

Decision Notice



Decision 291/2013 Mr Longmuir and Education Scotland

Correspondence with Commission on Delivery of Rural Education

Reference No: 201301550

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Scottish Information Commissioner

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Summary

On 1 May 2013, Mr Longmuir asked Education Scotland for information contained in communications between Education Scotland and the Commission on the Delivery of Rural Education (the CDRE), and on related matters. Education Scotland provided Mr Longmuir with some of the information, explained that it did not hold other information and withheld information on the basis that disclosure would substantially inhibit the free and frank exchange of views.

Education Scotland disclosed additional information during the investigation, which (in the absence of submissions to the contrary) the Commissioner found that the authority was not entitled to withhold earlier. She also found a failure in Education Scotland's handling of information which comprised Mr Longmuir's own personal data.

During the investigation, Education Scotland applied additional exemptions to the remaining withheld information. The Commissioner accepted that Education Scotland was entitled to withhold this information as Mr Longmuir's personal data (section 38(1)(a)) or under section 29(1)(a) of FOISA (which relates to the formulation or development of government policy).

There being no further information which the Commissioner required disclosed, she did not require Education Scotland to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and 2(e)(i) (Effect of exemptions); 29(1)(a) and (4) (definition of "government policy") (Formulation of Scottish Administration policy etc.) and 38(1)(a) (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.



9. Background

1. On 1 May 2013, Mr Longmuir wrote to Education Scotland requesting the following information:
 - a) *All information contained in communications of Education Scotland with the secretariat of the CDRE since its founding in September 2011. This should include any statistical analysis and/or any evidence based on any statistical analysis.*
 - b) *All information contained in communications with a named individual (a secretary to the CDRE), in their position as a Scottish Government Officer based at Victoria Quay Edinburgh. This should all be caught in request a), but is included in case any communications could be interpreted as being with the Scottish Government instead of the CDRE.*
 - c) *Any information contained in communications with the Convention of Scottish Local Authorities (COSLA) which contain any direct reference to the CDRE.*
 - d) *Any statistical analysis routinely prepared internally or otherwise which compares or tabulates inspection reports or school attainment in Scotland since September 2011. If any of this is published information, I am more than happy to be directed to the published source.*
2. Education Scotland responded on 5 June 2013, as follows:

Requests a) and b) Education Scotland provided Mr Longmuir with links to reports it had submitted to the CDRE, which were published online. Education Scotland also withheld some of the information he sought on the basis that section 30(b)(ii) of FOISA applied.

Request c) Education Scotland informed Mr Longmuir, in line with section 17(1) of FOISA, that it held no communication between it and COSLA containing any direct reference to the CDRE.

Request d) Education Scotland supplied Mr Longmuir with five documents which tabulated relevant inspection reports and provided him with a link to other information which was published online.
3. On the same day, Mr Longmuir wrote to Education Scotland requesting a review of its decision to withhold information (i.e. in relation to requests a) and b)). As he had not been provided with an indication of the number of items withheld, or the subject matter of the information withheld, he considered it difficult to understand the grounds on which the information was withheld. He also considered there to be a strong public interest in disclosure, to determine what weight CDRE had given to the input from Education Scotland.
4. Education Scotland notified Mr Longmuir of the outcome of its review on 3 July 2013. It provided Mr Longmuir with one additional document, but maintained its original position with regard to the remaining information. Education Scotland provided Mr Longmuir with a schedule of information which remained withheld.



5. On 4 July 2013, Mr Longmuir wrote to the Commissioner's office, stating that he was dissatisfied with the outcome of Education Scotland's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Longmuir made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. Education Scotland is an agency of the Scottish Ministers (the Ministers). On 30 July 2013, in line with agreed procedures, the investigating officer notified the Ministers in writing that an application had been received from Mr Longmuir and asked them to provide the Commissioner with the information withheld from him. The Ministers responded with the information requested.
8. The Ministers were given (and took up) the opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). They were asked to respond to specific questions, focusing on the provisions of FOISA they had relied upon to withhold information.
9. Subsequent references to contact with or submissions from Education Scotland should be read as references to contact with or submissions made by the Ministers on behalf of Education Scotland.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Longmuir and Education Scotland. She is satisfied that no matter of relevance has been overlooked.
11. Mr Longmuir's application was limited to requests a) and b), as set out above.
12. Education Scotland reviewed the information it was withholding and, on 30 August 2013, disclosed further documents to Mr Longmuir. In the absence of substantive arguments as to why this information was originally withheld from Mr Longmuir (none have been provided by the Ministers), the Commissioner must conclude that Education Scotland failed to comply with Part 1 of FOISA in withholding this information from Mr Longmuir. As this information was disclosed during the investigation, the Commissioner does not require any action as a result of this failure.



