



Scottish Information
Commissioner

**Decision 116/2006 Mr M and Scottish Borders
Council**

*Request for information on allegations of bullying incidents at
school*

Applicant: Mr M
Authority: Scottish Borders Council
Case No: 200501618
Decision Date: 21 June 2006

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
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KY16 9DS



Request for information on bullying incident – section 38(1)(a) personal data – 36(1) confidentiality – section 17 not held – request under Data Protection Act 1998 made – certain information released on review

Facts

Mr M requested information held by Scottish Borders Council (the Council) relating to allegations made by his son of bullying at school. The Council responded to this request and advised that certain information was exempt under section 38(1)(a) of the Freedom of Information (Scotland) Act 2002 (FOISA) as it constituted Mr M's son's personal data and should be accessed under the Data Protection Act 1998 (DPA). The Council advised that certain information was not held and that other information was exempt by virtue of section 36(1) of FOISA. Mr M was dissatisfied with this response and sought a review. On review, the Council upheld its decision that certain information was exempt under section 38(1)(a) and under section 36(1). However, it released certain information previously withheld. Mr M remained dissatisfied with this response and applied to the Commissioner for a decision.

Outcome

The Commissioner found that Scottish Borders Council complied with Part 1 of FOISA in exempting certain information under section 36(1) and section 38(1)(a) (and consequently directing Mr M to his and his son's rights under the Data Protection Act 1998) and by advising that certain information was not held.

The Commissioner found that the Council partially failed to comply with Part 1 of FOISA in failing to issue a notice in conformity with sections 16 and 19 of FOISA.

Appeal

Should either Mr M or Scottish Borders Council wish to appeal this decision they have 42 days from the receipt of this notice to appeal to the Court of Session on a point of law.



Background

1. On 6 January 2005 Mr M wrote to the Council and requested the following information:

- a) In February 2002, the management and the staff of Selkirk High School were informed of the allegations by Mr M's son that he had repeatedly approached his guidance teacher with details of bullying.

Under the Freedom of Information Act, Mr M requested to view the (i) documentation, (ii) any reports, (iii) correspondence, and iv) records (including minutes of meetings, reports and emails) that processed and recorded this matter at Selkirk High School in accordance with the management processes and procedures of the Scottish Borders Council and the School Bullying Policy and Staff Reports.

- b) On 6 March 2003, at a review meeting with the Head Teacher, Mr M raised concerns about his son's allegations of bullying at school. Mr M observed that the Head Teacher recorded notes at this meeting.

Under the Freedom of Information Act, Mr M requested to view (i) any documentation, (ii) any reports, analysis or records involving the specifics of this allegation or associated matters, (iii) resultant correspondence, and iv) records (including minutes of meetings, reports and emails) that processed and formally recorded this matter at Selkirk High School by the Head Teacher or anyone else in accordance with the management processes, School Bullying Policy and Staff Reports.

- c) At a meeting in August 2003, at which Mr M was present, an (until then) unknown secret "gentlemen's agreement" between the Scottish Borders Council and NHS Borders, in relation to the set up of Psychological Services for children, was disclosed.

Mr M requested to view the following information under the Freedom of Information Act (i) when was the agreement as set up, entered into between Scottish Borders Council and NHS Borders (ii) at inception how was it meant to operate and what agreements, written protocols and safeguards were in place surrounding its operation (iii) any correspondence detailing the setting up of this agreement, (iv) any instructions to the Educational Psychology Department and its staff making sure they were aware of the agreement and how it was intended to operate, (v) the details of any changes intimated by the Director's comment that "lessons had been learned" including meetings, reports, correspondence, protocols and guidance prepared or issued to Educational Psychology or Teaching Staff in relation to children in this situation since August 2003.



- d) Details of any updated or formalised arrangements between the NHS and the Scottish Borders Council that replaced the secret “gentlemen’s agreement”.
 - e) Information contained in any internal legal or professional advice or analysis, (including correspondence, emails and minutes of meetings) in relation to Mr M’s formal complaint to Scottish Borders Council and his subsequent referral of this matter to the Scottish Executive under Section 70 of the Education (Scotland) Act 1980.
2. The Council responded to this request on 1 February 2005.
- a) Request no. 1
The Council advised that most of this information did not qualify under FOISA but was covered by Data Protection legislation. The Council indicated that the information pertained to a specifically named person, that is, Mr M’s son, who was over the age of 16 and that as a result this was a subject access request under the DPA. The Council provided information on how Mr M’s son could make a subject access request.
The Council advised that the final part of Mr M’s request would be met and supplied the relevant page from the document “Better Behaviour Better Learning” and underlined the section which required schools to have an anti-bullying policy. The Council also enclosed a copy of the school’s anti-bullying policy and the Police/Schools Liaison Policy.
 - b) Request no. 2
The Council’s response was ambiguous in that it referred to information gathered on the school’s anti-bullying policy (see above).
 - c) Request no. 3
The Council advised that there was no written or recorded information regarding the “gentlemen’s agreement” to which Mr M had referred. The Council advised that as the term suggested there was verbal agreement.
 - d) Request no. 4
The Council indicated that these matters would be taken up by the relevant staff but that at this point in time there was no documentation.
 - d) Request no. 5
The Council advised that this request was not covered by the Freedom of Information Act as it was covered by “client confidentiality”. Therefore this information could not be released.
3. In subsequent correspondence, the Council confirmed that it was relying on section 36 to withhold the information in respect of request no. 5.



