

Decision Notice



Decision 087/2008 Mr John Falconer and NHS Lothian

Report produced by NHS Counter Fraud Services

Reference No: 200800169
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www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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Summary

Mr John Falconer (Mr Falconer) requested a copy of a report prepared by NHS Scotland Counter Fraud Services (CFS) into NHS Lothian's Laboratory Van Service from NHS Lothian. The CFS is part of the Common Services Agency for the Scottish Health Service (the CSA). NHS Lothian refused to provide the report on the basis that it was exempt under section 34 (Investigations by Scottish public authorities and proceedings arising out of such investigation) and section 35 (Law enforcement) of the Freedom of Information (Scotland) Act 2002 (FOISA).

Following an investigation, the Commissioner found that NHS Lothian had been entitled to withhold the report on the basis that its disclosure would, or would be likely to prejudice substantially the CSA's statutory function in relation to the prevention and detection of fraud and other irregularities within the NHS.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections: 1(1) (General entitlement); 2(1) (Effect of exemptions) and 35(1)(g), (2)(a) and (b) (Law enforcement)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 8 May 2007, Mr Falconer wrote to NHS Lothian requesting either a copy of the full report, commissioned by NHS Lothian into its Laboratory Van Service or a redacted version of the report if it was considered by NHS Lothian that only some of the information contained in the report could be released to Mr Falconer.



2. NHS Lothian responded on 7 June 2007, confirming that it held the information requested by Mr Falconer, but withholding the information by virtue of exemptions in sections 34 and 35 of FOISA. On consideration of the public interest test as set out in section 2(1)(b) of FOISA, the CSA concluded that the public interest in withholding the information outweighed the public interest in disclosing it.
3. On 18 June 2007, Mr Falconer wrote to NHS Lothian requesting a review of its decision.
4. NHS Lothian notified Mr Falconer of the outcome of its review on 7 August 2007. NHS Lothian upheld its original decision to withhold the information requested by Mr Falconer in its entirety by virtue of exemptions in sections 34 and 35 of FOISA.
5. On 1 February 2008, Mr Falconer wrote to the Commissioner, stating that he was dissatisfied with the outcome of NHS Lothian's review and applying to him for a decision in terms of section 47(1) of FOISA.
6. Further correspondence subsequently took place with Mr Falconer to establish that his application to the Commissioner was valid and that he had made a request for information to a Scottish public authority (i.e. NHS Lothian) and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 6 February 2008, NHS Lothian was notified in writing that an application had been received from Mr Falconer and was asked to provide the Commissioner with the information which had been withheld from Mr Falconer. The validation officer informed NHS Lothian that the Commissioner was also handling a request for the same information from Mr Falconer to the CSA and that, on confirmation that the document requested is one in the same, both cases would be allocated to one investigating officer.
8. NHS Lothian responded with the information requested, confirming that the report requested from it was the same report Mr Falconer had requested from the CSA. NHS Lothian also confirmed that it was in contact with the CSA with regard to this Mr Falconer's request. The case was then allocated to an investigating officer. For reference, the decision relating to Mr Falconer and the CSA can be viewed on the Commissioner's website: *Decision 084/2008 Mr Falconer and the Common Services Agency for the Scottish Health Service* from 28 July 2008.
9. The investigating officer subsequently contacted NHS Lothian on 27 February 2008, providing it with an opportunity to comment on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, NHS Lothian was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.



10. NHS Lothian responded on 19 March 2008. In its response, NHS Lothian confirmed its position that the entire report requested by Mr Falconer was exempt and that it wished to apply the exemptions in sections 34(1)(a)(i) and (ii), 34(1)(b), 35(1)(a), (b) and (g).
11. In presenting its case to the Commissioner, NHS Lothian provided the investigating officer with a copy of the Minute taken during the Review Panel meeting to review Mr Falconer's request to the CSA. NHS Lothian confirmed that it wished to rely on this Minute and was satisfied that the Minute contained all the arguments it wished to rely on in the context of this investigation.
12. The Commissioner does not intend to repeat the submissions in this Decision. As such, full details of the submissions made by both the CSA and Mr Falconer can be viewed on the Commissioner's website as detailed in paragraph 8.

Commissioner's analysis and findings

13. In coming to a decision in this matter, the Commissioner has considered all the information and submissions that have been presented to him by both Mr Falconer and NHS Lothian and he is satisfied that no matter of relevance has been overlooked.

Section 35(1)(g) (Law enforcement)

14. Section 35(1)(g) of FOISA allows Scottish public authorities to withhold information if its disclosure would, or would be likely to, prejudice substantially its ability (or that of another public authority) to carry out its functions for any of the purposes listed in section 35(2). NHS Lothian believe that the disclosure of the information withheld from Mr Falconer would, or would be likely to, prejudice substantially the CSA's ability to "exercise its core statutory functions, including investigations into allegations of fraud or other improper conduct", which is the purpose listed under section 35(2)(b). Section 35(1)(g) of FOISA makes it clear that it does not have to be the functions of the public authority under investigation which would, or would be substantially prejudiced, for the exemption to apply, Instead, section 35(1)(g) makes it clear that the exemption can be applied where disclosure would, or would be likely to, prejudice substantially the exercise by any public authority (as defined by the (UK) Freedom of Information Act 2000) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2).
15. With this in mind, in considering the use of section 35(1)(g), the Commissioner must consider three fundamental points as follows:
 - a. Does the CSA have a statutory function in relation to one or more of the purposes listed in section 35(2)?
 - b. If so, would disclosure of the information prejudice substantially, or be likely to prejudice substantially, the CSA's ability to carry out one or more of the functions listed in section 35(1)(g)?



c. Even if this is the case, does the public interest in maintaining the exemption outweigh the public interest in disclosure of the information?

16. The Commissioner has already considered these questions in some detail in Decision 084/2008, as mentioned above, and does not consider it necessary to repeat all of those arguments here. However, for the reasons set out in decision 084/2008, the Commissioner is satisfied that the CSA has a statutory function in relation to both of the purposes contained in section 35(2)(a) and (b) of FOISA. He is also satisfied that disclosure of the information would, or would be likely to prejudice substantially, the exercise of those functions by the CSA and that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.

DECISION

The Commissioner finds that NHS Lothian was entitled to withhold the report in question from Mr Falconer in terms of the Freedom of Information (Scotland) Act 2002 (FOISA) on the basis that disclosure of the information would, or would be likely to, prejudice substantially the exercise of the functions of the Common Services Agency for the Scottish Health Service in terms of section 35(1)(g) of FOISA.

Appeal

Should either Mr Falconer or NHS Lothian 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.

Margaret Keyse
Head of Investigations
22 July 2008



Appendix

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

2 Effect of exemptions

- (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 ...

35 Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-
 - ...
 - (g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c. 36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);
 - ...
- (2) The purposes are-
 - (a) to ascertain whether a person has failed to comply with the law;
 - (b) to ascertain whether a person is responsible for conduct which is improper
 - ...