

Decision Notice

Decision 042/2015: Mr Niall MacKinnon and Education Scotland

Matters relating to a school inspection

Reference No: 201402815

Decision Date: 30 March 2015



Scottish Information
Commissioner

Summary

On 4 November 2013, Mr MacKinnon asked Education Scotland for information from a note of a telephone call and comments about a school inspection report. Education Scotland withheld this information.

Following an investigation, the Commissioner accepted that the note could be withheld, but that the comments about a school inspection report should be disclosed.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(e)(ii) (Effect of exemptions); 30(b)(ii) (Prejudice to effective conduct of public affairs); 38(1)(b), (2)(a)(i), (2)(b) and (5) (definitions of “data protection principles”, “data subject” and “personal data”) (Personal information)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of “personal data”); Schedules 1 (The data protection principles, Part I: the principles) (the first data protection principle) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (condition 6)

European Convention on Human Rights Article 8 (Right to respect for private and family life)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 4 November 2013, Mr MacKinnon asked Education Scotland (amongst other requests not the subject of this decision) for the following information (original numbering of the parts of the request have been retained):
 - 1a. Item 1. Note of a telephone call from a parent with concerns about the nursery school [name redacted].
 - 1c. Item 3. Comments from the Care Commission officer on the first draft report [of the school inspection] dated 08/12/2006.
2. On 6 December 2013, Education Scotland informed Mr MacKinnon that, in terms of section 14(2) of FOISA, it was not required to comply with his requests because they were repeated requests. This response was upheld upon review. However, after Mr MacKinnon first appealed this matter to the Commissioner on 4 April 2014. Education Scotland issued a revised response to his request.
3. Education Scotland responded on 6 August 2014. It informed Mr MacKinnon that it had withheld the requested information under section 30(c) of FOISA. In addition, some of the requested information was considered exempt under section 38(1)(b) of FOISA.
4. On 18 September 2014, Mr MacKinnon asked Education Scotland to conduct a review of its response.

5. Education Scotland notified Mr MacKinnon of the outcome of its review on 19 November 2014. It revised its previous response and stated that the information requested in part 1a was withheld under section 38(1)(b) of FOISA while the information requested in part 1c could be partially disclosed with the remainder withheld under section 30(b)(ii) of FOISA.
6. On 10 December 2014, Mr MacKinnon emailed 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. Mr MacKinnon considered that the requested information should have been disclosed.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr MacKinnon made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. Education Scotland is an agency of the Scottish Ministers (the Ministers). Subsequent references to contact with or submissions from Education Scotland should be read as references to contact with or submissions made by the Ministers on behalf of Education Scotland.
9. On 15 December 2014, Education Scotland was notified in writing that Mr MacKinnon had made a valid application, and was asked to send the Commissioner the information withheld from him. Education Scotland provided the information and the case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Education Scotland was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.
11. Mr MacKinnon was invited to provide his views as to why the withheld information should be disclosed, and did so.

Commissioner's analysis and findings

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

Section 30(b)(ii) – Prejudice to effective conduct of public affairs

13. Education Scotland has relied upon the exemption contained in section 30(b)(ii) of FOISA to withhold parts of one email from Mr MacKinnon. The email contains comments from an employee of the Care Commission (now the Care Inspectorate) to her Majesty's Inspectorate of Education (HMIE) on the first draft of a school inspection report; the email is dated 8 December 2006. (HMIE and Learning and Teaching Scotland merged in July 2011 to become Education Scotland¹.)

¹ <http://www.scotland.gov.uk/News/Releases/2010/10/14145207>

14. In order for Education Scotland to rely on the exemption in section 30(b)(ii) of FOISA, it must show that disclosure of the information would, or would be likely to, inhibit substantially the free and frank provision of views for the purposes of deliberation. The exemption is subject to the public interest test in section 2(1)(b) of FOISA.
15. In applying the exemption, the chief consideration is not whether the information constitutes opinion, but whether the disclosure of that information would, or would be likely to, inhibit substantially the exchange of views. The Commissioner expects authorities to be able to demonstrate a real risk or likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is a remote possibility. Also, the harm in question should take the form of substantial inhibition from expressing views in as free and frank a manner as would be the case if disclosure could not be expected to follow. The word "substantial" is important here: the degree to which a person will be, or is likely to be, inhibited in expressing themselves has to be of some real and demonstrable significance.
16. Each request should be considered on a case-by-case basis, taking into account the effects on the future exchange of views anticipated from disclosure of the particular information involved.

