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Scottish Information
Commissioner

**Decision 119/2007 Ms N and the Common Services
Agency for the Scottish Health Service**

Request for compensation claims in connection with Hepatitis C

Applicant: Ms N

**Authority: Common Services Agency for the Scottish Health
Service**

Case No: 200601396

Decision Date: 26 July 2007

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 119/2007 Ms N and the Common Services Agency for the Scottish Health Service

Request for information on compensation claims – section 36(1) applied – section 33(2)(b) applied - public interest considered

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1)(General entitlement); 2(1) (Effect of exemptions); 28(2) (Relations within the United Kingdom); 33(2)(b) (Commercial interests and the economy) and 36(1) (Confidentiality)

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

Facts

Messrs Murray Donald Drummond Cook acting on behalf of Ms N requested information from the Common Services Agency (CSA) relating to compensation claims made in connection with tainted blood transfusions. The CSA responded by refusing to supply the information claiming section 36(1) (Confidentiality). Ms N was not satisfied with this response and asked the CSA to review its decision. The CSA carried out a review and notified Ms N that its initial decision had been upheld. The CSA further advised that section 33(2)(b) applied to some of the information requested. Ms N remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the CSA had failed to deal with Ms N's request for information in accordance with Part 1 of FOISA. He required the CSA to supply Ms N with the information requested.



Background

1. On 13 April 2006, Ms N wrote to the Central Legal Office (CLO) of the CSA requesting the following information:
 - a) Have any patients who received blood transfusions intimated compensation claims against the Scottish National Blood Transfusion Service (SNBTS);
 - b) How many of these claims have been settled;
 - c) What amount of compensation was paid to each claimant whose case was settled;
 - d) How many cases remain outstanding;
 - e) How many of these cases related to individuals who contracted Hepatitis C;
 - f) How much compensation was awarded to each patient whose claim has been settled;
 - g) How many of the claims intimated by patients suffering from Hepatitis C remain outstanding.
2. On 15 May 2006, the CSA wrote to Ms N in response to her requests for information. The CSA refused to supply the information indicating that it was exempt under section 36(1). The CSA advised that it considered the information to be confidential as held by the CLO, as solicitors to the SNBTS and the Scottish Ministers. The CSA advised that there was no public interest argument which could justify the release of this information.
3. On 15 May 2006, Ms N wrote to the CSA requesting a review of its decision. In particular, Ms N indicated that she did not accept that section 36(1) applied. She indicated that she was not asking the CSA to divulge the identity of the parties or to divulge the content of communications between the Service and its legal advisers.
4. On 12 June 2006, the CSA wrote to notify Ms N of the outcome of its review. The CSA indicated that it had been established that within the last five years no cases had gone to Proof and therefore there was no information regarding settlements already in the public domain. The CSA reaffirmed its belief that this information was covered by legal professional privilege, i.e. the exemption in section 36(1) of FOISA. The CSA advised that in considering the public interest test the review panel had recognised the general public interest in the safety of NHS blood and blood products and in the incidence of Hepatitis C information from these. The CSA referred to information that had been released by both the SNBTS and the Scottish Executive.



5. The CSA further advised that the review panel considered that section 33(2) applied to Ms N's third information request as disclosure would or would be likely to prejudice substantially the financial interests of an administration in the United Kingdom.
6. On 17 October 2006, Ms N wrote to my Office, stating that she was dissatisfied with the outcome of the CSA's review and applying to me for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Ms N had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.
8. On 25 October 2006, the CSA was notified in writing that an application had been received from Ms N and was asked to provide my Office with specified items of information required for the purposes of the investigation. The CSA responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the CSA, asking it to respond to specific questions on the application.

The Investigation

10. In its initial response to my letter the CSA provided the information it held in respect of all questions except question f). I understood that this might be because question c) and question f) of Ms N's original requests appeared to duplicate each other. I clarified this matter with Ms N who advised that question f) sought the levels of compensation only in respect of Hepatitis C cases. In subsequent correspondence with the CSA, therefore, I asked the CSA to identify those cases where the compensation payment related to Hepatitis C. The CSA advised that all levels of compensation previously supplied related to Hepatitis C.
11. Both the applicant and Ms N made a number of submissions in respect of the application of the exemptions. I will address these in my analysis and findings below.



The Commissioner's Analysis and Findings

12. Ms N made a series of requests for information relating to compensation claims made to the SNBTS with specific queries in respect of Hepatitis C.
13. The CSA argued that section 36(1) applied to all information requested and section 33(2) applied to Ms N's third request. I will consider the application of each exemption in turn.

