



22 November 2016

Dear ,

ATISN 10802 – Psychiatric patient Paul Khan

Thank you for your request to the Welsh Government for information under the Freedom of Information Act (2000) received on 28 September. You asked for information about the case of psychiatric patient Paul Khan who was convicted of the killing of Mr Brian Dodd, to include any documents between the then NHS Chief Executive Ann Lloyd and her advisers (as clarified) from the period of the incident on 25 March 2003, to 14 October 2005, the date of the publication of Healthcare Inspectorate Wales and Health Commission Wales' joint review. You also requested any subsequent responses from the then Chief Executive of NHS Wales.

Whilst I can confirm that the Welsh Government holds information of this description, we believe that it is exempt from release under section 40(2) – personal data and section 38 (1)(a) – health and safety. The reasons for applying these exemptions are set out in full at Annex A to this letter.

If you are dissatisfied with the Welsh Government's handling of your request, you can ask for an internal review within 40 working days of the date of the response. Requests for an internal review should be addressed to the Welsh Government's Freedom of Information Officer at:

Information Rights Unit
Welsh Government
Cathays Park
Cardiff
CF10 3NQ

Or email: FreedomOfInformationOfficer@wales.gsi.gov.uk

Please remember to quote the ATISN reference number above.



Grŵp Iechyd a Gwasanaethau Cymdeithasol
• Health and Social Services Group
Parc Cathays • Cathays Park
Caerdydd • Cardiff • CF10 3NQ

E-bost • E-mail:
health.enquiries@wales.gsi.gov.uk
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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

You also have the right to complain to the Information Commissioner. The Information Commissioner can be contacted at:

Information Commissioner's Office
Wycliffe House
Water lane
Wilmslow
Cheshire
SK9 5AF

However, please note that the Commissioner will not normally investigate a complaint until it has been through our own internal review process.

Yours sincerely,

Section 40(2) – Personal Information

Section 40 of the Freedom of Information Act (FOI Act) sets out an exemption from the right to know if the information requested is personal information protected by the Data Protection Act 1998 (DPA). Personal data is defined in Section 1(1) of the DPA as:

“personal data” means data which relates to a living individual who can be identified from those data; or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

We have concluded that, in this instance, the information requested contains third party personal data. Under Section 40(2) of the FOI Act, personal data is exempt from release if disclosure would breach one of the data protection principles. We consider the principle being most relevant in this instance as being the first.

The first data protection principle states:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

(a) at least one of the conditions in Schedule 2 is met, and (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

We consider that the information in this case clearly falls within the description of personal data as defined by the DPA and that its disclosure would breach the first data protection principle. The first data protection principle has two components:

1. *Personal data shall be processed fairly and lawfully and*
2. *Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met*

Guidance from the Information Commissioner’s Office (Personal information (section 40 and regulation 13) v 1.3) states (at p11):

- *The starting point is to consider whether it would be fair to the data subject to disclose their personal data. The key considerations in assessing this are set out in the section on Fairness below.*
- *If disclosure would not be fair, then the information is exempt from disclosure.*

This approach was endorsed by the Court of Appeal in the case of *Deborah Clark v the Information Commissioner and East Hertfordshire District Council* where it was held:

“The first data protection principle entails a consideration of whether it would be fair to disclose the personal data in all the circumstances. The Commissioner determined that it would not be fair to disclose the requested information and thus the first data protection principle would be breached. There was no need in the present case therefore to consider whether any other Schedule 2 condition or conditions could be met because even if such conditions could be established, it would still not be possible to disclose the personal data without breaching the DPA” (paragraph 63).

Your own interest in this information notwithstanding, it’s important to note that releases under the FOI Act are made to ‘the world’ and are usually published on our disclosure log. Because of that, we believe the individual would have no expectation that this information

would be made public in this way. Thus, we believe release of this information would be unfair and so breach the first data protection principle. For that reason, the information is being withheld under section 40(2) of the Freedom of Information Act. This is an absolute exemption and not subject to the public interest tests.

Section 38(1)(a) – health and safety

Section 38(1)(a) of the FOI Act states that Information is exempt information if its disclosure under this Act would, or would be likely to:

(a) endanger the physical or mental health of any individual

The additional knowledge that these details are being brought to the public attention once again will add to the already significant impact of the disclosure. Even being aware that consideration was being given to releasing information of this nature to the world at large would be detrimental.

Section 38 is a qualified exemption and therefore requires us to consider and decide whether the public interest in withholding the information outweighs the public interest in its disclosure.

Public Interest in disclosing the information

The Welsh Government recognises the general public interest in openness and transparency that release of the information would engender. Release of the information would also promote accountability and transparency by Welsh Government in how particular courses of action are decided upon.

Public Interest in withholding the information

The ICO's guidance 'Health and safety (section 38)' (V1.0) states (inter alia):

Information involving living individuals will be covered by section 40 (personal information). The focus of section 38 is on other information that might pose a risk, if disclosed. This may be information about:

- *someone who has died (and is therefore not covered by the personal information exemption) where disclosure might endanger the mental health of surviving relatives, particularly if they had been unaware of it;*

A significant period of time has passed since the incident and those involved in the case, including the families of both the victim and the perpetrator, would reasonably expect that the details of the case would not be brought to public attention once again. The Welsh Government believes that the potential endangerment to the mental health of two living individuals directly involved in this case is significant. As the Welsh Government can identify no overriding public interest in releasing this information, we believe that the public interest favours withholding. On that basis, the information is also exempt from release under s38(1)(a) of the FOI Act.