To deviate from this obligation would require the authorisation of the organisation's executive directors.
56. NHS Borders advised that the Clinical Chair for Borders General Hospital (and formerly the Medical Director for Borders General Hospital NHS Trust) and the Medical Director for NHS Borders had confirmed that no order to withhold treatment from Mr W had ever been authorised.

### **Commission's analysis and findings**

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57. A significant part of this investigation has involved determining what information is actually held by NHS Borders in relation to Mr W's requests and whether that information falls under DPA or FOISA.
58. Under section 38(1)(a) of FOISA information is exempt if it constitutes personal data of which the applicant is the data subject. In such cases the information request should be considered under DPA. These requests fall outwith my powers. An individual who is dissatisfied with the response to a request for his or her personal data has recourse to the Information Commissioner based in Wilmslow who has responsibility for regulating DPA on a UK-wide basis.
59. In this case, Mr W made the same requests to the same authority under DPA and under FOISA. There was apparently no central system for recording these requests. As a result, Mr W received responses under both pieces of legislation. In neither case did the responses indicate what information was held and what was not held.
60. In the case of the requests under DPA, NHS Borders went through each request and either supplied the information or indicated that it was being withheld for a specific reason. In the case of the requests made under FOISA, NHS Borders simply exempted all information under section 35(1)(h).



61. Authorities, in particular those which hold large amounts of personal information, should consider reviewing their systems for dealing with requests for information in the expectation that they will receive separate requests under FOISA and DPA covering the same type of information, so as to avoid conflicting responses. It seems clear from the nature of Mr W's requests that some or all of the information requested could fall under DPA. Mr W requested copies of any letters, email or anything held on computer in his name and then proceeded to list the specific information he requested.
62. However, just because information is held in the name of the applicant it does not follow that the information will automatically constitute personal data and fall under DPA. In this case, Mr W has made a complaint against the authority. Therefore it is likely that there will be a file under his name. However, information within that file may relate to how that claim was/is being dealt with by the authority and will not necessarily have Mr W as the "focus" of the information.
63. Section 38(5) of FOISA states that the definition of "personal data" is that contained in section 1(1) of DPA. That section defines personal data 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, 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."*
64. In the case of *Durant v Financial Services Authority* [2003] EWCA Civ 1746 the Court of Appeal concluded that data will relate to an individual if it:
- "is information that affects [a person's] privacy, whether in his personal or family life, business or professional capacity"*.
65. This suggests that in cases where it is not clear whether information relates to an individual the authority should take into account whether or not the information in question is capable of having an adverse impact on the individual. The Court identified two notions that might assist in determining whether information is information that affects an individual's privacy and, therefore, "relates to" an individual. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the individual's involvement in a matter or an event which has no personal connotations. The second concerns focus. The information should have the individual as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest.



66. Where an individual's name appears in information the name will only be 'personal data' where its inclusion in the information affects the named individual's privacy. Simply because an individual's name appears on a document, the information contained in that document will not necessarily be personal data about the named individual.
67. The following comments of Lord Justice Auld indicate some practical implications of the Court of Appeal's interpretation of 'personal data':
- a) not all information retrieved from a computer search against an individual's name or unique identifier is personal data;
  - b) [section 7 DPA] is not an automatic key to any information, readily accessible or not, of matters in which [the party making the request for information] may be named or involved;
  - c) the mere fact that a document is retrievable by reference to [the applicant for information's] name does not entitle him to a copy of it under the Act.
68. Information that has as its focus something or someone other than the individual will not be 'personal data'.
69. Therefore simply because an authority receives a request for information held on a computer in a person's name, it does not follow that this request should automatically be dealt with under DPA. The information held under that name may not have the applicant as the "focus" of this information.
70. In some cases, the authority will only be able to determine whether the information held falls under DPA or FOI once it has looked at the information. Where a request for information could fall under either FOISA or DPA it seems to me that the first step will be to determine what information the authority actually holds.
71. Once it has determined the information it holds the authority should consider whether the information falls under DPA or FOISA. Where an applicant has made multiple requests this decision should be reached in relation to each information request.
72. Where the authority determines that some or all of the information falls under DPA but the request has been made with specific reference to FOISA the authority should issue a refusal notice under section 16 advising that the information is exempt by virtue of section 38(1)(a) and indicate that the request will be dealt with under DPA.