4. Mr M was dissatisfied with this response and on 6 February 2005 he requested a review of this decision. In his request for review he challenged the use of section 36 in respect of all information withheld relating to request no. 5.
5. Mr M indicated that certain information should have been recorded and queried apparently why this was not the case. Mr M also queried the lack of documentation subsequent to the “gentlemen’s agreement” and his meeting of August 2003 where this matter had been discussed.
6. The Council responded to Mr M’s request for review on 3 March 2005. The Council confirmed that all recorded information in the file of Mr M’s son came under Data Protection legislation and a subject access request would be required to view this information. The Council advised that this information was exempt under section 38(1)(a) and (b).
7. The Council further responded that it had reviewed the nature of the legal advice provided in relation to Mr M’s complaint under section 70 of the Education (Scotland) Act 1980 and the Council had identified some papers from the legal advice file which could be released to him. These documents were supplied to Mr M along with a schedule.
8. The Council advised that certain papers in that file were exempt in terms of section 36(1) *Confidentiality of communications being maintained in legal proceedings*. The Council indicated that these would not be disclosed as it was not considered to be in the public interest to do so.
9. In subsequent correspondence with Mr M the Council indicated that the purpose of Freedom of Information legislation was to ensure a proper response to requests for recorded information held by the Council. The Council confirmed that on review it had considered the information held by the Council and concluded that other than the material personal to Mr M’s son and a small number of documents which represented legal or professional advice to the Council all other recorded material could be (and had been) released.
10. The Council advised that FOI could not elicit information which was not recorded. The Council indicated that it appreciated that Mr M had raised a number of questions which he considered remained unanswered, but hoped that he would appreciate that FOI could not bring the solution which he sought.



11. On 27 April 2005 Mr M appealed to me for a decision. Mr M provided background to his information requests and his concerns about the transparency of the Council. In his letter of application he expressed concern that the content of certain meetings was not recorded, although he recalled notes being taken at at least one of the relevant meetings. He appealed to me because he had been unable to receive any confirmation that the information relating the bullying incidents had been recorded or actioned in any way.
12. The case was allocated to an investigating officer.

The Investigation

13. Mr M's appeal was validated by establishing that he had made a request to a Scottish public authority, and had appealed to me only after asking the authority to review its failure to provide the information he had requested.
14. The investigating officer contacted the Council on 20 May 2005 giving notice that an appeal had been received and that an investigation into the matter had begun. The Council was asked to comment on the issues raised by Mr M's application and to provide supporting documentation for the purposes of the investigation.
15. In particular, the Council was asked to provide copies of the information withheld and copies of the information released to Mr M. It was also asked to provide a detailed analysis of the application of section 38 and section 36 to the information withheld and the details of steps taken to trace the information requested by Mr M. Finally, the Council was asked to provide copies of the records reporting Mr M's son's experience of bullying and the information on any subsequent action taken.
16. The Council responded on 2 June 2005. The Council declined to provide the information withheld under section 38(1)(a) and (b) on the grounds that this was personal information under the Data Protection Act 1998 (DPA). The Council advised that it had found no specific section under FOISA allowing the Council to release this information to me. The Council advised that it could not release this information unless it could be shown a legal provision which allowed or compelled it to do so.
17. The Council supplied copies of the information withheld under section 36(1) and the information released to Mr M. The Council advised that section 38(1) applied to certain information because it was contained in Mr M's son's file which was covered by DPA.



