

Subject: Access to High Court papers, 1923 (JC26/1923/12, JC36/43 and AD15/23/71).

FOI reference: FOI/19/00429

Date received: 11 February 2019

Date responded: 21 March 2019

Information requested:

Access to High Court papers, 1923 (JC26/1923/12, JC36/43 and AD15/15/23/71).

NRS Response:

The precognition file AD15/23/71 is exempt under Section 34 of FOISA – Investigations by Scottish public authorities and proceedings arising out of such investigations. The data controller of this record, Crown Office and Procurator Fiscal Service, have sanctioned this exemption for all precognition files (and appeal records) less than 100 years old. For further explanation of this exemption please see the attached annex.

A sensitivity review has been undertaken on JC26/1923/12 and JC36/43 by the Scottish Courts and Tribunals Service. As a result of this, some information in the files has been redacted due to sensitivity issues.

These files contain information relating to a deceased person's health record. This information has 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. This exemption is not subject to the 'public interest test', so we are not required to consider if the public interest in disclosing the information outweighs the public interest in applying the exemption.

The redacted copy of JC26/1923/12 and JC36/43 is available in digital form at the National Records of Scotland.

This 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.

ANNEX

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 some of the information (NRS ref. AD15/23/71) you have 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.