

# Decision Notice



Decision 155/2012 Mr Sandy Longmuir and Aberdeenshire Council

DVD about rural schools

Reference No: 201200504

Decision Date: 11 September 2012

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Scottish Information Commissioner

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## Summary

Mr Longmuir asked Aberdeenshire Council (the Council) for a copy of a DVD that had been shown to the Commission on the Delivery of Rural Education (the CDRE) by the Council. The Council disclosed an edited version of the DVD to Mr Longmuir, and informed him that it no longer held the full version which had been shown to the CDRE. It also stated that, had it still held the deleted content, it would be exempt from disclosure under the Freedom of Information (Scotland) Act 2002 (FOISA).

Mr Longmuir applied to the Commissioner for a decision, expressing concern that parts of the DVD appeared to have been deleted after his request had been made. However, during the investigation it was established that the Council still held the original DVD. Mr Longmuir subsequently indicated that he still wished to receive a copy with edited parts showing a head teacher reinstated, accepting that another part showing a pupil should not be disclosed.

When invited to comment, the Council made no submission claiming that the edited footage showing the head teacher was exempt from disclosure. For this reason, the Commissioner has found that it was incorrectly withheld by the Council, and now requires a copy of the DVD to be disclosed to Mr Longmuir with that footage included.

The Commissioner also expressed serious concern with the Council's handling of Mr Longmuir's request, and the fact that both Mr Longmuir and her staff were incorrectly advised that information requested by Mr Longmuir was no longer held by the Council. She found that by misleading Mr Longmuir in this way, the Council breached its duty to provide him with reasonable advice and assistance.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 15(1) (Duty to provide advice and assistance); 38(1)(b), (2), (3) and (5) (definitions of "the data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA) section 1(1) (Basic interpretative provisions) (definition of "personal data")

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

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1. On 29 November 2011, Mr Longmuir wrote to the Council requesting a copy of a DVD prepared by the Council, which was shown to the CDRE at Council offices on 28 September 2011. In the same email, Mr Longmuir made a further request that is not under consideration in this decision.
2. The Council responded to this request on 19 December 2011. It indicated that it was prepared to make the DVD available to view, but it could not provide a copy. The Council invited Mr Longmuir to contact a member of staff to make an appointment to view the DVD.
3. On the same date, Mr Longmuir wrote to the Council requesting a review of its decision. He indicated that he did not wish to view the DVD on site, but he wanted a copy of it to provide verification of its existence and content. He noted that the Council had refused to provide a copy of the information without applying any exemption to the information. He asked which exemption was being applied to information that had been shown to a number of parties outside the Council.
4. The Council notified Mr Longmuir of the outcome of its review on 27 January 2012. It indicated that some data protection issues had arisen, and certain parts of the film, primarily those showing school children, had been removed from the film.
5. The Council stated that “the Data Protection exemption under section 38” of FOISA may have applied had the deletions not been made. The Council concluded that no exemptions applied to the remaining parts of the DVD, and disclosed a DVD containing the edited film to Mr Longmuir.
6. In response to questions raised by Mr Longmuir, the Council explained on 30 January 2012 that the data protection issues arose prior to his information request being received on 29 November, and that, as a result, copies of the DVD were withdrawn and deleted and a small section was deleted from the master version. Mr Longmuir was advised that the DVD sent to him contained the only version of the film under consideration at the time of his request.
7. On 9 March 2012, 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. He expressed dissatisfaction with the chain of events described by the Council, and commented that it appeared that information may have been deleted while the subject of a live information request. He also disputed that the exemptions mentioned by the Council would apply to the deleted parts of the DVD, if it were still held.
8. 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

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9. On 29 March 2012, the Council was notified in writing that an application had been received from Mr Longmuir and was asked to provide the Commissioner with any information withheld from him. The Council responded to this request on the same day, stating that there was no withheld information to provide because it no longer held the version of the DVD shown to the CDRE at the point when Mr Longmuir's request was received. It explained that the DVD had been edited between 28 September 2012 (when it was shown to the CDRE) and 29 November 2011 (when the request was received).
10. However, following further investigations, it was established that the version of DVD that was shown to the CDRE was in fact still held by the Council.
11. Mr Longmuir was then asked to confirm whether he still wished to access the complete DVD as shown to the CDRE. In response, he indicated that he understood the edited parts to include footage involving a head teacher, and a school pupil. He advised that he did not wish to pursue his request in relation to the footage of the pupil, as he believed that disclosure could cause distress for the pupil and their family. He confirmed that he still wished to receive the remaining parts of the version shown to the CDRE, including the footage of the head teacher.
12. Mr Longmuir indicated that he wanted the Commissioner to consider the circumstances of his request more generally, as he considered that he had been lied to by Council staff in relation to this matter.
13. 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. In particular, the Council was asked to confirm whether it considered the footage relating to the head teacher to be exempt from disclosure, and if so, under which exemption(s) and why. The Council was also asked to provide an explanation as to how it came to wrongly indicate to both Mr Longmuir and the Commissioner that information was no longer held when in fact it was, and to provide an explanation of events prompting the modifications to the DVD, and associated documentation.
14. The Council provided its submissions and related documents on 27 August 2012.
15. 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

