

Decision Notice



Decision 078/2013 Mr Sandy Longmuir and Angus Council

Activities and expenses of two Council employees

Reference No: 201201320
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www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

On 6 May 2012, Mr Longmuir asked Angus Council (the Council) for information about the activities and expenses of two of its employees. The Council withheld some information on the basis that it was personal data, disclosure of which would breach the first data protection principle. The Council also advised Mr Longmuir that it did not hold other information which would fulfil the remaining parts of his request.

Following an investigation, the Commissioner found that the Council had complied with the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with Mr Longmuir's information request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions); 17(1) (Notice that information is not held); 38(1)(b) and (2)(a)(i) and (b) and (5) (definition of "the 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) (the first data protection principle) and 2 (Conditions relevant for the purposes of the first principle: processing of any personal data: conditions 1 and 6)

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data recital 26

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. Mr Longmuir represents the Scottish Rural Schools Network (SRSN) and, on 6 May 2012, he wrote to the Council advising that the SRSN had been accepted by the Court of Session as a party with an interest in litigation raised by the Council against the Scottish Ministers (the petition in question was subsequently withdrawn by the Council).
2. Having read the arguments which had been lodged by the Council in advance of the hearing, Mr Longmuir asked for:
 - i) any log held in the form of time sheets or other recorded material for the month of March 2009 relating to a named Council officer. Mr Longmuir said he was particularly interested in work the officer undertook on 18 March 2009 and the location where that work was undertaken;
 - ii) all details of the named Council officer's expenses claims for the month of March 2009 in relation to their work commitments only. Mr Longmuir said he was particularly interested in travel expenses during that month;
 - iii) all reports produced by the Council's Senior Maintenance Officer relating to the school estate for the months of March and April 2009 (first part) and all recorded information in communications with the named Council officer in the same period (second part); any time-sheets or work log for the month of March 2009 and details of any schools the Senior Maintenance Officer visited during that month (third part);
 - iv) Muirfield Primary School's visitors book for the month of March 2009 and
 - v) any recorded material issued to the named Council officer, since January 2007, instructing them how to carry out school condition and suitability assessments. Mr Longmuir made it clear that he did not require copies of the Core Fact Guidance.
3. The Council responded on 6 June 2012. In its response, the Council indicated that, while it holds information which is relevant to parts i), ii) and the third part of part iii) of Mr Longmuir's request, it considered that disclosure would breach the data protection principles and so sought to withhold the information under section 38(1)(b) of FOISA.
4. The Council also notified Mr Longmuir, in line with section 17(1) of FOISA, that it did not hold any relevant, recorded information which would fulfil the first and second parts of part iii) or parts iv) and v) of his request.
5. The following day, Mr Longmuir contacted the Council, requesting that it review its decision. Mr Longmuir commented that he was not seeking data on the private life or remuneration of the individual Council employees covered by his request. He considered that, in applying the exemption in section 38(1)(b), the Council had misinterpreted his request.



6. Mr Longmuir did not accept that the Council did not hold the information he had asked for in the first part of part iii) of his request (reports prepared by the Council's Senior Maintenance Officer relating to the school estate for the months of March and April 2009). He drew the Council's attention to comments it had made about a report, which he believed suggested that the Council did hold information covered by this part of his request. Mr Longmuir also asked additional questions relating to the information covered by parts iv) and v) of his request.
7. The Council notified Mr Longmuir of the outcome of its review on 6 July 2012, confirming its previous decision in full. The Council also commented that it considered the additional questions raised by Mr Longmuir in relation to part v) of his request to be outwith the scope of the review under FOISA that it had carried out.
8. The following day, Mr Longmuir wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
9. The application was validated by establishing that Mr Longmuir 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

10. On 13 July 2012, the Council was notified in writing that an application had been received from Mr Longmuir and was asked to provide the Commissioner with the information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.
11. The investigating officer subsequently contacted the Council, 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. The Council was asked to explain why it considered that information which would address parts i), ii) and the third part of part iii) of Mr Longmuir's request was exempt from disclosure under section 38(1)(b) of FOISA.
12. The Council was also asked questions focussed on establishing the nature and extent of the searches it had carried out to determine whether it held any information which would fulfil the other parts of Mr Longmuir's request.
13. Comments made by Mr Longmuir in his requirement for review were also raised with the Council and it was asked to respond to these.
14. The Council responded on 27 August 2012.
15. Further submissions were sought, and received, from the Council during the course of the investigation on the searches it had carried out.