18. The Council submitted that section 36 applied to certain information as it related to advice provided by the Legal Services Division of the Council to the Education and Lifelong Learning Department and the Chief Executive in their correspondence with Mr M.
19. In respect of the remainder of the requests the Council advised that this information was contained within Mr M's son's file and that this information would be made available should Mr M's son make a subject access request or give permission for his father to make such a request on his behalf.
20. The investigating officer contacted Mr M to advise him that his son should submit a subject access request or permit Mr M to make this request on his behalf. The investigating officer explained that the information relating to an applicant's personal data was exempt information under section 38(1)(a) of FOISA. Instead, these requests should be dealt with under DPA as subject access requests.
21. Mr M and his son subsequently made subject access requests to the Council and were supplied with all information held in Mr M's son's file.
22. After reviewing the contents of the file, Mr M advised my officer that he could find no information that was recorded contemporaneously with the events during February, March or April 2002, which was the information he was seeking. He suspected that no contemporaneous records existed but wished to have this confirmed by the Council.
23. The investigating officer contacted the Council in this respect and conveyed Mr M's concerns. The Council was asked to confirm whether it held any contemporaneous information in relation to Mr M's son and his parents reporting the incidents of bullying to school staff. The Council were also asked to confirm what steps were taken to determine whether such information existed and whether the Council held this information.
24. The Council subsequently advised that the Education Department had been asked whether it held any other information of relevance to this request. The Education Department, in turn, had checked with the school and had now confirmed that, other than any material previously sent to Mr M, no information was held beyond that contained in his son's file. This response was conveyed to Mr M.
25. In subsequent correspondence Mr M has expressed dissatisfaction with the responses from the Council in respect of these meetings and is concerned that there were apparently no contemporaneous notes made or records. In particular, he considers that the Council's response to the points made was less than direct.



26. I understand that Mr M has reluctantly accepted that there is no recorded information in respect of his requests relating to the “gentlemen’s agreement”.
27. Finally, Mr M accepted that certain information he requested under request no.5 was covered by legal professional privilege and withdrew his request in respect of that information.

Commissioner’s analysis and findings

28. Mr M made five requests for information to the Council. Before I deal with each of these requests I consider it helpful to make some general comments. Where information is requested which amounts to the applicant’s own personal information then these requests fall outwith the scope of FOISA (and my powers) by virtue of section 38(1)(a) and instead fall to be considered under DPA. Where an applicant is dissatisfied with this information he can raise his concerns with the Information Commissioner (based in Wilmslow) who has responsibility for data protection on a UK-wide basis.
29. Where an information request is made by an applicant on behalf of a child under 12 then the request should be dealt with under DPA as it essentially a subject access request. I consider that the position is more complicated where the request is made by a parent for access to a child’s record where the child is over 12. In such cases, the position may vary depending on whether the request is being made on the child’s behalf or for the parent. In this case, I consider it appropriate that the Council suggested that Mr M’s son or Mr M on his son’s behalf should make a subject access request.
30. It is also worth noting that FOISA covers recorded information held by a public authority. I have no powers where the applicant is dissatisfied because no information was recorded. I also have no powers to comment on the content of the information supplied to an applicant.
31. I will address each of Mr M’s requests in turn.

Request no. 1

32. In respect of this request the Council advised that the information was covered by DPA in that it was information relating to Mr M’s son. The Council provided information about making a subject access request and indicated that this could be made by Mr M on his son’s behalf or by his son. A subject access request was subsequently made by Mr M and his son.



33. Mr M was supplied with all information contained in his son's school file. He was disappointed that the specific information he was seeking, that is, contemporaneous notes about the reports of bullying and the concerns expressed by his son, did not appear to have been made or recorded.
34. The Council confirmed to this office that no information of the type requested by Mr M existed outside that information already supplied to him in his son's file. Mr M has reluctantly accepted this but has obvious concerns that no recorded information exists.
35. Mr M request was for information concerning reports of bullying made by his son. I accept that this information amounted to a request for Mr M's son's personal information in that the information relates to Mr M's son and has him as the focus while recognising that information on this matter, if it did exist, might also involve the personal data of others. I also accept that, in the circumstances, it was appropriate to suggest that a subject access request was made by Mr M's son or by Mr M.
36. Given that this request was dealt with under DPA it falls outwith my jurisdiction. If Mr M is dissatisfied with the information supplied to him under DPA he should raise his concerns with the Information Commissioner in Wilmslow, who has responsibility for enforcing DPA.
37. There was also a supplementary request to which the Council supplied certain documents relating to the school's anti-bullying policy.

Request no. 2

38. It was not clear from the Council's responses to Mr M or from its earlier correspondence with my office whether this request was dealt with under FOISA or under DPA. The Council subsequently confirmed that the request fell under FOISA and that Mr M had been supplied with a minute of the meeting held on 6 March 2003 following the decision of the Review Panel.
39. In subsequent correspondence between Mr M and the investigating officer Mr M advised that two meetings had taken place on 6 March 2003. The minute of the meeting supplied to him related to the meeting in the afternoon of that day. Mr M was interested in the notes taken at the meeting in the morning, at which he had complained about the alleged bullying and how it had been handled.
40. As a result, the Council was asked to advise what steps it had taken to identify whether it held any information relevant to this request and in particular, whether it had been in contact with Mr Jack, the then Head Teacher.