Application of section 36(1) (Confidentiality)

14. In its submissions to my office the CSA submitted that the request for disclosure was made directly to the CLO. The CSA explained that the CLO was employed solely to act as solicitors to the NHS bodies in Scotland and the Scottish Executive Health Department (SEHD) and considered that it was entitled to the exemption set out in section 36(1) of FOISA. The CSA explained that although the solicitors were employed by the CSA, they were professionally accountable to their various NHSScotland bodies. The CSA submitted that they did not have any right to and were precluded by the Law Society of Scotland (LSS) from publishing any information relating to the business or affairs of their client bodies without consent. The CSA referred to one of my earlier decisions on the application of section 36(1) *Decision 78/2005* in support of this position.
15. Ms N also made a number of submissions in respect of section 36(1). Ms N considers that the CSA has misapplied section 36(1). She argued that she was not seeking disclosure of communications between the SNBTS and their legal advisers. Rather she was seeking statistics and information on individuals (whose identity had not been sought) who have suffered as a result of blood transfusions. Ms N reaffirmed that she was not seeking disclosure of legal advice given by legal agents in these individual cases.
16. Ms N made further submissions in respect of the public interest test. I will consider these arguments below.
17. I consider it helpful to explain that the CLO is a Division of NHS National Services Scotland (the common name for the CSA) and provides an "in house" legal service to NHSScotland. The CLO is therefore part of the CSA.
18. Section 36(1) of FOISA exempts information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. 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:



- the information being withheld must relate to communications with a legal adviser.
 - 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.
 - 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.
 - the privilege does not extend to communications which relate to fraud or to the commission of an offence.
 - the fact that advice was sought is not necessarily privileged.
 - it is likely that communications are privileged whether or not they relate to pending or contemplated litigation.
19. My briefing on section 36(1) makes it clear that although Scottish public authorities may rely on this exemption to withhold advice which they have received from their solicitors, the public authority, as the client, has the right to waive this right to confidentiality. The SNBTS is also a division of the CSA. Given that the CLO and the SNBTS are both divisions of the same public authority, that is, the CSA, I asked the CSA to confirm that the CLO had approached the SNBTS to enquire whether it would consent to release of the information requested.
20. In its response, the CSA advised that its internal review had been carried out by the Chief Executive of the CSA and that he had confirmed that he wished to maintain the exemption.
21. I not persuaded by the CSA's reliance on section 36(1) in this case for a number of reasons. To begin with, the information requested in this case does not, it seems to me, amount to communications between the client and its lawyer. Rather it is client information held by its lawyers; that is, information relating to compensation claims made in respect of tainted blood and specifically in relation to Hepatitis C. Further, the information requested is confined to statistics and anonymised amounts of compensation. While I understand that legal professional privilege may extend to information about a client I would query whether it applies to all such information in every single case.



22. My second concern is more fundamental; that is, the relationship between the CLO and the SNBTS, particularly in respect of FOISA. As far as this legislation is concerned the CLO and the SNBTS are one and the same Scottish public authority, that is, the CSA. It seems to me that the relationship between the CLO and the SNBTS is similar to that of in-house local authority lawyers and the Council or the Office of the Solicitor to the Scottish Executive and the rest of the Executive. The CSA has submitted that the request was made directly to the CLO. However, if the CLO felt reluctant to supply what it considered to be client information it could simply have passed the request to the relevant division which, in this case, was the SNBTS. In the same way, I would expect a request addressed to the legal section of a local authority to be viewed as a request to the Council as a whole and not merely to the legal services division.
23. Further, the CSA has advised that the review was carried out by the Chief Executive of the CSA. It appears from the notice of review that the requests for information were considered purely from the perspective of the CLO and the information it held about its client. However, it seems to me that the Chief Executive should have taken a much broader approach and considered whether the SNBTS could supply this information. I understand from the review notice and the CSA's subsequent correspondence that as a public authority it wished to withhold this information and therefore was content to rely on section 36(1) as justification for this.
24. By confining consideration of the request to the CLO's responsibilities, the CSA took a particularly limited approach to this request for information. As I said, it seems to me that it should have passed this request to the SNBTS to address rather than decide to limit its response by applying section 36(1). For these reasons I am unwilling to uphold the CSA's reliance on section 36(1) in this case. To uphold its use would infer that requests for information under FOISA can be considered, where expedient to do so, as requests only to a particular part of a public authority.
25. I consider that in this case the CSA should have treated this request as a request to the authority as a whole rather than simply to the CLO. Even if this was not apparent when the request was first received the CSA should have taken a broader approach on review, particularly given that it was considered by its Chief Executive. While the CLO has chosen to rely on section 36(1) to withhold this information because it is information relating to a client I have difficulty in seeing how, conversely, the SNBTS could have relied on section 36(1) to withhold this information. It is not legal advice received nor does it amount to a communication with its lawyers. I find it difficult to uphold the application of section 36(1) in a case where the client and the lawyer are effectively part of the same authority and only the lawyers could, in essence, rely on this exemption.



