

Decision Notice



Decision 109/2012 Ms Marie Anne Austen and Healthcare Improvement
Scotland

Complaints investigations

Reference No: 201102139
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www.itspublicknowledge.info

Rosemary Agnew
Scottish Information Commissioner

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Summary

Ms Austen requested from Healthcare Improvement Scotland (HIS) information relating to complaints against independent care services. HIS provided some of the requested information, but withheld the remainder in terms of sections 25(1), 35(1)(g) and 38(1)(b) of FOISA. Following a review, Ms Austen remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that HIS had been entitled to withhold the information from Ms Austen under section 25(1) of FOISA (on the basis that the information was reasonably obtainable elsewhere) and section 35(1)(g) of FOISA (on the basis that its disclosure would have prejudiced substantially, or would have been likely to prejudice substantially, the exercise by HIS of certain investigative functions).

While also finding that HIS failed to respond to the request within the time allowed by FOISA, the Commissioner did not require HIS to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (3) and (6) (General entitlement); 2(1) and (2)(a) (Effect of exemptions); 10(1) (Time for compliance); 25(1) (Information otherwise accessible); 35(1)(g), and (2)(c), (i) and (j) (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 16 August 2011, Ms Austen wrote to HIS requesting the following:
... full details of any complaints investigated, the complaints and outcomes of the complaints and enforcement action taken against independent care services from 2002 to present.
2. On 25 August 2011, as permitted by section 1(3) of FOISA, HIS wrote to Ms Austen asking her to clarify whether her request related to independent care services or to independent healthcare services, explaining the difference.



3. On 31 August 2011, Ms Austen wrote to HIS and clarified that the information she was seeking related to the independent healthcare services regulated by HIS.
4. HIS emailed Ms Austen on 28 September 2011 and informed her that a response covering the period from 1 April 2005 to August 2011 had been prepared and would be provided to her the following day. HIS explained that the data prior to April 2005 was contained in a database called PMS, which was a complex system. It considered it likely that the excessive costs provisions in section 12(1) of FOISA might apply to the pre-1 April 2005 complaints data.
5. HIS went on to explain that after discussion, the Care Inspectorate (Social Care and Social Work Improvement Scotland, or SCSWIS, whose predecessor had been responsible for regulating the relevant services prior to 1 April 2011) had indicated that it would be able to run a query on HIS's behalf to summarise complaints data between 2002 and 1 April 2005. HIS stated that this should allow it to prepare response tables similar to those it was putting together for the April 2005 to August 2011 information. HIS further explained that, by asking the Care Inspectorate to run such a query, the cost threshold would be avoided.
6. On the same day, Ms Austen wrote to HIS requesting a review of its decision. She was dissatisfied with the time taken by HIS to respond to her request, and that the information had not yet been supplied. Ms Austen confirmed that the only information she wanted was the complaint category, a brief summary of the complaint and any action taken.
7. On 29 September 2011, HIS wrote to Ms Austen (as it had stated it would in the email of 28 September 2011) and informed her that it did not hold all of the pre-April 2005 information she had requested. It explained that, once it had retrieved the pre-April 2005 information it held on its database, it would be able to clarify which information she would require to obtain from the Care Inspectorate (which held the relevant paper files).
8. In its letter of 29 September 2011, HIS provided Ms Austen with some information it held regarding complaints between 1 April 2005 to 16 August 2011. HIS explained that certain information was not being provided, as it was readily accessible on the SCSWIS website and therefore section 25(1) of FOISA applied. HIS provided Ms Austen with a link to where that information could be obtained.
9. HIS also explained that it had withheld information in terms of section 35(1)(g) of FOISA, as it considered disclosure was likely to substantially prejudice the exercise of certain of its regulatory functions. It explained why it considered this to be the case and also why, on balance, it considered the public interest to favour the information being withheld. In addition, certain information HIS considered to be personal data was withheld under section 38(1)(b) of FOISA.