41. In response, the Council indicated that over the course of this enquiry, from the first request received from Mr M through to my investigation, numerous discussions had taken place between senior officers of the Education Department and Selkirk High School Staff, including the former and current Head Teacher and their Depute regarding this matter. The Council advised that every possible step had been taken to ensure that all recorded information held by the Council had been identified and with the few exceptions stated, provided to Mr M.
42. I am satisfied in all the circumstances that the Council has taken all reasonable steps to determine that it holds no recorded information relevant to Mr M's request.

Request no. 3 & 4

43. Mr M also sought information about the "gentlemen's agreement" he was alerted to at a meeting with school staff in August 2003. The Council advised that it held no information relevant to these requests. I understand that Mr M has accepted this response reluctantly.
44. In subsequent correspondence with the Council I asked it to set out the steps it had taken to identify any information the Council might hold relevant to this request. The Council advised that the Education Department had asked those officers concerned and those who could have been involved in any way if there was any written gentlemen's agreement and were assured there was not. Checks were also made with the school. The Council advised that every member of staff involved was asked whether they had any information beyond that previously forwarded. A third party to the agreement was contacted and asked if they were aware of any written or electronic copy of such agreement. The response was in the negative.
45. In the circumstances, given that it is of the essence of a "gentlemen's agreement" that it is not recorded in writing, I am satisfied with the steps the Council has taken to determine whether it holds any recorded information relevant to Mr M's requests.
46. As I indicated above, I am unable to comment on whether an authority should have noted or recorded information in any given situation.

Request no. 5

47. Finally, Mr M sought information concerning his complaint to the Council and his subsequent referral of this matter to the Scottish Executive. Although the Council withheld all information when it first responded to Mr M, it supplied around 30 documents from the legal file on review. It withheld certain information under section 36(1) confidentiality of communications.



48. I sought submissions from the Council on the application of this exemption to the remaining six items.
49. The Council subsequently advised that both section 36(1) and section 38(1) applied to the documents withheld. I will address the Council's submissions in respect of these documents (numbered SIC1 to SIC6) in turn.

Document SIC1

50. This document falls outwith the scope of Mr M's request for information in that the information was not held in a recorded format at the time of his request.

Documents SIC3 and SIC6

51. The Council subsequently advised that these documents were being withheld under section 38(1)(a) and section 38(1)(b) rather than under section 36(1) in that the information constituted the personal data of the applicant and his son. Having considered the terms of the documents, I accept that section 38(1)(a) is capable of applying to both of them. Therefore, Mr M and his son should seek access to this information by making a subject access request to the Council.

Documents SIC2, SIC4 and SIC5

52. The Council submitted that the remainder of the documents were being withheld under section 36(1) in that these documents relate to the Council's legal preparation for any section 70 Appeal under the Education (Scotland) Act 1980. Given that section 36(1) is subject to the public interest I asked the Council to set out its submissions as to why the public interest in disclosing the information was outweighed by the public interest in maintaining the exemption.
53. The Council submitted that the Council has to be in a position to allow a free and frank exchange of written legal advice/information between solicitor and client to ensure a trusting relationship is established and maintained. As the information related to one individual, the son of the enquirer and very specific incidents relating purely to that individual, including the possibility of the Council becoming involved in an Appeal under section 70, it was concluded that the public interest in disclosing the information did not outweigh the public interest in keeping the information confidential.
54. I have considered each document withheld and accept that they fall under the scope of section 36(1). However, as mentioned above, the exemption in section 36(1) is subject to the public interest test, and I must now go on to consider whether the public interest would be better served by the exemption being maintained or the information being released.



55. FOISA has brought about many changes to public life in Scotland, not least that for the first time communications between a legal adviser and a public authority client may be made public if it is in the public interest for those communications to be released.
56. The courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed towards the end of last year in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England* (2004) UKHL 48.
57. There will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client. As a result, I am likely only to order the release of such communications in highly compelling cases.
58. Having considered the information withheld I am satisfied that there are no compelling reasons in this case for the legal advice to be released to Mr M.

Technical compliance with the Act

59. In its notice dated 1 February 2005 in response to Mr M's initial request the Council did not cite the relevant exemption (section 36(1)) or explain why it applied but rather advised that the information was outwith FOI because it was covered by "client confidentiality". Likewise, in referring to DPA 1998 the Council should have made specific reference to the relevant exemption under FOISA, that is section 38(1)(a). Accordingly, it failed to comply with the requirements of section 16 of FOISA.
60. Further, the Council's letter made no reference to Mr M's right to seek an internal review (and subsequently to apply to me, if remaining dissatisfied) as required by section 19(1) of FOISA.

Decision

I find that the Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to Mr M's requests for information, insofar as it applied appropriate exemptions to the information withheld and advised that certain of the information requested was not held.



I find that the Council partially failed to comply with Part 1 of FOISA in failing to issue a notice in conformity with sections 16 and 19 of FOISA. I do not require the Council to take any action in this connection.

Kevin Dunion
Scottish Information Commissioner
21 June 2006