73. Therefore, on receipt of Mr W's requests for information the first step taken by NHS Borders should have been to determine what information it held relevant to each individual request. The subsequent notice should have set out the authority's response in relation to each request. That is, whether the information was held; if the information was held, whether it fell under DPA or FOISA; where it was exempt by virtue of section 38(1)(a) that the request would be dealt with under DPA. Where information was held but fell under FOISA the authority should indicate which exemption applies and why. The authority should ensure that it cites the relevant part/para/subsection of the exemption.
74. NHS Borders subsequently indicated in relation to each request 1) the information that would be supplied to Mr W, 2) the information not held and 3) the information exempt by virtue of section 36(1) of FOISA. I will deal with each case in turn.

#### Information supplied

75. NHS Borders has advised that it has supplied the information in relation to requests 5, 9, 10 and 11. There was some dispute between NHS Borders and Mr W on the information held in relation to request 5. NHS Borders had identified 5 items of information all of which it was content to release to Mr W. Mr W indicated that there were far more than 5 items of correspondence.
76. NHS Borders advised that certain information relevant to request 5 was exempted as a result of section 36(1) of FOISA (confidentiality). It also advised that the file contained the letters that Mr W had sent to NHS Borders and the responses he had received.
77. NHS Borders subsequently advised that the information withheld in connection with Question 5 was the same information withheld in relation to Questions 8, 12 and 13. This information is addressed below under information withheld.
78. NHS Borders advised that it had not supplied the letters that Mr W had sent or the responses he had been issued. I consider that in its original response to Mr W, NHS Borders should have indicated what information it held in connection with this request and offered to supply copies of the correspondence between Mr W and NHS Borders. Given that this was not done when Mr W first made his request, NHS Borders should now provide a list of the correspondence that it holds between the two parties and offer to supply copies if Mr W so wishes.
79. NHS Borders has indicated that it will supply the bed statistics for the date 8/7/99 for the time when Mr W was at the hospital with an explanatory note.

#### Information not held



80. In respect of request 1 NHS Borders advised that it did not hold information on bed availability. NHS Borders advised that it kept bed management statistics, that is, the number of beds utilised at the point of bed count on any particular day. However, it was not possible to say whether a bed would be available to a specific individual in retrospect as this would be dependent on a number of factors, such as the patient's condition, clinical assessment and hospital activity at the time. NHS Borders offered to provide Mr W with the bed statistics for the date 8/7/99 (see para 79 above). I am satisfied with this response.
81. Mr W subsequently clarified his request in respect of request 10 and advised that he was seeking Mr Philips' request to the Radiology Department for the x-rays. NHS Borders advised that it did not hold this information and provided an explanation which is set out in paragraphs 49 to 50. I am satisfied with this explanation.
82. NHS Borders also advised that it did not hold information in relation to requests 2, 3, 4, 6, 7 and 14. After discussing this with Mr W, it was agreed that the Investigating Officer should ask NHS Borders to set out the steps it took to determine what information it held. NHS Borders supplied the Investigating Officer with detailed information on the process followed (see paragraphs 51 to 54 above). Having considered this information I am satisfied that NHS Borders has taken all reasonable steps to determine that it does not hold the information requested by Mr W in relation to these requests.
83. NHS Borders also advised that it did not hold any information in relation to question 15 which concerned information advising doctors in the A&E department not to treat Mr W. NHS Borders advised that no order of this kind had ever been made. NHS Borders indicated that the NHS has a statutory obligation to provide access to appropriate advice or medical care to anyone attending an A&E department. To deviate from this obligation would require the authorisation of the organisation's executive directors.
84. NHS Borders advised that the Clinical Chair for Borders General Hospital (and formerly the Medical Director for Borders General Hospital NHS Trust) and the Medical Director for NHS Borders have confirmed that no order to withhold treatment from Mr W had ever been authorised.
85. I am satisfied that NHS Borders has taken all reasonable steps to determine that it does not hold any information advising doctors in the A&E department not to treat Mr W.

#### Information withheld

86. NHS Borders is withholding information in relation to the following information requests:



### Question 8

Information exchanged between the Trust Management and its legal advisors from 8/7/99

### Question 12

Information exchanged between the Radiology Department and the Trust Management from 8/7/99 onwards

### Question 13

Information exchanged between the Radiology Department and Mr Dennyson or Tiemessen from 8/7/99 onwards

87. NHS Borders indicated that this information was exempt under section 36(1) of FOISA (Confidentiality). Before I can consider the application of this exemption I must first consider whether the information falls under FOISA or DPA.

