

Decision Notice



Decision 011/2012 Mr Ewan Smith and Education Scotland

School closures

Reference No: 201101745

Decision Date: 12 January 2012

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Scottish Information Commissioner

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Summary

Mr Smith requested from Education Scotland the information used to compile an inspector's report into the possible closure of two primary schools. Education Scotland withheld the information under a number of exemptions in FOISA. Following a review, Mr Smith remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, Education Scotland indicated that it no longer wished to apply all of the exemptions it had previously cited, continuing to withhold the information under sections 30(c) and 36(2) of FOISA.

Following an investigation, the Commissioner found that Education Scotland had partially failed to deal with Mr Smith's request for information in accordance with Part 1 of FOISA, by incorrectly withholding some information. He required Education Scotland to disclose further information to Mr Smith.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(c) (Effect of exemptions); 25(1) (Information otherwise accessible); 30(c) (Prejudice to the effective conduct of public affairs) and 36(2)(Confidentiality)

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 27 July 2011, Mr Smith wrote to Education Scotland requesting all notes made by a named HMIE Inspector to compile a report relating to the proposed closure of two primary schools in Arbroath, including handwritten notes or any annotated reports made during the inspection period, being 1 March 2011 to 1 May 2011.
2. Education Scotland responded on 23 August 2011, withholding the information Mr Smith had requested under sections 30(b) and (c), 36(2) and 38(1)(b) of FOISA, explaining its reasoning for applying each exemption respectively relative to prejudice to the conduct of public affairs, confidentiality and any personal data which it considered could not be disclosed.



3. On the same day, Mr Smith wrote to Education Scotland requesting a review of its decision. Mr Smith drew Education Scotland's attention to its "100 per cent blanket refusal", arguing that there will be information which is not too sensitive to be closed and urging Education Scotland to look at the actual information within the documents to see which parts could be viewed by the public.
4. Education Scotland notified Mr Smith of the outcome of its review on 20 September 2011, upholding its original response, with further reasoning.
5. Later that day, Mr Smith wrote to the Commissioner, stating that he was dissatisfied with the outcome of Education Scotland's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Smith 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

7. On 23 September 2011, Education Scotland was notified in writing that an application had been received from Mr Smith and was asked to provide the Commissioner with the information withheld from him. Education Scotland responded with the information requested and the case was then allocated to an investigating officer.
8. Mr Smith was asked to clarify what his requirements were in terms of any personal information caught within the scope of his request. Mr Smith clarified that the names or contact details of any individuals caught within the scope of his request were not his main focus.
9. The investigating officer subsequently contacted Education Scotland, 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 relating to the withheld information. In particular, Education Scotland was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
10. Education Scotland responded on 3 November 2011 with its submissions clarifying which exemptions it was continuing to rely upon. It also commented that it considered the contents of document 3 to be otherwise readily accessible to Mr Smith in terms of section 25 of FOISA (information otherwise accessible) given the document comprised contact details for the schools involved which were already in the public domain. In light of Mr Smith's comments during the investigation that he did not require these names and contact details the Commissioner need not consider document 3 further in this decision.
11. The submissions received from Education Scotland and Mr Smith, insofar as relevant, will be considered fully in the Commissioner's analysis and findings below.



Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Smith and Education Scotland and is satisfied that no matter of relevance has been overlooked.

Section 30(c) of FOISA – documents 1, 2, 4, 5 and 6

13. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would be caused to the conduct of public affairs by release of the information, and how that harm would be expected to follow from release.
14. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. 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; therefore, the authority 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.
15. The Commissioner has previously stated that it is important for public authorities to treat each request for information on a case by case basis. Release of information in one case should not be taken to imply that communications of a particular type will be routinely released in future. The circumstances of each case, including the content of the specific information under consideration, must be taken into consideration and (where required) the public interest in each case assessed on its own merits.
16. Mr Smith explained in his application why he did not agree with Education Scotland applying exemptions to all the information he requested. Whilst he could accept some of the information may be sensitive and may have to be redacted, he could not understand why Education Scotland had denied him access to all of the information, given that the public interest lay in being able to scrutinise the basis on which some of the conclusions were drawn within the reports produced by the Inspector. In particular, he was concerned at the accuracy of some of the factual information used to form conclusions during the consultation process.



17. Documents 1, 2, 4, 5 and 6 comprise notes taken at a range of meetings, interview notes and annotations on reports, all of which, according to Education Scotland, formed the provisional thoughts on the part of the Inspector, and were very much aide-memoires to enable the Inspector to draw up a holistic, carefully considered final report. Education Scotland also clarified that its concerns over disclosure related to any possible misinterpretation, given both the context in which the documents were created and the fact that some of the notes are abbreviated, partial or “provisional”.
18. As a result, Education Scotland contended that disclosure of the information in these documents would be likely to prejudice substantially the effective conduct of public affairs by inhibiting teaching staff, education authority staff, parents and stakeholders from providing views on a local authority’s proposals under the Schools (Consultation) (Scotland) Act 2010¹ in future inspections. Education Scotland commented that inspectors have to use their experience and expertise to weigh up and interpret a range of evidence, and then collate and present an overall view of closure proposals. To release “the raw, unprocessed data” would be likely to lead to it being misinterpreted, and that this in turn would undermine Education Scotland’s ability to effectively contribute to the consultation process. Such concerns, it explained, could also substantially inhibit its staff from providing advice to education authorities, individual schools, Scottish Ministers and Scottish Government departments.

