

Subject: Access to closed court records (JC/26/1980/283, JC34/32/18, AD24/1980/44)

FOI reference: 202000015161

Date received: 6 February 2020

Date responded: 13 March 2020

Information requested:

Access to closed court records (JC/26/1980/283, JC34/32/18, AD24/1980/44)

NRS Response:

National Records of Scotland (NRS) holds the following records for this case:

JC26/1980/283 (trial papers from the High Court)

JC34/32/18 (appeal papers)

AD24/1980/44 (precognition papers produced by the Crown Office and Procurator Fiscal Service (COPFS))

These records are all closed to public access. We asked the Scottish Courts and Tribunals Service (SCTS), the depositor and data controller of JC26/1980/283 and JC34/32/18, to carry out a sensitivity review of this material. As a result of this, some information in the files has been redacted due to sensitivity issues.

An exemption under section 38(1)(b) of FOISA (personal information) applies to the information in JC26/1980/283 and JC234/32/18 which has been redacted because it is personal data of a third party and disclosing it would contravene the General Data Protection Regulation and Data Protection Act 2018. This exemption is not subject to the 'public interest test', so SCTS are not required to consider if the public interest in disclosing the information outweighs the public interest in applying the exemption.

The trial papers (JC26/1980/283) also contain information relating to a deceased person's health record. This information has also been redacted as an exemption under section 38(1)(d) of FOISA applies. A common law duty of confidence applies to an individual's health information and these ethical obligations extend even after the individual's death. The exemption under section 38(1)(d) is time limited to 100 years. Again, this exemption is not subject to the 'public interest test', so SCTS are not required to consider if the public interest in disclosing the information outweighs the public interest in applying the exemption.

COPFS have applied an exemption under Section 34 of FOISA (investigations by Scottish Public Authorities and proceedings arising out of such investigations) to the precognition papers (AD24/1980/44). COPFS are the depositor and data controller of

this record and they have sanctioned this exemption for all appeal records less than 100 years old. For further explanation of this exemption please see the annex to this letter.

The redacted copies of JC26/1980/283 and JC34/32/18 are available in digital form at NRS.

These can be viewed in the Historical Search Room at General Register House, 2 Princes Street, Edinburgh, EH1 3YY. Further information is available on our website at: <https://www.nrscotland.gov.uk/research/visit-us/historical-search-room>.

Under section 25(1) of FOISA, we do not have to provide information if it is already reasonably accessible by inspection or copying, even if a payment has to be made for it.

REASONS FOR NOT PROVIDING INFORMATION

Section 34 exemptions applied to precognitions and appeal records

Exemptions under section 34(1)(a), (b) and (c) of FOISA (investigations by Scottish Public Authorities and proceedings arising out of such investigations) apply to all of the information requested because it is information which has been held by the Crown Office and Procurator Fiscal Service (COPFS) for the purposes of criminal investigations and the institution of criminal proceedings.

COPFS apply section 34(1) exemptions to all precognition and appeal records. There is no harm test in any of these exemptions – information will be exempt simply because it has, at some point, been held by an authority for any of the purposes described under section 34(1). These exemptions are subject to the ‘public interest test’. COPFS recognise that while there may be some public interest in the disclosure of information about individual cases, there is a greater public interest in withholding all information relating to criminal investigations in order not to compromise the informant and witness system, which is essential for an effective justice system. They believe that witnesses would be inhibited from co-operating in criminal investigations if there was a possibility that the information they gave could be disclosed under FOISA, and that the possibility of disclosure would undermine the informant system.

The section 34 exemptions can be applied in perpetuity, subject to public interest. COPFS do not, however, wish this information to be exempt forever and have decided to remove the exemption after 100 years.