16. Submissions were also sought, and received, from Mr Longmuir on why he believes he has a legitimate interest in receiving the information which the Council refused to disclose under section 38(1)(b) of FOISA.
17. The relevant submissions received from both the Council and Mr Longmuir will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

18. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Mr Longmuir and the Council. She is satisfied that no matter of relevance has been overlooked.

Section 38(1)(b) – Personal information

19. As noted above, the Council applied the exemption in section 38(1)(b) to information which would fulfil parts i), ii) and the third part of part iii) of Mr Longmuir's request, arguing that disclosure of this information would breach the first data protection principle.
20. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or, as appropriate, 38(2)(b), exempts information from disclosure if it is "personal data" as defined in section 1(1) of the DPA, and its disclosure would contravene one or more of the data protection principles set out in Schedule 1 to the DPA.
21. In order to rely on this exemption, therefore, the Council must show that the information being withheld is personal data for the purposes of the DPA and that disclosure of the information into the public domain (which is the effect of disclosure under FOISA) would contravene one or more of the data protection principles to be found in Schedule 1 to the DPA.

Is the information personal data?

22. 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).
23. The Council has applied the exemption in section 38(1)(b) to information contained in the travel and subsistence expenses claims forms for two officers employed by the Council. (Mr Longmuir restricted this part of his request to information covering March 2009. One of the forms contains information about February 2009, which is outwith the scope of the request, as is the form for April 2009. This information does not form part of this investigation.)



24. The Commissioner is satisfied that the information in the forms is the personal data of the officers in question. The individual officers are named on the forms which have been withheld, and details are given of their home address, pay numbers, vehicle and place of work as well as of their movements during March 2009. The personal data clearly relates to the individuals and the individuals can, in line with definition (a) of “personal data”, be identified from the forms. Mr Longmuir argued that, because the information he is seeking concerns these employees’ work related actions, the information is not their personal data. The Commissioner does not accept this; providing information affects a person’s privacy and has the individual as the focus of the information, information relating to a person’s personal and professional lives can constitute personal data.
25. Mr Longmuir also suggested that information in the claim forms could have been redacted to prevent identification of those concerned.
26. The Commissioner has noted that Mr Longmuir is aware of the identity of one of the Council employees about whom he is seeking information (he named the employee in his request), so it is clear that even if information such as the name of the employee was redacted, it would still be possible for the employee concerned to be identified
27. Matters are not quite so straightforward in relation to the other employee, whom Mr Longmuir has referred to by job title alone. However, in considering questions of identifiability, the Commissioner must bear in mind that, in determining whether a person could be identified, consideration must, in line with recital 26 to EU Directive 95/46/EC (reproduced in the Appendix below), be given to “all the means likely reasonably to be used either by the controller or by *any other person* [emphasis added] to identify the said person.” Given that the job description of the officer is known, together with the dates when that person worked in that role for the Council, as is the number of employees who fulfil this role, the Commissioner is satisfied that the individual in question could be identified, even if information such as their name was to be redacted.

The first data protection principle: fair and lawful processing

28. The first data protection principle states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met, and in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA is also met.
29. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA, and she is satisfied that the personal data under consideration in this case do not fall into any of the categories set out in that definition. Therefore, it is not necessary to consider the conditions in Schedule 3 to the DPA in this case.
30. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. However, these three aspects are interlinked. For example, if there is a specific condition which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.



31. The Commissioner must now go on to consider whether there are any conditions in schedule 2 to the DPA which would permit the personal data to be disclosed. Where a schedule 2 condition can be met, she will then go on to consider whether the disclosure of the personal data would otherwise be fair and lawful.

Can any Schedule 2 condition be met?