Document 1

19. Document 1 comprises the Inspector’s notes of a public meeting attended by a large number of people. Education Scotland contended that disclosure of information in document 1 could substantially inhibit parents and teaching staff, as well as other stakeholders, from providing their views.
20. The Commissioner notes that the majority of the information in Document 1 is simply a record of the comments made by people attending the public meeting, most of whom would be parents of children at the schools. These comments were aired in the presence of all those attending; in effect, the information in document 1 is an informal minute of a public meeting. In the Commissioner’s view, there is very little of the Inspector’s own input or comments within the notes, and the notes do not appear to contain any particular conclusions attributed to the Inspector. As a result, the Commissioner is not satisfied that disclosure of this particular information would have a significant impact on the ability of Education Scotland to carry out its statutory functions or would, or would be likely to, prejudice substantially, the effective conduct of public affairs. Consequently, he requires document 1 to be disclosed in full.

Document 2

21. Document 2 consists of the notes taken by the Inspector whilst interviewing the Head Teachers. It is clear that there are views and comments being expressed in private on a one to one basis with the expectation of privacy for the purposes of facilitating a frank discussion with the Inspector. It is clearly a process by which the Inspector has been able to in-gather the “raw data” to which Education Scotland refers in its submissions.

¹ <http://www.legislation.gov.uk/asp/2010/2/contents>



22. It is apparent that the information in document 2 is not intended for a wider audience and is given on the basis that the interviewees should be able to be candid in their remarks without fear of such remarks being attributable to any one individual. The Commissioner therefore accepts that the type of harm described by Education Scotland in its submissions with respect to any future consultations would, or would be likely to, occur if document 2 were disclosed, as Head Teachers would be less willing to provide their views in this way in future consultations. The Commissioner therefore concludes that Education Scotland was entitled to withhold document 2 under section 30(c) of FOISA.

Documents 4 and 5

23. Documents 4 and 5 are the Inspector's own annotated copies of a report (document 4) and a proposal document (document 5). It should be noted that the documents themselves (i.e. the typed text) are both published on the Angus Council website (from the dates contained in the documents it is reasonable to assume that they were published prior to Mr Smith's information request to Education Scotland), although the Inspector's hand written annotations are not².
24. The Commissioner observes that some of the annotations jotted in the margin are calculations relating to published figures within the text of the accompanying paragraph, as opposed to an opinion. The meaning of these and other annotations (such as under-scorings) have not been commented on by Education Scotland in its submissions; accordingly, it is difficult to ascertain what is intended by these markings. It is not for the Commissioner to surmise what was intended by the Inspector other than to observe that no particular view or conclusion has been expressly stated or even implied within the annotations.
25. Having considered Education Scotland's arguments in relation to the exemption in section 30(c) as it applied to documents 4 and 5, the Commissioner is not persuaded that the effective conduct of public affairs would, or would have been likely to have been, prejudiced as a consequence of disclosure of the withheld information in these documents. The typed text is already in the public domain; the Commissioner does not consider that there is anything sensitive about the annotations and, in any case, Education Scotland has provided no specific reasons as to why this particular information should be considered sensitive in the circumstances. The Commissioner does not, therefore, accept that Education Scotland was entitled to withhold the information in documents 4 and 5 under section 30(c) of FOISA.

Document 6

26. Document 6 comprises three emails, one of which was written by Mr Smith to Education Scotland. The remaining emails are internal emails generated as a result of Mr Smith's email.
27. Education Scotland did not apply the exemption in section 25 to the email sent by Mr Smith. However, the Commissioner considers that the information in that email is clearly information which Mr Smith can reasonably obtain other than by requesting it under section 1(1) of FOISA. As such, the Commissioner considers it exempt from disclosure.

² <http://www.angus.gov.uk/ccmeetings/reports-committee2011/AngusCouncil/133.pdf> and <http://www.angus.gov.uk/bestvalue/consultation/objectives/ArbroathProposalDocument.pdf>



28. Having considered carefully the content of the two internal emails, the Commissioner has taken the view that there is little in the two internal emails themselves which is capable of being characterised as “raw, unprocessed data” from parents or teachers, etc. as suggested by Education Scotland in its submissions. That said, given the purpose of these two internal emails, there was clearly a degree of sensitivity at the time of writing, particularly given the wider continuing process relating to school closure proposals.
29. Having considered carefully the content of document 6, the Commissioner accepts Education Scotland’s contention that disclosure would, or would be likely to, have a negative impact on its ability to carry out future inspections given the level of trust required during a consultation process of this nature and he finds that disclosure of these two emails would have, or would have been likely to have, prejudiced substantially the effective conduct of affairs.
30. Accordingly, the Commissioner requires that Education Scotland release documents 1, 4 and 5 to Mr Smith.
31. Given that the Commissioner found the exemption under section 30(c) does apply to the information in document 2 and to the two internal emails in document 6, he must now go on to consider whether, in line with section 2(1)(b) of FOISA, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public Interest Test – document 2 and the two internal emails in document 6)