26. However even if, contrary to my view, section 36(1) could be considered to apply to this information there appear to be strong public interest grounds pointing to disclosure. The CSA has put forward a number of submissions as to why disclosure of this information would not be in the public interest. In particular, it pointed to information that had been published or otherwise disclosed in respect of the safety of NHS blood and blood products.
27. I have indicated in other decisions where section 36(1) has been applied that I am likely only to order disclosure in highly compelling cases. However, in many, if not all of those cases, the information withheld has amounted to communications between client and lawyer constituting, in some cases, actual legal advice. In this case, the information requested amounts to data relating to numbers of cases and in particular, those cases settled in connection with Hepatitis C. Ms N has also requested anonymised figures relating to compensation paid.
28. There has been considerable amount of publicity in connection with tainted blood, particularly in relation to Hepatitis C. In the course of my research, I have looked at the various publications, press releases and articles discussing the provision of compensation for tainted blood. In particular, I have read the *Report of the Expert Group on Financial and other Support - March 2003* commissioned by the Scottish Executive. Levels of compensation have been discussed at some length. Therefore, I understand the interest in the number of claims made, how many of those claims have been settled and the levels of compensation. These are the kind of statistics that form the basis of responses to parliamentary questions.
29. In her application to me, Ms N explained that she was interested in seeing how cases of tainted blood had been handled by the NHS. In further submissions to my Office, Ms N indicated that the infection of individuals who received transfusions of tainted blood had been the subject of public interest and scrutiny since the matter was discovered in the late 1980s and early 1990s. Ms N submitted that it regularly featured in the media and was of great public interest. This included interest in the cost in financial terms of the public purse which these cases of tainted blood had cost.
30. It seems to me that there is a strong public interest in members of the public receiving information about the numbers of claims received, those that have been settled and the levels of compensation made where this latter information can be supplied in an anonymised format. A key objective of FOI is to provide access to information about how public funds are deployed. The provision of the information requested by Ms N would provide information, including financial information, about a matter of significant public interest without disclosing personal data.



31. In all the circumstances, I do not accept the CSA's reliance on section 36(1). Even if section 36(1) could be considered to apply to this information I find that the public interest in disclosure of this information is not outweighed by the public interest in withholding it.

Application of section 33(2) (Commercial interests and the economy)

32. On review, the CSA submitted that an exemption under section 33(2) also applied to the information it held relevant to Ms N's third request for information.
33. Section 33(2)(b) states that information is exempt if its disclosure would, or would be likely to, prejudice substantially the financial interests of an administration in the United Kingdom. In its submissions to my office the CSA stated that while the claims were normally against the CSA for SNBTS, actual payments were being made in many cases by the SEHD on behalf of the Scottish Ministers. The CSA argued that release of this information would undermine the ability of the CLO to defend effectively its client's financial interests. The CSA submitted that this would potentially have an adverse impact on its clients and on the public purse, which would not be in the public interest.
34. Section 33(3) provides that the meaning of "administration in the United Kingdom" has the same meaning as in section 28(2) of FOISA and therefore means:
- a) the Government of the United Kingdom;
 - b) the Scottish Administration;
 - c) the Executive Committee of the Northern Ireland Assembly; or
 - d) the National Assembly for Wales
35. I understand from the CSA's submissions that they are arguing that the financial interests of the Scottish Ministers would be harmed by disclosure of this information. The CSA did not expand on this argument. The CSA indicated that the Skipton Fund had been established as the UK body to manage the ex gratia payment scheme for people infected with Hepatitis C from NHS blood and blood products. The CSA advised that information about the level of payments from the fund was available on the NHSScotland website.
36. With respect, Ms N is not interested in the levels of compensation paid as part of the Skipton Fund. She is presumably familiar with this information. Rather she is seeking the individual levels of compensation that have been paid by the SNBTS.



37. In considering disclosure of the levels of compensation paid to date, I have taken into account that all the compensation paid has been made in respect of Hepatitis C and therefore, to this extent, members of the public will know the illness to which the compensation relates. However, disclosure of the compensation amounts alone would not reveal the particular circumstances of the individual claimant or the reasons for the level of payment. Members of the public would not know why one payment was higher than the other. At most, disclosure would reveal the range of payments that have been made by NHSScotland. Therefore in the absence of more detailed submissions from the CSA I am unable to accept that disclosure of the levels of compensation payment made to date would, or would be likely to, prejudice substantially the financial interests in the Scottish Ministers. In the circumstances, I do not uphold the application of section 33(2)(b).
38. As I have not upheld the application of section 33(2) to the information requested I am not required to go on to consider whether the public interest in disclosure of the information is outweighed by the public interest in withholding it.

Decision

I find that the Common Services Agency for the Scottish Health Service (the CSA) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request from Ms N. I find that the information requested by Ms N is not exempt in terms of section 36(1) or section 33(2)(b) of FOISA. Even if the information were exempt in terms of section 36(1), then I have found that the public interest would lie in disclosure of the information. I also find that in failing to disclose this information to Ms N, the CSA failed to comply with section 1(1) of FOISA.

I therefore require the CSA to supply Ms N with the information requested within 45 days of receipt of this notice.



Appeal

Should either Ms N or the CSA 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 of receipt of this decision notice.

Kevin Dunion
Scottish Information Commissioner
26 July 2007



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.

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.

28 Relations within the United Kingdom

- (2) ... “administration in the United Kingdom” means –
 - (a) the Government of the United Kingdom;
 - (b) the Scottish Administration;
 - (c) the Executive Committee of the Northern Ireland Assembly; or
 - (d) the National Assembly for Wales.

33 Commercial interests and the economy

- (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-
 - (...)
 - (b) the financial interests of an administration in the United Kingdom.



- (3) In subsection (2), "administration in the United Kingdom" has the same meaning as in section 28(2).

36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.