32. In its submissions, the Council argued that none of the conditions in Schedule 2 to the DPA are met in this case and, therefore, the processing of the personal data would be neither fair nor lawful.
33. When considering the conditions in Schedule 2, the Commissioner has noted Lord Hope's comment in the case of *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47¹ 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.
34. Condition 1 of Schedule 2 applies when the data subject (i.e. the individual to whom the data relate) had consented to the release of the information.
35. The investigating officer asked the Council whether the data subjects had been asked to consent to the information being disclosed. In response, the Council explained that one of the data subjects had expressly objected to the release of their personal data. The Council explained that, for reasons specified to (and accepted by) the Commissioner, it did not consider it appropriate to contact the other data subject to seek their consent to disclosure, given they had retired.
36. The Commissioner accepts the Council's submission on this and has therefore determined that condition 1 cannot be met in the circumstances of this case.
37. Condition 6 would, therefore, appear to be the only other condition in Schedule 2 which might permit disclosure to Mr Longmuir in the circumstances of this case. Condition 6 allows personal data to be processed if 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 subjects (i.e. the individuals to whom the data relate).
38. As explained in the Commissioner's guidance² there are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
- Does Mr Longmuir have a legitimate interest in obtaining the personal data?

¹ http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm_1.htm

² <http://www.itspubliacknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.asp>



- If yes, is disclosure necessary to achieve these legitimate interests? In other words, is the disclosure proportionate as a means and fairly balanced to its ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the data subjects?
 - Even if the processing is necessary for Mr Longmuir's legitimate interests, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects?
39. There is no presumption in favour of the release of personal data under the general obligation laid down by FOISA. Accordingly, the legitimate interests of Mr Longmuir must outweigh the rights and freedoms or legitimate interests of the data subjects before condition 6 will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that the Council was correct to refuse to disclose the personal data to Mr Longmuir.

Does Mr Longmuir have a legitimate interest?

40. Mr Longmuir submitted that, in relation to Muirfield Primary School, he is acting on behalf of parents whose children attend that school and, whilst the petition to the Court of Session referred to in his request has been withdrawn, this has simply been replaced by another consultation on the future of schools in Arbroath. Mr Longmuir contends that this consultation relies upon information assembled contrary to guidance issued by the Scottish Government, and that he needs to be able to demonstrate that "Council officials have fabricated information rather than reporting fact". Mr Longmuir commented that, unless he can do this, there will always be doubters amongst elected members who believe that it is he who is fabricating a fictitious scenario in order to undermine senior officers.
41. The new consultation, Mr Longmuir submitted, also includes his local school, Arbirlot, which, he says, he has spent the last eight years defending against repeated closure attempts. In relation to this, Mr Longmuir indicated that the comments made on the suitability assessments for his local school reveal, in his view, that the Council has ignored the guidance in assembling this data.
42. Mr Longmuir has also explained that there is a high chance that, because of the situation with Arbirlot school, this matter will again reach the Court of Session, and he will be a public interest participant. For this reason, Mr Longmuir considers that any information which showed that the Council had been less than truthful in their submission to the Court in the past would be invaluable at that time.
43. The Council advised that it had concluded that Mr Longmuir did not have a legitimate interest in obtaining the personal data of the two Council employees concerned. It is the Council's view that Mr Longmuir has no specific interest in the matter other than as a concerned member of the public, and it considered it difficult to envisage how this legitimate interest can be demonstrated in a case which essentially deals with a non-statutory activity of the Council in drawing up School Estate Management Plans.



44. The Council went on to explain that the proposed project to replace Muirfield Primary School is no longer proceeding; as such, it argued that this means that Mr Longmuir has no demonstrable legitimate interest in obtaining personal data relevant to the former proposed project.
45. The Commissioner accepts that there is a general interest, amongst parents and local communities in areas where local authorities are considering school closures, to ensure that the information on which closure decisions are based is accurate and a true reflection of the school concerned. This interest also ties in with the general interest in ensuring that public authorities which receive and spend public money are both transparent and accountable in their actions and decision making.
46. As a member of the SRSN, the Commissioner recognises that Mr Longmuir has a particular interest in decisions taken by the Council to close local schools. This interest is also evidenced through Mr Longmuir's involvement as a public interest participant in the court action which has now been withdrawn regarding Muirfield school, and also his likely involvement in this capacity should a decision be made by the Council to close Arbirlot school.
47. The Commissioner has noted the Council's comments that it considers that its decision to no longer proceed with its proposal to replace Muirfield Primary School means that Mr Longmuir has no demonstrable legitimate interest in receiving the withheld information. The Commissioner cannot agree with this; should the new proposals on the future of schools in Arbroath reach the Court of Session, information relevant to the action that has recently been dropped may be of assistance to him should he become a public interest participant. The Commissioner also accepts that the withheld information would also assist him more generally in his role in the SRSN campaigning against school closures by the Council.
48. For these reasons, the Commissioner accepts that Mr Longmuir does have a legitimate interest in the withheld information.