### Question 8

88. NHS Borders holds 13 documents relevant to this request for information. I have looked through each piece of information and consider that the first 12 documents fall under FOISA. I consider that the final document, document 8xiii, has Mr W as its focus. I find that this information constitutes his own personal information and therefore is exempt by virtue of section 38(1)(a). This request for information falls to be considered under DPA and is outwith my remit.
89. NHS Borders considers the remaining 12 documents to be exempt under section 36(1) of FOISA. This section provides that information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information. One type of communication covered by this exemption is communications between legal adviser and client. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled. For example:
- a) the information being withheld must relate to communications with a legal adviser.
  - b) the legal adviser must be acting in his/her professional capacity and the communications must occur in the context of his/her professional relationship with his/her client.
  - c) the privilege does not extend to matters known to the legal adviser through sources other than the client or to matters in respect of which there is no reason for secrecy.
  - d) the privilege does not extend to communications which relate to fraud or to the commission of an offence.



- e) the fact that advice was sought is not necessarily privileged.
- f) it is likely that communications are privileged whether or not they relate to pending or contemplated litigation.
90. The principle of legal professional privilege is based upon the need to protect a client's confidence that any communication with his/her professional legal adviser will be treated in confidence and not revealed without consent. This is to ensure there is the greatest chance that justice is administered to the client. Legal professional privilege protects communications between a professional legal adviser and client from being disclosed, even to a court of law. The emphasis should be on communications, that is, the information rather than documents.
91. Mr W has confirmed that he has issued a writ against Borders General Hospital NHS Trust (although he is considering withdrawing it). Therefore internal communications between NHS Borders and its lawyers in contemplation of these proceedings would fall under section 36(1) of FOISA.
92. The first document, document 8i is the Citation and the notice of intention to defend. A copy of this document would also be held by Mr W and/or his legal representatives and therefore I do not consider that this information falls under section 36(1) of FOISA. It is not a communication between NHS Borders and its lawyers but rather a communication between the parties to the action.
93. However, I consider that rather than section 36(1) NHS Borders should have applied section 25(1) because the applicant can reasonably obtain this information other than by requesting it under section 1(1) of FOISA.
94. The remaining 11 documents, that is, documents 8ii to 8xii are communications between NHS Borders and its lawyers concerning the pending litigation. I am satisfied that this information is exempt by virtue of section 36(1) of FOISA.
95. Section 36(1) is a qualified exemption and is therefore subject to the public interest test. Therefore, even where an authority considers the information to be exempt it must still go on to consider whether the public interest in disclosing the information is outweighed by the public interest in withholding it.
96. In its submissions to me NHS Borders set out the issues it had considered when applying the public interest test:
- The definition of public interest is "something that is of serious concern and benefit to the public, not merely something of individual interest. It does not mean "of interest to the public" but must serve the interests of the public



- The information requested is of interest to the individual rather than the public at large
  - If the outcome of the legal case criticises NHS Borders' standards of care, this would be in the public interest. At this point in time, these are unproven allegations concerning one individual
  - The applicant has taken these issues through Local Resolution, an Independent Review Panel, the Scottish Public Services Ombudsman, as well as the Scottish Executive Health Department and his MSP. NHS Borders is satisfied that the applicant has been given every opportunity to access relevant information during the Complaints Process and since completing Local Resolution. Staff have also been generous with their time, in explaining technical issues and answering enquiries outwith any formal process. NHS Borders is, therefore, confident that the applicant has been treated fairly and openly and has been assisted in understanding the process and outcome of the Complaints Investigation.
  - NHS Border concluded that the release of the information is not in the public interest at this time.
97. In *Decision 023/2005 - Mr David Emslie and Communities Scotland* I advised that there will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client. As a result, I am likely only to order the release of such communications in highly compelling cases.
98. FOISA has brought about many changes to public life in Scotland, not least that for the first time communications between a legal adviser and a public authority client may be made public if it is in the public interest for those communications to be released.
99. The courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed towards the end of last year in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England* (2004) UKHL 48.
100. I understand Mr W would like to have access to this information so that he can raise this matter with the Scottish Parliament. The correspondence being withheld in relation to question 8 is routine correspondence between NHS Borders and its lawyers of the type one would expect in preparation for legal action of this nature. I find that there are no highly compelling reasons why this information should be released in this case.

### Question 12



101. Mr W also asked for information exchanged between the Radiology Department and the Trust Management from 8/7/99 onwards. NHS Borders advised that there was one document which was relevant to this request. It advised that this information was also exempt by virtue of section 36(1), as it was information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings.
102. NHS Borders advised that the document withheld may be used to defend a claim in a legal dispute.
103. I have looked at the content of this document. I consider that the “focus” of the information is Mr W. I therefore consider that in line with the Durant case discussed above, this information is Mr W’s personal data and is exempt by virtue of section 38(1)(a).
104. As the information falls within section 38(1)(a) I have no power to consider this request.