32. Education Scotland acknowledged that there is likely to be public interest in the release of considerations leading to reports determining the future of schools as this can affect considerable numbers of people and communities. Nonetheless, Education Scotland contended that the public interest would be better served here by maintaining and providing “an unfettered role and environment” for Inspectors when considering or providing their evidence-based professional reports to local authorities and to the public. By so doing, it argued, parents and their representatives would continue to trust that their discussions with Inspectors are held in confidence. It contended that disclosure would inhibit such a relationship and break down the trust placed in Inspectors to perform this role. For these reasons, it contended that the public interest in withholding the information outweighs the public interest in disclosure of the information.
33. In his application to the Commissioner, Mr Smith commented that, given the nature of the process involved where school closures were being proposed, there was a public interest in disclosure of the information he had requested and that his request was reasonable in the circumstances for the scrutiny of facts which form the basis of the conclusions being drawn. He also commented that whilst he could understand some information may be sensitive he was expecting there would be some information capable of being released given the public interest in the school closure process.



34. The Commissioner has considered the submissions from both Mr Smith and Education Scotland on the public interest arguments with regard to document 2 and the two internal emails in document 6. On balance, the Commissioner finds that the public interest lies in maintaining the exemption in section 30(c) in respect of document 2 and the two internal emails in document 6, for the reasons put forward by Education Scotland.
35. The Commissioner will now go on to consider Education Scotland's application of the exemption at section 36(2) of FOISA to the remaining withheld information.

Section 36(2) of FOISA – document 7

36. Education Scotland applied the exemption in section 36(2) to the information in documents 2 and 7. However, given the Commissioner's findings above regarding document 2 (i.e. that it was correctly withheld under section 30(c) of FOISA), the Commissioner need only consider document 7 under section 36(2) of FOISA.
37. Section 36(2) of FOISA provides that information is exempt if it was obtained by a Scottish public authority from another person and its disclosure by the authority so obtaining it would constitute a breach of confidence actionable by that person or any other person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA, but it is generally accepted in common law that an obligation of confidence cannot apply to information the disclosure of which is necessary in the public interest.
38. Document 7 comprises a set of email strings between the Inspector and Angus Council making arrangements for the Inspector's visit. Having reviewed the information withheld under this exemption, the Commissioner is satisfied that part of the information in these documents (i.e. the incoming email) has been supplied to Education Scotland by another person. However, he does not accept that information in the outgoing emails from the Inspector was obtained by Education Scotland from another person. As such, the information in the outgoing emails is not exempt from disclosure under section 36(2) of FOISA.
39. Where information has been provided by another person, the Commissioner must consider whether its disclosure would constitute a breach of confidence actionable either by the person from whom the public obtained the information or by any other person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled.
40. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
 - the information must have the necessary quality of confidence
 - the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality
 - there must be a disclosure which has not been authorised by the person who communicated the information but which would cause detriment



Necessary quality of confidence

41. Having considered the information obtained from a third party within document 7 (i.e. the incoming emails) it is clear that the purpose of the email exchange is administrative, there is nothing within the emails which discusses any issues or conclusions under consideration by the Inspector. Moreover, it is likely that it would be generally known by the time of Mr Smith's request that the Inspector had visited the school and met with pupils and staff. Indeed, Mr Smith's request post dates the inspection period during which there would be a reasonable expectation for the Inspector to have visited the schools.
42. The Commissioner cannot accept that the information has the necessary quality of confidence or that it was communicated in circumstances which created an obligation of confidence which still existed at the time Mr Smith's request was made. As such, he cannot accept that the disclosure of the information obtained by Education Scotland from the Council would constitute an actionable breach of confidence for the purposes of section 36(2) of FOISA.
43. The Commissioner concludes that section 36(2) of FOISA is not engaged in respect of the information in document 7. Consequently, the Commissioner requires Education Scotland to disclose the information contained in document 7 to Mr Smith.

DECISION

The Commissioner finds that Education Scotland partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Smith.

The Commissioner finds that documents 2 and 6 are exempt from disclosure.

However, for the reasons set out above, he finds that documents 1, 4, 5 and 7 are not exempt from disclosure. In failing to disclose these documents to Mr Smith, Education Scotland failed to comply with Part 1 (in particular, section 1(1)) of FOISA.

The Commissioner therefore requires Education Scotland to disclose documents 1, 4, 5 and 7 to Mr Smith by 28 February 2012.

Decision 011/2012
Mr Ewan Smith
and Education Scotland



Appeal

Should either Mr Smith or Education Scotland 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 notice.

Kevin Dunion
Scottish Information Commissioner
12 January 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.

...

...

- (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 –

...

- (c) section 36(2);

...

25 Information otherwise accessible

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

...



30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

36 Confidentiality

...

- (2) Information is exempt information if-
 - (a) it was obtained by a Scottish public authority from another person (including another such authority); and
 - (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.