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

49. The Commissioner must now consider whether disclosure is necessary for those legitimate interests, and in doing so she must consider whether these interests might reasonably be met by any alternative means.
50. Mr Longmuir advised that he currently has unsubstantiated, circumstantial evidence that the claimed visits and inspections that he is interested in did not take place. Mr Longmuir contends that, without this information from the Council, it will be impossible for him to prove one way or another whether Council officials lied in the petition to the Court of Session.
51. In its submissions, the Council explained that, as it was satisfied that Mr Longmuir has no demonstrable legitimate interest in obtaining the withheld personal data, it was not necessary for it to consider whether the disclosure would be necessary to achieve that legitimate interest.



52. Having considered the submissions from Mr Longmuir, the Commissioner is not aware of any other avenue or viable means of meeting Mr Longmuir's legitimate interest and the general interest which would interfere less with the privacy of the data subjects other than by obtaining the information requested. For this reason, she is satisfied that disclosure of the information is necessary for the purposes of Mr Longmuir's legitimate interest.

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

53. The Commissioner must now consider whether disclosure would nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects. As noted above, this involves a balancing exercise between the legitimate interests of Mr Longmuir and those of the data subjects. Only if the legitimate interests of Mr Longmuir outweigh those of the data subjects can the information be disclosed without breaching the first data protection principle.
54. In the Commissioner's briefing on section 38 of FOISA³, she notes a number of factors which 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.
55. In its submissions, the Council argued that an employee, who is not a senior member of staff, would not reasonably expect that their travel expenses claim form or timesheets would be released to the public at large.
56. The Council commented that it appreciated that the withheld information relates to officers' professional conduct as opposed to their private lives, but it felt strongly that the officers in question are not of such a senior level which would justify this level of public scrutiny of their day to day work activities as they, unlike a chief officer, do not have a public facing role.
57. The Council re-iterated that the data subjects had not consented to the disclosure.
58. The Council advised the Commissioner that numerous information requests have been made about this project and that, throughout, it has maintained an open and transparent policy, releasing information to the maximum extent. The Council expressed the view that some of the information that has been released has been used in a derogatory way about the staff member named by Mr Longmuir in his request and about other employees below Chief Officer level on a particular website where their professional integrity and ability has come under attack.

³ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.asp>



59. The Council also provided specific submissions to the Commissioner about how release of the data subjects' personal data would cause them distress and prejudice their rights and freedoms, which the Commissioner does not consider it appropriate or necessary to summarise here.
60. In his requirement for review, Mr Longmuir quoted from previous decisions by the Commissioner which concluded that information relating to the activities carried out by a public sector employee in the course of his/her employment could be released. Mr Longmuir also queried why, if the visits were made on the dates claimed, disclosure of the information would be detrimental to any individual, as it would demonstrate that they did their job as claimed.
61. The Commissioner notes the comments made by Mr Longmuir regarding information relating to the activities of public sector employees in the course of their employment, but she must balance that against matters such as the level of seniority of the data subjects within the Council, what their reasonable expectations would be, and any distress that may be caused to the data subjects by disclosure of the information.
62. In doing this, the Commissioner recognises that the employees whose personal data has been withheld are relatively junior members of staff, whose role is not a public facing one. As such, the Commissioner accepts that they would not expect information recorded in their travel and subsistence claim forms and timesheets to be placed in the public domain in response to an information request. The Commissioner also notes that the employees have not consented to disclosure of the withheld information.
63. Having considered the specific submissions made by the Council about the harm and distress that may be caused to the data subjects if their information were to be released, the Commissioner accepts that disclosure of the withheld information in response to this information request would be highly likely to cause distress to the data subjects, particularly given the Council's concern over the way information relating to this project has been used in the past.
64. In all the circumstances, having considered the arguments made by both Mr Longmuir and the Council, and having weighed Mr Longmuir's legitimate interests against the legitimate interests, rights and freedoms of the staff whose personal data it is, the Commissioner has concluded that the legitimate interests of the employees outweigh those of Mr Longmuir. As a result, she has determined that disclosure would be unwarranted in this case.
65. Having drawn these conclusions, the Commissioner has concluded that condition 6 in Schedule 2 (to the DPA) is not met in this case in relation to the withheld personal data.
66. Having accepted that disclosure of the personal data would lead to unwarranted prejudice to the rights, freedoms and legitimate interests of the data subjects as described above, the Commissioner also concludes, for the same reasons, that disclosure of the withheld information would be unfair.