13. With regard to the information which remained withheld, Education Scotland informed the investigating officer (and Mr Longmuir) that it was withheld on the basis that sections 30(b)(i), (ii) and 29(1)(a) of FOISA applied. Mr Longmuir was also informed that one document was being withheld as it comprised his own personal data (and was exempt from disclosure on the basis of section 38(1)(a) of FOISA).
14. On 3 September 2013, having received the additional information, Mr Longmuir wrote to the investigating officer expressing his dissatisfaction at Education Scotland's application of section 29(1)(a).
15. Education Scotland withheld four documents in their entirety. Information was redacted from a further three documents.

Background to request

16. The CDRE was established jointly by the Scottish Government and COSLA. The CDRE published its final report in April 2013. The Scottish Government's response to this report was published on 13 June 2013.
17. CDRE had the following remit:
 - a. to review the Schools (Consultation) (Scotland) Act 2013 and its application;
 - b. to examine how the delivery of rural education can maximise attainment and outcomes to give pupils the best life chances, and to examine, where appropriate, how this can be applied more widely;
 - c. to make recommendations on how to reflect best practice on the delivery of all aspects of education in rural areas (pre-school through to higher and further education);
 - d. to examine the links between rural education and the preservation, support and development of rural communities and to make recommendations on how these links might be strengthened if necessary; and
 - e. to examine and make recommendations on funding issues surrounding rural education.
18. Mr Longmuir made his request to Education Scotland, which acts as a professional advisor to the Scottish Government and other stakeholders (such as COSLA). Education Scotland explained that its professional advice covered many different areas, including support and implementation of the curriculum, evaluative advice on schools, adult learning and educational policy. In relation to this particular request, Education Scotland stated that it provided advice on the schools consultation process and its role within it, the implementation of the Curriculum for Excellence (CfE) in rural and small schools, and the impact of proposed recommendations by the CDRE.



Section 29(1)(a) – Formulation of Scottish Administration policy etc.

19. Under section 29(1)(a), information held by the Scottish Administration (which includes the Ministers - see the Scotland Act 1998) is exempt information if it relates to the formulation or development of government policy. The Commissioner takes the view that "formulation" suggests the early stages of the policy process, where options are identified and considered, risks are identified, consultation takes place and recommendations and submissions are presented to Ministers. "Development" suggests the processes involved in reviewing, improving upon or amending existing policy: it can involve piloting, monitoring, analysing, reviewing or recording the effects of existing policy.
20. As noted above, for information to fall under this exemption, it need only "relate" to the formulation or development of government policy.
21. Mr Longmuir queried how information exchanged between Education Scotland and CDRE could be considered as information relating to the formulation of *government* policy, given that the CDRE was not part of the Scottish Government.
22. Education Scotland explained that it was involved throughout CDRE's work, including being asked to provide their professional opinion on draft text which was used to formulate the Commission's report. Education Scotland submitted that the whole purpose of the CDRE report was to feed into the development of the Scottish Government's overall policy on the delivery of rural education. Consequently, discussions between Education Scotland and the CDRE related to the formulation and development of that policy.
23. The Commissioner has considered the information to which this exemption has been applied, along with the submissions received from both parties. Clearly, it was inherent in the CDRE's remit that its work was intended to inform the development of government policy on the delivery of rural education. The information in question is held by Education Scotland (part of the Scottish Administration) and, by its nature, relates to the formulation or development of that policy. The Commissioner has noted Mr Longmuir's comments, but cannot accept that information on its work held by a Scottish Government agency is incapable of falling within the application of this exemption. The CDRE was established as an entity independent of Government, but the outcomes of its work were never intended to stand in isolation.
24. The Commissioner is therefore satisfied that the information withheld from Mr Longmuir is exempt under section 29(1)(a). However, the exemption is subject to the public interest test in section 2(1)(b) of FOISA. This means that the Commissioner must order Education Scotland to disclose the information unless, in all the circumstances of the case, she is satisfied that the public interest in maintaining the exemption outweighs that in disclosing the information.



Public interest test

25. Education Scotland recognised the public interest in disclosing this type of information as part of an open, transparent and accountable government, and to inform public debate on issues such as the delivery of rural education. Education Scotland believed this was met to a significant extent by the publication of the CDRE's report, alongside the information released to Mr Longmuir.
26. In this case, Education Scotland considered there to be a greater public interest in high quality policy-making, and in the properly considered implementation and development of policies on the delivery of rural education. Education Scotland argued that in order to meet this public interest it was necessary to allow officials and stakeholders private space within which the issues surrounding rural education delivery could be fully and freely explored and refined, until the Government could adopt a policy that was sound and likely to be effective. This allowed issues to be thoroughly examined, based on complete and informed evidence from all sides of the debate, allowing good policy decisions to be taken. Education Scotland submitted that premature disclosure was likely to undermine these discussions, which in turn could undermine the quality and credibility of the eventual decisions on rural education policy.
27. Mr Longmuir submitted that any policy decisions influenced by Education Scotland should be evidence-based and be able to stand up to public scrutiny. He argued that, if education policy was being influenced by simple opinion of a few individuals, with no statistical or analytical basis for that policy, then this should be of critical public interest.