#### Question 13

105. Mr W also asked to see information exchanged between the Radiology Department and Mr Dennyson or Mr Tiemessen from 8/7/99.
106. NHS Borders advised that it held two documents relevant to this request. The first of these is the document considered above in relation to Question 12. I decided that that information was exempt by virtue of section 38(1)(a) as the information amounted to Mr W’s own personal data.
107. I therefore only need to consider document 13(ii). NHS Borders advised that this information was exempt by virtue of section 36(1), as it was information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings.
108. I have looked at the content of this document. I consider that the “focus” of the information is Mr W. I therefore consider that in line with the Durant case discussed above, this information is Mr W’s personal data and is exempt by virtue of section 38(1)(a).
109. As the information falls within section 38(1)(a) I have no power to consider this request.

#### Conclusion

110. In conclusion therefore I am satisfied with the steps NHS Borders has taken to ascertain whether it holds any information in respect of requests 1, 2, 3, 4, 6, 7, 10, 14 and 15.



111. After further consultation with Mr W, NHS Borders agreed to provide Mr W with the bed statistics for the date 8/7/99.
112. NHS Borders has provided 5 documents to Mr W relevant to his request number 5. NHS Borders has advised that it holds correspondence between itself and Mr W which it assumed Mr W already had. However, NHS Borders should have indicated the information held by the authority relevant to the request and asked whether the applicant required further copies of any of this correspondence.
113. NHS Borders has also supplied further copies of information contained within his medical records. This was information relevant to requests 9, 10 and 11.
114. Finally, NHS Borders considered exempt information held relevant to requests 8, 12 and 13.
115. I find that in respect of information held relevant to question 8, that document 8i is information otherwise accessible and the Mr W should already have a copy or will be able to obtain one from his legal representatives. I find that document 8xiii is Mr W's personal data and therefore is exempt by virtue of section 38(1)(a).
116. I find that documents 8ii to 8xii are exempt by virtue of section 36(1). I consider that the public interest would not be served by the disclosure of this information at this stage.
117. I find that in respect of information held relevant to request 12 that this information is Mr W's personal data and is exempt by virtue of section 38(1)(a).
118. The same decision is applicable to document 13i as document 12 is the same document.
119. I find that document 13ii is exempt by virtue of section 38(1)(a).

#### Compliance with section 10(1) of FOISA

120. Finally, Mr W complained in his request for review that NHS Borders had failed to respond to his original request for information within 20 working days. In its notice of review, the Panel acknowledged that the response had not been made within the statutory 20 working days. It advised that this error occurred due to a miscalculation of the period in which the clock was stopped while seeking clarification. NHS apologised for this error and indicated that it would ensure that administrative processes were improved.
121. I asked NHS Borders to expand on this explanation. If clarification had been sought then the clock simply stopped. The twenty working days would start from the date that clarification was received.



122. NHS Borders subsequently advised that the Panel had miscalculated the days and had wrongly believed that the clock stopped ticking when clarification was sought and then restarted.
123. I consider that the email sent by NHS Borders on 4 March 2005 sought clarification on the requests made in that the response received from Mr W would have determined how some or all of requests for information would be dealt with. If Mr W was not the individual named in the email then the request would have been for third party data and would have fallen to be considered under FOISA. Confirmation that the applicant and the named individual were the same person should have led some of the information requests to be dealt with under DPA.
124. NHS Borders received confirmation on 7 March 2005 that Mr W was the individual named in the emails. As a result, the clock started ticking on 7 March 2005. NHS Borders responded to Mr W's request on 31 March 2005 and therefore within the statutory 20 working days.

## Decision

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I find that NHS Borders partially failed to comply with Part 1 of the Freedom of Information (Scotland) Act (FOISA) by failing to issue a refusal notice in accordance with section 16(1) of FOISA in that it:

- a) failed to disclose which information it held
- b) failed to specify which information was exempt by virtue of section 38(1)(a)
- c) failed to specify which information was exempt by virtue of section 36(1)
- d) wrongly applied section 35 as an exemption to the information

However, I find that NHS Borders complied with Part 1 of FOISA in withholding certain information from Mr W as detailed in paragraphs 110 to 119 above.

I am also satisfied that NHS Borders does not hold certain information requested by Mr W as detailed in paragraphs 110 to 119 above.

As mentioned above, I require NHS Borders to advise Mr W of the correspondence it holds between Mr W and NHS Borders (up to 24 February 2005) and to ask whether Mr W requires further copies of any of this correspondence. I require NHS Borders to do this within six weeks of receipt of this decision notice. If Mr W does require further copies of this correspondence and advises NHS Borders of this within 20 working days of being contacted by NHS Borders, NHS Borders must supply any copies requested by Mr W within 20 working days of receipt of his request.



**Kevin Dunion**  
**Scottish Information Commissioner**  
**15 December 2005**