Education Scotland's submissions

17. Education Scotland considered that all team members involved in the inspection process might be substantially inhibited from exchanging views if the withheld information was disclosed. Team members could include HM Inspectors, Care Inspectorate team members, Lay Members who work for Education Scotland on a voluntary basis, and Associate Assessors who work in the education profession and are involved in the inspection process. Similar views would be provided as part of any joint scrutiny activity between Education Scotland and the Care Inspectorate.
18. Education Scotland explained that a core aspect of the inspection process is the ability to deliberate and communicate with team members, in an open and private forum, to allow the group to come to a common understanding and agreement of the evaluations from the inspection. It stated that team members require a level of confidence that details of discussions undertaken as part of the deliberation aspect of a school inspection are not shared later with the public. Team members would normally expect their views would be treated confidentially until the final report was drafted. In line with Education Scotland's records management policy, any written comments would normally be destroyed one year following publication.
19. Education Scotland argued that disclosure, particularly without the consent of the team member(s) involved, was likely to undermine team members' trust in Education Scotland and to substantially inhibit them when communicating on similar issues in the future so that statements were more restrained or not provided at all. This would significantly harm Education Scotland's ability to carry out many aspects of its work, and could adversely affect its ability to undertake robust discussions of evidence and provide fully informed inspection reports.

The Commissioner's view

20. The Commissioner notes Education Scotland's comment that disclosing the comments within the email would undermine inspection team members' trust in Education Scotland, with the result that team members are unlikely to be as frank in their assessments during future

inspections. However, Education Scotland has not provided the Commissioner with sufficient evidence to satisfy her that this would be the case.

21. The Commissioner has considered carefully Education Scotland's comments with regard to the likelihood of inhibition, should the views under consideration in this case be disclosed. The Commissioner accepts that the possibility that such views might be disclosed might lead individuals to be more cautious in recording their views in future, and to pay more attention to the manner in which their views are expressed. However, the issue for the Commissioner is whether disclosure would, or would be likely to, substantially inhibit individuals in the free and frank exchange of views for the purpose of deliberation.
22. The Commissioner considers that the official who commented on the draft school inspection report did so as part of their professional duties, and that such comments were likely to have been thoroughly considered before they were sent. The views expressed within the email do not appear to be controversial. Given that the provision of such comments would be a part of the normal duties of the individual concerned, and having received no evidence to the contrary, the Commissioner has concluded that it is highly unlikely that this individual or other individuals at the same level would change their practices to any significant extent, when providing comments in similar situations in future.
23. The Commissioner has obtained a copy of comments made by another authority to the same draft school inspection report at the same time as the Care Commission. The other authority disclosed its comments to Mr MacKinnon in 2014, in response to another information request. The Commissioner considers that the Care Commission's comments are less detailed and specific than those disclosed by the other authority. She has concluded that there is no obvious reason to withhold similar comments from the Care Commission.
24. In general, the sensitivity of information is likely to decline with the passage of time. In this case, Mr MacKinnon submitted his information request in November 2013, some seven years after the information was recorded at the time of the school inspection in October 2006. The Commissioner considers that that the passage of time since the inspection has diminished the sensitivity of the comments from the Care Commission.
25. On balance, the Commissioner does not accept that disclosure of the withheld information would, or would be likely to, damage trust in the inspection process by significantly reducing the ability for Education Scotland to receive candid and frank comments on its inspection reports. In all the circumstances, the Commissioner does not accept that Education Scotland was correct to apply the exemption in section 30(b)(ii) of FOISA to the withheld information.
26. The Commissioner requires Education Scotland to disclose the withheld information from the email to Mr MacKinnon.

Section 38(1)(b) – personal data

27. Education Scotland submitted that the note of a telephone call from a parent was information which related to a third party and was personal data for the purposes of the DPA. Education Scotland considered that disclosure would contravene the first data protection principle, and the information was therefore exempt from disclosure under section 38(1)(b) of FOISA.
28. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (2)(b) (as appropriate), exempts personal data from release if its disclosure to a member of the public, otherwise than under FOISA, would contravene any of the data protection principles.

29. In considering the application of this exemption, the Commissioner will first consider whether the information in question is personal data as defined in section 1(1) of the DPA. If it is, she will go on to consider whether disclosure of the information would breach the first data protection principle.
30. The exemption in section 38(1)(b) of FOISA is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.

Is the information under consideration personal data?

31. Personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified a) from those data, or b) from those data and other information which is in the possession of, or likely to come into the possession of, the data controller (the full definition is set out in the Appendix).
32. Mr MacKinnon stated that he did not seek the name of the person who made the phone call, only the content of the note of the call.
33. The Commissioner has considered the submissions received from Education Scotland on this point, along with the withheld information. She is satisfied that even if the name of the parent was withheld, they could be identified from the information, either by itself or with other information reasonably likely to be accessible to Mr MacKinnon (and others). For reasons which cannot be explained in this decision (as to do so would have the effect of disclosing the content of the note), the withheld information clearly relates to a living individual. Consequently, the Commissioner accepts that the information is personal data, as defined by section 1(1) of the DPA.
34. The Commissioner must now go on to consider whether disclosure of this information would contravene the first data protection principle as argued by Education Scotland.

Would disclosure of the information breach the first data protection principle?

35. The first data protection principle requires that personal data shall be processed fairly and lawfully and, in particular, shall not be processed (in this case, disclosed into the public domain in response to Mr MacKinnon's request) unless at least one of the conditions in Schedule 2 to the DPA is met and, in the case of sensitive personal data (as defined by section 2 of the DPA), at least one of the conditions in Schedule 3 to the DPA is also met. (The Commissioner is satisfied that the personal data in question is not sensitive personal data for the purposes of section 2 of the DPA, so it is not necessary for the Commissioner to consider the conditions in Schedule 3).
36. When considering the conditions, the Commissioner has noted Lord Hope's comment in the case of *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47² (the CSA case) that the conditions 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 (i.e. the named individual to which the data relates).
37. Condition 1 of Schedule 2 permits personal data to be processed if the data subject consents to the data being processed. In its submissions, Education Scotland explained that it does not hold any information as to whether the person in question still lives within the school

² <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>

community and it does not have any contact details for them. The Commissioner has concluded that condition 1 in Schedule 2 cannot be met in this case.

38. The Commissioner considers that the only other condition in Schedule 2 which might apply in this case is condition 6. Condition 6 allows personal data to be processed if that 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.
39. There are, therefore, a number of tests which must be met before condition 6(1) can apply. These are:
- Does Mr MacKinnon have a legitimate interest in obtaining the personal data?
 - If so, is the disclosure necessary to achieve those legitimate interests? In other words, is disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate interests be achieved by means which interfere less with the privacy of the data subject?
 - Even if disclosure is necessary for those purposes, would it nevertheless be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject? As noted by Lord Hope in the above judgment, there is no presumption in favour of disclosure of personal data under the general obligation laid down in FOISA. The legitimate interests of Mr MacKinnon must outweigh the rights and freedoms or legitimate interests of the data subject before condition 6 will permit the personal data to be disclosed.

Does Mr MacKinnon have a legitimate interest in obtaining the personal data?

40. Mr MacKinnon argued that, as the head teacher of the school concerned, he should be afforded access to the complaint placed by the parent (which he understood to be the subject of the phone note). Mr MacKinnon considered that the concern raised by the parent had a material impact on the school inspection and the report itself, even though the Care Commissioner had fully investigated the complaint prior to the school inspection.
41. Education Scotland considered that while Mr MacKinnon may have some legitimate interest in the information in the phone note, as it relates to a school where he was head teacher, his interest seems in fact to lie with the inspection process. Education Scotland commented that the inspection provided Mr MacKinnon with information about the parent's concerns which should have met his legitimate interest in knowing which issues were of concern. It argued that disclosure of the details of the phone call would not serve to address the overriding concerns that Mr MacKinnon has about the inspection process itself.
42. The Commissioner is aware that Mr MacKinnon has not had sight of the withheld information and is not in a position to judge the extent to which it would meet his expectations. The Commissioner accepts that Mr MacKinnon has a legitimate interest in information relating to the inspection of the school of which he was head teacher, so that he can better understand the outcome of that inspection. The Commissioner accepts that disclosure of the phone note would (to a limited degree) assist Mr MacKinnon in understanding how the matters discussed in that phone call related to events during the inspection.

Is disclosure of the information necessary to achieve those legitimate interests?