The Commissioner's conclusions on the public interest

28. The Commissioner has considered carefully the comments made by Mr Longmuir and Education Scotland when balancing the public interest test.
29. The information in question is limited in nature and relates specifically to the implementation of the recommendations arising from the CDRE report. At the time of Education Scotland's submissions to the Commissioner, a public consultation exercise had been implemented to determine the changes that may be made to the legislation as a result of the CDRE report. Consequently, the Commissioner recognises that the policy formulation in question was at a relatively early stage.
30. The Commissioner has weighed the public interest considerations, taking account of all relevant circumstances. On balance, taking account of the information which has already been published or released to Mr Longmuir, the nature of the subject matter under discussion and the timing of Mr Longmuir's request and requirement for review, she has concluded that the disclosure of the remaining withheld information would have been likely to prejudice the policy-making process significantly.



31. The Commissioner therefore concludes, in all the circumstances of this case, that the public interest in disclosure of the information under consideration is outweighed by that in maintaining the exemption in section 29(1)(a) of FOISA. Consequently, Education Scotland was entitled to withhold the information under that exemption. Having reached this conclusion, she is not required to (and will not) consider the application of the other exemptions claimed by Education Scotland in relation to this information.

Section 38(1)(a) of FOISA – Personal information

32. Section 38(1)(a) of FOISA contains an absolute exemption in relation to personal data of which the applicant is the data subject. The fact that it is absolute means that it is not subject to the public interest test set out in section 2(1) of FOISA.
33. This exemption exists under FOISA because individuals have a separate right to make a request for their own personal data (commonly known as a "subject access request") under section 7 of the DPA. The DPA will therefore usually determine whether a person has a right to their own personal data. Section 38(1)(a) of FOISA does not deny individuals a right to access to information about themselves, but ensures that the right is exercised under the DPA and not under FOISA (which would involve disclosure to the world at large rather than simply the individual concerned).
34. Personal data are 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 is likely to come into the possession of, the data controller (the full definition is set out in the Appendix).
35. Education Scotland confirmed that it held a "personal" email from Mr Longmuir, which it withheld under this exemption. Mr Longmuir stated in his application to the Commissioner that he believed Education Scotland was withholding an email sent by him on a personal basis.
36. Having considered the nature of the information in this email, the Commissioner is satisfied that the information comprises Mr Longmuir's personal data. Mr Longmuir confirmed in his application that the email in question was sent on a personal basis. The Commissioner is satisfied the information relates to Mr Longmuir as an individual and that he can be identified from the information.
37. Having concluded that the information under consideration is Mr Longmuir's own personal data, the Commissioner finds that Education Scotland is entitled to withhold the information under section 38(1)(a) of FOISA. However, by failing initially to inform Mr Longmuir that the information was being withheld under this exemption, the Commissioner finds that Education Scotland failed to comply with Part 1 of FOISA.
38. As noted above, the exemption in section 38(1)(a) is an absolute one and the Commissioner is therefore not required to go on to consider the public interest in disclosing the information or maintaining the exemption.



39. Education Scotland explained that Mr Longmuir has since submitted a subject access request under section 7 of the DPA, in response to which it intended to release this information to him.

DECISION

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

The Commissioner finds that Education Scotland was entitled to withhold information from Mr Longmuir in line with the exemptions in sections 29(1)(a) and 38(1)(a) of FOISA.

By initially withholding some of the information under consideration under section 30(b)(ii), and by failing to inform Mr Longmuir that other information was withheld under section 38(1)(a), the Commissioner finds that Education Scotland failed to comply with section 1(1) of FOISA.

Given the subsequent disclosure of the information wrongly withheld, and Education Scotland's appropriate handling of the personal data during the investigation, the Commissioner does not require Education Scotland to take any action in respect of these failures.

Appeal

Should either Mr Longmuir or Education Scotland wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Margaret Keyse
Head of Enforcement
18 December 2013



Appendix

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

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

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and
(b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (e) in subsection (1) of section 38 –
(i) paragraphs (a), (c) and (d); and

...

29 Formulation of Scottish Administration policy etc.

- (1) Information held by the Scottish Administration is exempt information if it relates to-
- (a) the formulation or development of government policy;

...

- (4) In this section-
"government policy" means-



- (a) the policy of the Scottish Administration; and
- (b) in relation to information created before 1st July 1999, the policy of the Government of the United Kingdom;

...

38 Personal information

- (1) Information is exempt information if it constitutes-
 - (a) personal data of which the applicant is the data subject;

...

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;

...