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16. 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 and is satisfied that no matter of relevance has been overlooked.

### **Was the Council entitled to withhold the footage of the head teacher?**

17. As noted above, Mr Longmuir wishes to receive a copy of the requested DVD with only the footage of a pupil removed. The remaining withheld information comprises two segments of the DVD containing footage of a head teacher.
18. On review, the Council indicated that the withheld information (which at that time it stated it no longer held) would be exempt under "the Data Protection exemption under section 38 of FOISA".
19. The Council did not indicate which of four exemptions within section 38 of FOISA it considered relevant, but, given the nature of the information, the Commissioner presumes that the Council was referring to the exemption in section 38(1)(b). This applies to information that is personal data as defined in section 1 of the DPA, where certain other conditions are met. The relevant parts of section 38 of FOISA and the definition of personal data are set out in the Appendix to this decision.
20. When invited to comment during the investigation, the Council indicated that when considering Mr Longmuir's request, and the submission it received from the Council's Education, Learning and Leisure Service, its review panel had focussed on data protection issues relating to the pupil, and concluded that information was exempt. It added that no exemptions were discussed in relation to the content showing the head teacher.
21. The Council made no submission during the Commissioner's investigation to suggest that any exemption was now considered applicable to the withheld content relating to the head teacher.
22. The Commissioner recognises that this information is personal data, because it identifies and relates to the head teacher. However, in the absence of any submissions from the Council to suggest that it is exempt from disclosure under section 38(1)(b) of FOISA, or any other exemption in section 38 or elsewhere in Part 2 of FOISA, the Commissioner can see no reason for finding this to be exempt information.
23. In the circumstances, the Commissioner finds that the Council was not entitled to withhold the parts of the DVD containing footage of the head teacher, and that it breached section 1(1) of FOISA by doing so. She requires the Council to disclose the original DVD shown to the CDRE to Mr Longmuir, subject to the removal only of the contribution from a school pupil (which Mr Longmuir has indicated he does not wish to be disclosed).



### Commentary on the Council's handling of Mr Longmuir's request

24. Having reached this conclusion, the Commissioner wishes to express concerns about the Council's handling of Mr Longmuir's request.
25. Section 65 of FOISA creates an offence where
  - a request for information is made to a public authority and,
  - the applicant is, under section 1, entitled to be given the information or any part of it, and
  - a person to whom that entitlement relates, alters, defaces, blocks, erases, destroys or conceals a record held by the authority with the intention of avoiding preventing the disclosure by the authority of the information to which the entitlement relates.
26. The information provided by the Council to the Commissioner does not make clear exactly when the editing of the DVD to remove footage of the pupil and the head teacher took place. However, internal communications provided by the Council indicate that it was edited on more than one occasion and that at least some of the amendments that led to the version that was disclosed to Mr Longmuir were made after his request was received.
27. The Commissioner has also been provided with (by Mr Longmuir, with the agreement of the recipient) a letter from the Council dated 19 December 2011, addressed to a parent of the school pupil whose contribution was removed from the film. This refers to a complaint being made on 29 November 2011, asking for footage involving the pupil to be deleted.
28. The Council has provided copies of emails regarding the handling of that complaint (but not the response letter provided by Mr Longmuir). This information confirms that the complaint was received at 16:57 on 29 November 2011. Mr Longmuir's information request was sent to the Council at 23:31 on the same day.
29. The Council's response to the parent's complaint indicates that, after a Council officer was appointed to consider the complaint, an instruction was given to remove the footage of the pupil on 16 December 2011.
30. Based on this information, it is clear that, while the data protection issues concerning the pupil had been raised prior to the receipt of Mr Longmuir's request, the deletion of the footage of the pupil took place after his request was received.
31. The Council's submissions indicated that the content involving the head teacher was removed in an earlier edit of the film, but did not state when this took place. For this reason, it is not clear to the Commissioner whether the content involving the head teacher was removed from the edited version before or after Mr Longmuir's request was received.
32. Nonetheless, it is clear to the Commissioner that the Council modified the information requested by Mr Longmuir to some extent, after his request was received. Although it continued to retain the original film, it gave the impression that it had deleted and destroyed that information. In doing so, it created a strong impression that an offence may have been committed under section 65 of FOISA.