67. As disclosure of the personal data would be unfair and no schedule 2 conditions can be met, that personal data cannot be disclosed without contravening the first data protection principle. Consequently, disclosure would also be unlawful. The Commissioner therefore concludes that disclosure of the withheld information which would address parts i), ii) and the third part of part iii) of Mr Longmuir's request would breach the first data protection principle, and so this information was properly withheld on the grounds of the exemption in section 38(1)(b).

Section 17 – Information not held

68. In terms of section 1(4) of FOISA, the information to be provided in response to a request made under section 1(1) is, subject to limited provisions which are not relevant here, that held at the time the request is received.
69. Under section 17(1) of FOISA, where an authority receives a request for information that it does not hold, it must give the applicant notice in writing to that effect.
70. As mentioned previously, the Council notified Mr Longmuir that it did not hold any recorded information which would address the first and second parts of part iii) of his request and parts iv) and v).
71. In order to determine whether the Council dealt with these parts of Mr Longmuir's request in accordance with Part 1 of FOISA, the Commissioner must be satisfied as to whether at the time it received his request it held:
- reports prepared by the Council's Senior Maintenance Officer about the school estate for the months of March and April 2009
 - communications from the Council's Senior Maintenance Officer to the named Council officer
 - the details held in Muirfield Primary School's visitor book for the month of March 2009
 - material issued to the named Council employee (since January 2007), instructing them how they were to carry out school condition and suitability assessments.
72. The Council was asked to explain the nature and extent of the searches that it had undertaken in order to ascertain whether this information was held.
73. The Council advised that staff carried out searches of records held by the Education Department. Personal computers, relevant servers and manual files were also searched, but no information was found which fell within scope of the request.



First part of part iii): reports prepared by the Senior Maintenance Officer

74. In the first part of part iii) of his request, Mr Longmuir asked for all reports produced by the Council's Senior Maintenance Officer, relating to the school estate for the months March to April 2009.
75. In his request for review, Mr Longmuir quoted the following statement from the Council:

"The preparation of that [School Estate Management Plan] included inter alia a mechanical/electrical inspection undertaken by the Council's Senior Maintenance Officer which was validated by the [Council's] Property Advisor who visited the school on 18 March 2009. Evidence of this inspection having taken place is reflected in the SEMP spreadsheet for Muirfield ..."
76. This clearly suggested to Mr Longmuir that such a report existed. However, the Council stated that any schedules produced by the Senior Maintenance Officer were prepared manually and were submitted to the Education Department without retaining a copy. The Council advised that it was unnecessary to retain a copy once the information had been input into the electronic planned maintenance programme system, and that the destruction of the Senior Maintenance Officer's report after it had been passed to the Education Department was part of the normal course of business.
77. Even so, the Council's Education Department carried out searches of relevant personal computers and servers using particular keywords, which the Council provided to the Commissioner.
78. Searches were also carried out of information contained on a PC within the Property Division, which had previously been used by the Senior Maintenance Officer. The Council explained that officers are largely responsible for the back-up of essential files and that the Senior Maintenance Officer only used the computer occasionally and predominantly recorded his work in hard copy format.
79. Information retained as a consequence of the retirement of the Senior Maintenance Officer was also searched by relevant staff, but no relevant information was identified.
80. The Council also advised that the School Estate Management Plans for each school are held electronically, and PDF copies can be produced when required. The Council also explained that it is possible to view the documents produced in March and April 2009; however, it would not be possible to ascertain which officer had input the information into each electronic document (including the supporting detailed condition surveys), particularly when the source copy of the information is in hard copy format. The Council provided the Commissioner with copies of the document properties of two reports to evidence this.



81. The Council explained that condition survey sheets are completed by hand and their content is used to update the version saved electronically on its computer system. Submissions from the Council, which concerned investigations undertaken by an officer from the Commissioner's office in relation to a similar application in 2011, also showed that a note in a file from the Education Department confirmed that all handwritten notes were destroyed after typing.
82. Having considered the submissions from the Council, the Commissioner is satisfied that the searches carried out by the Council for information which would fulfil this part of Mr Longmuir's request would, on balance of probabilities, have identified any relevant information held by the Council. The Commissioner therefore accepts that the Council did not, at the time it received Mr Longmuir's request, hold any recorded information which would address this part of his request.