43. Having concluded that Mr MacKinnon has a legitimate interest in obtaining the personal data under consideration, the Commissioner must now consider whether disclosure of the personal data is necessary in order to satisfy the legitimate interests identified above. In doing so, she must consider whether these legitimate interests might be reasonably met by any alternative means.
44. The Commissioner is aware that Mr MacKinnon already has some information relating to the concerns raised by the parent, through the Care Commission's investigation of the parent's concerns and a published letter from the parent which detailed their concerns. However, having considered the withheld information, the Commissioner does not find that the legitimate interests identified in paragraph 42 above can be fully satisfied by the information already available to Mr MacKinnon.
45. The Commissioner considers that it would be necessary for the withheld personal data to be disclosed to Mr MacKinnon in order to achieve his legitimate interests. The Commissioner is not aware of any other viable means of meeting Mr MacKinnon's interests which would interfere less with the privacy of the data subject than providing the withheld personal data. For this reason, the Commissioner is satisfied that disclosure of the information is necessary for the purposes of Mr MacKinnon's legitimate interests.

Would disclosure cause unwarranted prejudice to the legitimate interests of the data subject?

46. The Commissioner must now consider whether disclosure of the personal data requested by Mr MacKinnon would nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject. As noted above, this involves a balancing exercise between the legitimate interests of Mr MacKinnon and those of the data subject. Only if the legitimate interests of Mr MacKinnon outweigh those of the data subject can the information be disclosed without breaching the first data protection principle.
47. In the Commissioner's briefing on the personal information exemption, she notes that a number of factors should be taken into account in carrying out the balancing exercise. These include:
 - whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances)
 - the potential harm or distress that may be caused by disclosure
 - whether the individual objected to the disclosure
 - the reasonable expectations of the individuals as to whether the information should be disclosed.
48. Education Scotland has explained that the parent's comments have not been sought as to whether they are content for the information to be disclosed because Education Scotland has no contact details for them. However, Education Scotland understands that, at the time the phone call was made, the parent would have expected that their comments to be made in confidence.
49. Education Scotland concluded that any legitimate interests served by disclosure would not outweigh the unwarranted prejudice that would be caused to the rights and freedoms or legitimate interests of the data subject. Disclosing the details of the call could, in Education Scotland's view, have no legitimate purpose or value and the obligations on Education

Scotland as a data controller, alongside Article 8 of the European Convention on Human Rights, should take precedence over any possible interest in the disclosure.

50. The Commissioner notes that the parent contacted Education Scotland directly about their concerns, rather than contacting Mr MacKinnon as the head teacher of the school. The Commissioner considers that a person contacting Education Scotland in this context would do so with the expectation that their phone call would be treated confidentially.
51. The Commissioner accepts that disclosure of the note into the public domain (which would be the effect of disclosure under FOISA) would constitute an intrusion into the private life of the parent. The Commissioner accepts that the parent would have a reasonable expectation that their personal information recorded in a telephone note would not be disclosed to anyone outwith Education Scotland.
52. In any event, the Commissioner is satisfied that disclosing the information in the note would have only limited value in meeting Mr MacKinnon's legitimate interests, as identified in paragraph 42 above.
53. Having concluded that disclosure of the withheld information would lead to unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject, the Commissioner must conclude that disclosure would be unfair. In the absence of a condition permitting disclosure, she would also regard disclosure as unlawful.
54. The Commissioner therefore concludes that disclosure of the withheld information would breach the first data protection principle and, accordingly, that this information was properly withheld under the exemption in section 38(1)(b) of FOISA.

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 Niall MacKinnon.

The Commissioner finds that information which was personal data was correctly withheld under section 38(1)(b) of FOISA.

However, the Commissioner finds that the exemption in section 30(b)(ii) of FOISA was incorrectly applied by Education Scotland.

The Commissioner therefore requires Education Scotland to disclose the email containing comments about the school inspection report, by **Thursday, 14 May 2015**.

Appeal

Should either Mr MacKinnon or Education Scotland wish to appeal against this decision, they have the right to 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.

Enforcement

If Education Scotland fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that Education Scotland has failed to comply. The Court has the right to inquire into the matter and may deal with Education Scotland as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

30 March 2015

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

...

- (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 –

...

- (e) in subsection (1) of section 38 –

...

- (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

30 Prejudice to effective conduct of public affairs

...

- (b) would, or would be likely to, inhibit substantially-

...

- (ii) the free and frank exchange of views for the purposes of deliberation; or

...

38 Personal information

- (1) Information is exempt information if it constitutes-

...

- (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;

...

- (2) The first condition is-
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles; or
 - ...
 - (b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

....

- (5) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;

"data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;

...

Data Protection Act 1998

1 Basic interpretative provisions

- (1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into 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;

...

Schedule 1 – The data protection principles

Part I – The principles

1. 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

...

Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

1. The data subject has given his consent to the processing.
- ...
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.

European Convention on Human Rights

Article 8 – Right to respect for private and family life

- 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

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