33. Having viewed the submission from the Education, Learning and Leisure Service to the review panel, the Commissioner is concerned that this provided only a partial explanation of the circumstances surrounding the DVD. It made no reference, for example, to the content relating to the head teacher, either to indicate that it had been edited from the version shown to the CDRE, or that it was considered to be exempt from disclosure.
34. In relation to the footage of the pupil, the submission made clear that the consideration of the parents complaint was underway “at the time when Mr Longmuir’s request was being processed” and that “this resulted in all copies of the film being withdrawn and deleted with the small section including the child being deleted from the master version”. The Commissioner understands that it was this content that led the review panel to conclude that the Council no longer held the version of the DVD shown to the CDRE.
35. The Commissioner has noted that that this text also suggested that the relevant deletion was made after Mr Longmuir’s request was received. Given the seriousness of an offence under section 65 of FOISA, the Commissioner is surprised and concerned that the submission from the Education, Learning and Leisure Service did not prompt the review panel or its advisors to check the facts around this matter more closely to ensure that its communications with Mr Longmuir were accurate, or to raise its concerns about amendments and deletions being made after a request was made.
36. She is also concerned that the Council’s review panel was given incomplete information to inform its decision about amendments (either made or proposed) to the film. As a result, information was withheld that went beyond that understood by review panel to have been deleted (and exempt from disclosure).
37. In the circumstances of this case, the Commissioner is troubled that on the evidence available to her there appears to have been insufficient awareness of, or attention given to, the importance of ensuring that information is not modified or deleted following receipt of a request for that information. The Council, at both request and review stages, appears not to have recognised the risks and implications of its actions and statements given the terms of section 65 of FOISA, or to have then taken appropriate action to avoid those risks.
38. While in this case it was ultimately confirmed that the information originally requested was actually held by the Council, the Commissioner considers the provision of partial and misleading information within the Council led to Mr Longmuir and the Commissioner also being provided with incomplete and misleading information. This prompted serious concerns that an offence under section 65 of FOISA may have been committed.
39. Under section 15(1) of FOISA, the Council has a duty, so far as it is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made a request for information to it. This duty continues through the request handling process.
40. The Commissioner considers that reasonable advice and assistance includes avoiding (where possible) providing inaccurate or misleading information to the requester about the nature and extent of the information they had requested.



41. In this case, the Commissioner considers that the information communicated to Mr Longmuir suggesting the deletion of parts of the film he had requested was misleading (and avoidably so) to the extent that the Commissioner considers that the Council failed to comply with its duty under section 15(1) of FOISA.
42. The Commissioner recommends that the Council review the circumstances of its handling of Mr Longmuir's information request and consider what training or other awareness raising activities are required to ensure that all staff are sufficiently aware of the obligations created by FOISA, the offence under section 65 and its implications, and the need to ensure that its decisions are accurately and fully informed and can be justified to the Commissioner.

## DECISION

The Commissioner finds that Aberdeenshire Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Sandy Longmuir. By withholding content within the requested film showing a head teacher, the Council breached Part 1 and section 1(1) of FOISA.

The Commissioner also finds that, by providing misleading information to Mr Longmuir suggesting that it no longer held certain parts of the requested DVD, the Council failed to comply with its duty to provide advice and assistance to Mr Longmuir in line with section 15(1) of FOISA.

The Commissioner requires the Council to disclose the version of the DVD requested by Mr Longmuir, edited to remove the footage concerning the school pupil in relation to which a complaint was made, by 26 October 2012.

## Appeal

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Should either Mr Longmuir or Aberdeenshire 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 notice.

**Rosemary Agnew**  
**Scottish Information Commissioner**  
**11 September 2012**





## Appendix

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### Relevant statutory provisions

#### Freedom of Information (Scotland) Act 2002

##### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

##### 15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to 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
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress); and
- (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.
- (3) The second condition is that, by virtue of any provision of Part IV of that Act, the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

...

- (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;

...