10. On 19 October 2011, HIS notified Ms Austen of the outcome of its review. This was followed up with a further letter of 26 October 2011. The review upheld Ms Austen's complaints in relation to the timing of HIS's response and on certain other technical aspects of the handling of the case. Additional information was provided, for the period 27 April 2004 to 1 April 2005, consolidated with the information provided earlier in respect of the period from 1 April 2005. As with the information provided earlier, information was withheld in terms of sections 25(1), 35(1)(g) and 38(1)(b) of FOISA.
11. On 16 November 2011, Ms Austen wrote to the Commissioner, stating that she was dissatisfied with the outcome of HIS's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
12. The application was validated by establishing that Ms Austen had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

13. On 24 November 2011, HIS was notified in writing that an application had been received from Ms Austen and was asked to provide the Commissioner with any information withheld from her. HIS responded with the information requested and the case was then allocated to an investigating officer.
14. The investigating officer subsequently contacted HIS, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. With particular reference to the requirements of the exemptions it had cited earlier, HIS was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
15. HIS responded on 3 February 2012 with its submissions, confirming that it wished to continue to rely on the exemptions in sections 35(1)(g) and 38(1)(b) of FOISA to withhold the information.
16. In her application to the Commissioner, Ms Austen complained that:
 - HIS had failed to respond to her request within the timescale laid down in FOISA
 - HIS had failed to respond to the part of her request about enforcement action taken against independent healthcare services
 - summary information could be provided without breaching the DPA
 - HIS's reliance on section 25(1) of FOISA was inappropriate in the circumstances.
17. The relevant submissions obtained from Ms Austen and HIS will be considered fully in the Commissioner's analysis and findings below.



Commissioner's analysis and findings

18. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the submissions made to her by both Ms Austen and HIS, and is satisfied that no matter of relevance has been overlooked.

Technical Issues

19. The Commissioner will firstly consider the complaint by Ms Austen that HIS had failed to respond to her request within the timescale allowed.
20. In most circumstances, section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days after receipt of the request to comply with a request for information. However, in line with section 1(3), if the authority reasonably requires further information from the applicant to identify and locate the information, the period of 20 working days runs from receipt of that clarification (see section 10(1)(b)).
21. Ms Austen's request for information was dated 16 August 2011 and clarified on 31 August 2011. She has not suggested that HIS acted unreasonably in seeking clarification. In the circumstances, HIS should have responded by 28 September 2011. Given that it did not respond until 29 September 2011, the Commissioner must find that HIS failed to respond to Ms Austen's request for information within the 20 working days allowed by section 10(1) of FOISA.
22. In her application to the Commissioner, Ms Austen also stated that HIS had failed to provide a response to the part of her request relating to enforcement action. However, the Commissioner notes that within the review outcome dated 26 October 2011, under the heading *Enforcements in the period 2002 to 31 March 2011 inclusive (Care Commission)*, HIS directed Ms Austen to the Care Inspectorate's website, where inspection reports could be accessed including summary information on enforcements. HIS also informed her that there had been no enforcement action taken since 1 April 2011. HIS claimed that the information available on the Care Inspectorate website was exempt in terms of section 25(1) of FOISA.

Section 25(1) – Information otherwise accessible

23. Under section 25(1) of FOISA, information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt information. The exemption in section 25(1) is absolute, in that it is not subject to the public interest test set out in section 2(1)(b) of FOISA.
24. The Commissioner notes that, in responding to Ms Austen's request, HIS informed her that certain of the information she requested was published on the SCSWIS website and provided a link to the website. It adhered to this position in its submissions to the Commissioner.



25. Following the instructions which had been provided to Ms Austen, the investigating officer was readily able to access the information which was published on the SCSWIS website by using “independent healthcare services”, or the name of any independent healthcare provider, as search criteria. Consequently, the Commissioner is satisfied that the information to which HIS applied section 25(1) of FOISA could reasonably be obtained by Ms Austen other than by requesting it under section 1(1) of FOISA. Consequently, the Commissioner is satisfied that it is exempt from disclosure under section 25(1) of FOISA.

Section 35(1)(g) – Law enforcement

26. HIS submitted that all of the information, with the exception of that which was reasonably obtainable by the applicant, was exempt from disclosure under section 35(1)(g) of FOISA.
27. Under section 35(1)(g) of FOISA, information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the exercise by any public authority (as defined by the Freedom of Information Act 2000) or Scottish public authority (as defined by FOISA) of its functions for any of the purposes listed in section 35(2) of FOISA. HIS argued that disclosure of the information requested would, or would be likely to, prejudice substantially the exercise of its functions for three of the purposes specified in section 35(2):
- to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise (section 35(2)(c))
 - to secure the health, safety and welfare of persons at work (section 35(2)(i))
 - to protect persons, other than persons at work, against risk to health or safety where that risk arises out of, or in connection with, the actions of persons at work (section 35(2)(j)).
28. The exemptions contained within section 35 are all qualified exemptions, in that they are subject to the public interest test set out in section 2(1)(b) of FOISA. In addition, the exemptions can only apply where substantial prejudice would, or would be likely to, occur as a result of the disclosure of the information. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the harm in question would require to be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.
29. When considering the use of the exemption in section 35(1)(g), the Commissioner must consider three separate matters. Firstly, the Commissioner must determine whether HIS has a function in relation to one or more of the purposes it identified in section 35(2). If satisfied that it does, she must then consider whether disclosure of the information would, or would be likely to, prejudice substantially HIS’s ability to exercise the function(s). If she accepts that it would, she must go on to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.



30. In its submissions to the Commissioner, HIS stated that it had a duty to carry out the functions mentioned above by virtue of the Public Services Reform (Scotland) Act 2010 (the PSR Act), under which it was established. It highlighted its specific functions in relation to the inspection of independent healthcare services, which the PSR Act had created by adding section 10J to the National Health Service (Scotland) Act 1978 (the 1978 Act).
31. The Commissioner has noted the functions identified by HIS and also the principles HIS must apply in carrying out its functions, set out in the new section 10B of the 1978 Act. These principles include protecting and enhancing the safety and wellbeing of all persons who use independent health care services. The purposes of an inspection under section 10J include reviewing and evaluating the effectiveness of the provision of the service, encouraging improvement in the provision of that service and investigating any incident, event or cause for concern.
32. In the light of the above, the Commissioner is satisfied that the purposes described in section 35(2)(c), (i) and (j) are functions of HIS, by virtue of the provisions added to the 1978 Act by the PSR Act
33. HIS submitted that complaint investigations provide critical intelligence in relation to inspections of independent healthcare services, and that the release of the information as requested would (or would be likely to) substantially prejudice its intelligence gathering abilities, by inhibiting the free and frank disclosure of complaints by members of the public or employees of independent health care providers. As a consequence, HIS argued, its ability to investigate alleged misconduct or mismanagement would (or would be likely to) be substantially prejudiced, which could in turn lead to a reduction in public confidence in service providers and in the regulator.
34. HIS further argued that disclosure would inhibit the free and frank disclosure of complaints by members of the public or employees of independent health care providers. Complaints could, it advised, allege under-staffing and inadequate work procedures. Substantial prejudice was also identified to HIS's ability to investigate alleged misconduct or mismanagement. HIS submitted that failures in these areas could affect the health, safety and welfare of persons at work.
35. HIS went on to explain that carrying out complaint investigations could inform its inspections of independent health care services under section 10J. Reiterating that disclosure would, or would be likely to, prejudice substantially its ability to investigate alleged misconduct or mismanagement, HIS argued that any inhibition of this function would reduce its ability to protect users of independent healthcare services against risk to health or safety, where that risk arose out of, or in connection with, the actions of persons at work.



36. HIS also submitted that there was an expectation that, when receiving evidence in respect of complaints about individuals and their treatment at small, named facilities, information which enabled the identification of individuals, whether complainants or staff, would not be disclosed into the public domain. It explained why it considered identification to be a real risk in the circumstances, asserting that disclosure of this information would deter others from providing information in future, thus greatly inhibiting HIS's ability to investigate alleged misconduct and/or mismanagement, and protect patients and staff from such misconduct or mismanagement.
37. In relation to the provision of evidence in respect of complaints, the Commissioner considers investigations carried out by HIS to be similar in nature to investigations of crime carried out by the police, in that criminal prosecution or other regulatory proceedings could result should evidence of wrongdoing be identified.
38. When the Freedom of Information (Scotland) Bill was being considered by the Scottish Parliament, the Lord Advocate (in an opening statement to the Justice 1 Committee meeting on 5 December 2001) stated that the existence of a class-based exemption in relation to criminal investigations (in section 34(1) of FOISA) was "essential for an effective justice system". Information provided by witnesses and victims was, he submitted, for the purposes of criminal investigation and possible proceedings, and subsequent disclosure for another purpose would undermine confidence in the criminal justice system. In this context, he argued that witnesses and people under investigation should not be inhibited from co-operating in criminal investigations by the possibility that information provided might be disclosed and their identity revealed to the public outwith the protection of the court.
39. While the above paragraph relates to criminal investigations, the Commissioner considers that the rationale behind the protection offered is equally relevant to the types of investigations carried out by HIS for the purposes outlined under section 35(2)(c), (i) and (j) of FOISA, provided of course that substantial prejudice can be established in any given case.
40. The previous Commissioner considered the exemption in section 35(1)(g) and, in *Decision 088/2009 Mr Robert O'Hare and the Office of the Scottish Charity Regulator*¹, accepted that the names of the individuals who provided statements to OSCR had been correctly withheld, in that the witnesses would not in the circumstances have expected their names to be divulged outwith the protection of any legal process which might have resulted.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2009/200900605.asp>



41. In *Decisions 063/2007 Mr David Keown and West Dunbartonshire Council*² and *111/2007 Mr Robert Mathewson and Angus Council*³ (both relating to the regulatory functions of local authorities), that Commissioner also accepted that if information relating to statements (in each case provided voluntarily in the expectation that they would not be made public) were to be disclosed, the likelihood was that the local authorities would be unable to rely on the provision of evidence of the same type (in each case on matters of some sensitivity) in the future, to the substantial prejudice of their exercise of the relevant functions. While these previous cases related to names of witnesses and their statements, the Commissioner is satisfied that the information under consideration here (information provided in the context of complaint investigations, voluntarily in the expectation that they would not be made public) falls within the same category.
42. The Commissioner accepts that public authorities such as HIS must have the confidence of individuals and organisations when conducting inquiries which, by the nature of their functions, relate to matters of public trust and could result in criminal proceedings or action by HIS in the form of enforcement action. Should organisations or individuals come to believe that information they provide for such inquiries will routinely be made public, without the protection afforded by relevant criminal or civil proceedings, then the Commissioner accepts that it is likely such confidence would be undermined.
43. In the circumstances, the Commissioner is satisfied that disclosing the information withheld under section 35(1)(g) would make it much less likely that future potential complainants (patients, staff and members of the public) would be willing to provide information about such matters, to the substantial prejudice of HIS's ability to carry out its functions under the PSR Act and the 1978 Act.
44. The Commissioner is therefore satisfied that disclosure of the requested information would have prejudiced substantially, or would have been likely to prejudice substantially, the exercise by HIS of its functions for the purposes listed in section 35(2)(c), (i) and (j) of FOISA, and consequently that HIS was correct in considering the information to be exempt in terms of section 35(1)(g) of FOISA.

The public interest test

45. As noted above, the exemption in section 35(1)(g) is subject to the public interest test contained in section 2(1)(b) of FOISA. This means that, even where the Commissioner is satisfied that disclosure of the information would, or would be likely to, prejudice substantially the exercise of HIS's functions, she must order the information to be disclosed unless she is satisfied that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in its disclosure (or unless the information is exempt information under a different exemption in Part 2 of FOISA).
46. The Commissioner will therefore go on to consider the public interest test as it applies to the information she has found to be exempt in terms of section 35(1)(g) of FOISA.

² <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200502335.asp>

³ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200601011.asp>



47. In its submissions, HIS stated that it had considered the public interest as follows, concluding that the public interest in maintaining the exemption outweighed that in disclosure:

Considerations supporting disclosure:

- The general public interest in transparency and accountability in independent healthcare providers, and in allowing public scrutiny of the decision making and actions of such providers.
- HIS's duty "... to provide information to the public about the availability and quality of independent health care services;" (See 10E(1)(a) of the 1978 Act, added by the PSR Act).
- Disclosure of detailed complaint information would assist the public in understanding the exercise of regulatory functions, which would in turn assist public debate on regulation of independent healthcare services and serve to increase confidence in HIS and the services it regulates.

Considerations against disclosure:

- The significant public interest in ensuring that all parties involved are willing to engage fully and openly with HIS's complaints investigations.
- The expectation, highlighted in paragraph 36 above, that information which would allow individuals to be identified, will not be disclosed into the public domain.
- The need for a regulator to have the confidence of organisations and their staff when carrying out its statutory functions. Should organisations or staff believe that complaints investigation information will be routinely made public, confidence in HIS will be undermined.

48. HIS concluded, given the purpose, nature and the consequences that might follow from its complaints investigations, that there was a stronger public interest in this case in maintaining the exemption in section 35(1)(g). The public interest, it argued, was served by ensuring that complaint investigations were conducted on a confidential basis, in which all those providing information could do so with confidence that it would not be routinely disclosed into the public domain, outwith the formal process (such as an enforcement notice) that might be the outcome of the investigation.

49. The Commissioner has considered the submissions of both HIS and Ms Austen, including Ms Austen's argument that summary information could be provided while maintaining individuals' rights to privacy. The Commissioner has considered the content of the information withheld and the benefits to the public which might be considered to follow from disclosure. In this context, she has borne in mind that HIS has a statutory duty to conduct investigations and carry out inspections. It is subject (under the provisions added to the 1978 Act by the PSR Act) to both general and specific duties in relation to making information available to the public about independent healthcare services. As outlined above, details of complaints and enforcement are routinely published where appropriate. Having considered HIS's website, there would appear to be no reason for concluding that the level of information available will reduce under a new regulator. To some extent, therefore, the public interest in disclosure is already met.



50. On balance, the Commissioner concluded that the greater public interest lies in ensuring that individuals can supply certain information with the confidence that it will not be disclosed without appropriate safeguards, and in maintaining HIS's ability to carry out its statutory duties.
51. In all the circumstances, the Commissioner is satisfied that the public interest in the exemption being maintained outweighs that in disclosure of the information. She therefore finds that HIS was correct to withhold the information under section 35(1)(g) of FOISA, read in conjunction with section 35(2)(c), (i) and (j).
52. Given that the Commissioner concluded that all of the information withheld by HIS under section 38(1)(b) of FOISA was correctly withheld in terms of section 35(1)(g) of FOISA, she is not required (and does not intend) to consider the exemption in section 38(1)(b) in relation to that information.

DECISION

The Commissioner finds that Health Improvement Scotland (HIS) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms Austen.

While the Commissioner finds that HIS correctly withheld the information requested in terms of section 25(1) and 35(2)(g) of FOISA, she also finds that HIS failed to comply with section 10(1) of FOISA by failing to respond to Ms Austen's request for information within the required 20 working days.

The Commissioner does not require HIS to take any action.

Appeal

Should either Ms Austen or HIS 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.

Rosemary Agnew
Scottish Information Commissioner
6 July 2012



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.

...

- (3) If the authority –
- (a) requires further information in order to identify and locate the requested information; and
 - (b) has told the applicant so (specifying what the requirement for further information is),

then provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

- (a) section 25;

...



10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
 - (b) in a case where section 1(3) applies, the receipt by it of the further information.

...

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...

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-

...

- (c) to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise;

...

- (i) to secure the health, safety and welfare of persons at work; and
- (j) to protect persons, other than persons at work, against risk to health or safety where that risk arises out of, or in connection with, the actions of persons at work.

Decision 109/2012
Ms Marie Anne Austen
and Healthcare Improvement Scotland

