

## **Explanation of use of section 38 (1) (b) of the Freedom of Information (Scotland) Act 2002.**

In coming to this decision we have taken into account the guidance provided by the Scottish Information Commissioner (SIC) on applying section 38 (1) (b) of Freedom of Information (Scotland) Act 2002 (FOISA).

The Data Protection Act 1998 (DPA) defines personal data as follows:

“data which relate to a living individual who can be identified:

- From those data; or
- From those data and other information which is in the possession of, 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.”

This information constitutes “third party personal data”, personal data about someone other than the applicant.

It is our opinion that to release this information could lead to a potential breach of the first principle DPA. The first principle requires that personal data is processed fairly and lawfully. The (UK) Information Commissioner considers the question of fairness in his Freedom of Information Act Awareness Guidance No 1 – Personal Data

[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/awareness\\_guidance%201\\_%20personal\\_information\\_v2.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance%201_%20personal_information_v2.pdf). Examples given in this guidance of the types of questions which should be asked when assessing whether the disclosure of personal data (which would be a form of processing) would be fair are:

- Would disclosure cause unnecessary or unjustified distress or damage to the person who the information is about?
- Would the third party expect that his or her information might be disclosed to others? Is disclosure incompatible with the purposes for which it was obtained?

The DPA lays out certain conditions within schedule two and three that require to be met before it would be fair or lawful to disclose personal information. In the House of Lords case, *Common Services Agency v Scottish Information Commissioner* 2008 UKHL 47 (the Collie judgement), Lord Hope opined that the conditions within the schedule two require careful treatment in the context of a request for information under FOISA, given that they were not designed to facilitate the release of information but rather to protect personal data from being processed in a way that might prejudice the rights, freedoms or legitimate interests of the data subject.

Patients and patients families have a legitimate expectation that any personal information relating to them is kept confidential.

We also have a duty to consider the six Caldicott principles which are guidelines regarding the use of personal-identifiable and confidential information relating to patients.

#### Caldicott principles

Principle 1 – Justify the purpose(s) for using confidential information

Principle 2 – Only use it when absolutely necessary

Principle 3 – Use the minimum that is required

Principle 4 – Access should be on a strict need-to-know basis

Principle 5 – Everyone must understand his or her responsibilities

Principle 6 – Understand and comply with the law

To release this information would be a breach of these principles and lend weight to the argument that it would be both unfair and unlawful to disclose any personal information about patients.

#### **Condition six of schedule two**

We are therefore relying on section 38 (1) (b) to withhold this information. However, there are three separate aspects to the first data protection principle:

i) fairness

ii) lawfulness, and

iii) the schedules (schedule one - the principles, schedule two - conditions relevant for purposes of the first principle: processing any personal data and schedule three - sensitive personal data)

All three are interlinked and to release the requested information would be unfair. However, we are unable to consider condition six of schedule two:

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

Condition 6 allows personal data to be processed if the processing is necessary for the purposes of legitimate interests. If you believe you have a legitimate interest in obtaining this data then please let us know what you believe those interests to be so we can consider them in full.

For further information on the Freedom of Information (Scotland) Act 2002, please visit, [www.itspublicknowledge.com](http://www.itspublicknowledge.com).

The Data Protection Act is regulated by the (UK) Information Commissioner Office, please visit, [www.ico.gov.uk](http://www.ico.gov.uk) for further information.