Second part of part iii) communications from Senior Maintenance Officer

83. In the second part of part iii) of his request, Mr Longmuir asked for all recorded information contained in communications with the named Council employee from the Council's Senior Maintenance Officer in the period March and April 2009.
84. In its response, the Council explained that, following the retirement of the Senior Maintenance Officer, all information held on that officer's personal computer was purged, and their diaries were disposed of as there was no reason to retain them.
85. Nevertheless, the Council carried out the searches outlined in paragraphs 77 to 79 above in an effort to determine whether any relevant, recorded information was held within either the Education Department or Property Division, which would fulfil this part of Mr Longmuir's request. Following these searches, the Council concluded, for the same reasons as outlined above, that no relevant recorded information was held.
86. Searches of relevant filing systems were also undertaken, but no relevant information was held.
87. Having considered these submissions from the Council, the Commissioner is satisfied that the searches carried out by the Council for information which would fulfil this part of Mr Longmuir's request would, on the balance of probabilities, have identified any relevant information held by the Council. The Commissioner therefore accepts that the Council did not, at the time it received Mr Longmuir's request, hold any recorded information which would address this part of his request.

Part iv): Muirfield Primary School visitor book

88. In part iv) of his request, Mr Longmuir asked for information held in Muirfield Primary School's visitor book for the month of March 2009, on the understanding that visitors to schools in Angus are required to fill in the time and reasons for any visits.



89. The Council confirmed that visitor logs are used to record the arrival and departure of visitors and the reason for their visit, and they serve as a safety record in the event of, for example, a fire. However, there is no requirement for it to retain these documents for a specified length of time and schools dispose of these on a regular basis and at their discretion. In the case of Muirfield Primary School, the Council advised that the logs are disposed of approximately every six months.
90. In its submissions, the Council explained that a Senior Education Manager contacted the Head Teacher of Muirfield Primary School, who, following discussion with the Senior Clerical Assistant, confirmed that it did not have the log Mr Longmuir had asked for. This was established by reviewing the visitor log held by the school, which revealed, as expected, that the information pertaining to the relevant date was no longer held.
91. Having considered the submissions from the Council, and the fact that Mr Longmuir's request was made more than three years after any relevant visits would have taken place, the Commissioner is satisfied that, on the balance of probabilities, the Council does not (and did not at the time of his request) hold the visitor book for Muirfield Primary School from March 2009.

Part v): instructions to named employee

92. In part v) of his request, Mr Longmuir asked for any recorded material issued to the named Council employee since January 2007, instructing them how to assess school condition and suitability.
93. The Council explained that it had no need to issue the named officer with guidance as they had been recruited specifically to prepare School Estate Management Plans.
94. The Council also explained that the named officer attended seminars run by the Scottish Government on School Management Planning and was given copies of guidance documents published by the Scottish Government. The Council also explained that, as the aim was to implement government guidance and the process was discussed at the seminars which were attended by staff from other local authorities, there was no reason for any manager to write to the named officer instructing them how to apply government guidance as it was clear from the officer's remit that this was what they were required to do.
95. Having considered the submissions from the Council, the Commissioner accepts that the only information held by it which would address this part of Mr Longmuir's request is the guidance notes issued by the Scottish Government, which Mr Longmuir has specifically indicated he does not require.

Conclusion

96. As mentioned previously, in assessing whether the Council holds any information which would address the first and second parts of part iii) and parts iv) and v) of Mr Longmuir's request, the Commissioner must consider what was held by the Council on the date it received Mr Longmuir's request.



97. Having considered the submissions from the Council, the Commissioner is satisfied, on the balance of probabilities that the Council does not (and did not at the time of Mr Longmuir's request) hold recorded information which would address the first and second parts of part iii), part iv) and part v) of his request. As a consequence, the Commissioner finds that the Council was entitled to notify Mr Longmuir, in terms of section 17(1) of FOISA, that it did not hold information relevant to those parts of his request.

DECISION

The Commissioner finds that Angus Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Longmuir.

Appeal

Should either Mr Longmuir or the Council 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.

Rosemary Agnew
Scottish Information Commissioner
29 April 2013



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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (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 –
- ...
- (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.



17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
 - (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),if it held the information to which the request relates; but
 - (b) the authority does not hold that information,
- it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

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

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

...



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.

...

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

Recital 26 Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas, to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person; whereas the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable....