

# Decision Notice



Decision 158/2013 Mr Sandy Longmuir and the Scottish Ministers

Commission on Delivery of Rural Education

Reference No: 201301033

Decision Date: 6 August 2013

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**Rosemary Agnew**

Scottish Information Commissioner

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## Summary

On 22 February 2013, Mr Longmuir asked the Scottish Ministers (the Ministers) for information received by the Commission for the Delivery of Rural Education (CDRE). The Ministers informed Mr Longmuir that the relevant information on their systems was held on behalf of the CDRE and consequently not held for the purposes of FOISA. This was accepted by the Commissioner following an investigation.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 3(2)(a)(i)(Scottish public authorities).

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 22 February 2013, Mr Longmuir wrote to the Ministers requesting all recorded information received by the CDRE falling within the following descriptions:
  - a. Any information to and from Education Scotland, specifically material which provides a statistical analysis of education attainment in various sizes or locations of schools and information relating to the wider attainment and personal development of children, including any reference to Curriculum for Excellence.
  - b. Any information received by CDRE which relates to any evidenced education detriment occurring in any identified school type, region, size or location, to cover all sources and reference any research or studies they quote in support of the information.
2. On 2 March 2013, Mr Longmuir clarified that he sought all information (on the matters described above) held by a named individual, one of the secretaries to the CDRE, employed by the Scottish Government.



3. The Ministers responded on 22 March 2013. The Ministers provided Mr Longmuir with some information, withheld some information under section 38(1)(b) of FOISA (individual level personal data used for statistical analysis) and advised him that further information was held on behalf of the CDRE. In terms of section 3(2)(a)(i) of FOISA, therefore, this last category of information was not held by the Ministers for the purposes of FOISA.
4. On 23 March 2013, Mr Longmuir wrote to the Ministers requesting a review of their decision. He was not satisfied that the Ministers were correct to withhold information on the basis that it was held on behalf of the CDRE. He confirmed that he had no interest in the withheld personal data.
5. The Ministers notified Mr Longmuir of the outcome of their review on 25 April 2013. While providing further explanation, they confirmed their original decision under section 3(2)(a)(i) without modification.
6. On 30 April 2013, Mr Longmuir wrote to the Commissioner's office, stating that he was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. 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. The case was then allocated to an investigating officer.

## Investigation

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8. The investigating officer contacted the Ministers on 20 May 2013, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their application of section 3(2)(a)(i) of FOISA. The Ministers provided submissions in response.

## Commissioner's analysis and findings

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9. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to her by both Mr Longmuir and the Ministers. She is satisfied that no matter of relevance has been overlooked.
10. Section 1(1) of FOISA creates a general right of access to recorded information held by a Scottish public authority, except where that right is disapplied by the application of one of the exemptions in Part 2 of FOISA, or another provision in Part 1 of FOISA.



11. Section 3(2)(a)(i) of FOISA makes it clear that if a Scottish authority holds information on behalf of another person, then the information is not held by the authority for the purposes of FOISA. This is qualified by the provisions of section 3(4), which relate to records transferred to the Keeper of the Records of Scotland and which are not relevant in this case.

### **Background to the CDRE**

12. The CDRE was established jointly by the Scottish Government and the Convention of Scottish Local Authorities (COSLA) and chaired by Sheriff David Sutherland. The CDRE's formation was announced in a statement to the Scottish Parliament in June 2011 and it published its final report in April 2013. The Scottish Government's response to this report was published on 13 June 2013.
13. The CDRE had the following remit:
  - a. to review the Schools (Consultation) (Scotland) Act 2010 and its application;
  - b. to examine how the delivery of rural education can maximize 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.
14. The CDRE's membership consisted of, amongst others, representatives from the Society of Local Authority Chief Executives, the Association of Directors of Education Scotland, the Scottish Rural Schools Network, the James Hutton Institute, the National Parents Forum, the Care and Learning Alliance, the Universities of Edinburgh and the Highlands and Islands, and elected members from four local authorities.
15. Secretariat for the CDRE was provided jointly by the Scottish Government and COSLA. Additional administrative support to the CDRE was provided by other Scottish Government employees.

### **Section 3(2)(a)(i)**

16. The word "held", in relation to information for the purposes of FOISA, has a specific meaning in section 3(2) of FOISA. When information is present within a Scottish public authority's premises and systems only because it is held on behalf of another person, that information is not held by the authority for the purposes of FOISA.



17. If an authority holds information on behalf of another person or organisation, it will not control that information in the same way as it would if it held the information in its own right. The authority would not have power to delete or amend that information without the owner's consent, nor would it be able to apply its own policies and procedures to it. It might have restricted access to the information.

#### *The Ministers' submissions*

18. The Ministers submitted that the CDRE operated independently of the Scottish Government. While its remit and timeframe were agreed by the Scottish Government and COSLA, the CDRE was free to decide how to gather evidence for its report and to come to its own conclusions and recommendations. Sheriff Sutherland had full responsibility for the programme of work undertaken by the CDRE and the content and work commissioned for its meetings. The Ministers explained that the Scottish Government's approval of CDRE papers, discussions or decision was not sought by Sheriff Sutherland, and such information was not routinely shared with the Ministers. Neither the Scottish Government nor COSLA approved the CDRE's report or recommendations prior to publication.
19. For the reasons set out above, the Ministers submitted that the CDRE was independent of the Scottish Government and (subject to paragraph 21 below) any relevant information it held was held on behalf of the CDRE.
20. The Ministers explained that access to the CDRE files on their systems was restricted so that only a limited number of users could access information held on behalf of the CDRE. This included the Secretary to the CDRE and individuals providing administrative support (as described in paragraph 15 above).
21. The Ministers explained that the information released to Mr Longmuir was prepared by the Education Analytical Services Division of the Scottish Government. These were prepared in response to a request from the CDRE for evidence/research on attainment based on school size and rurality. The records released were held in the corporate filing system for that Division. The Ministers explained that some of the information contained in these records was presented to the CDRE as part of its work (and therefore was also stored in the CDRE's files as part of the CDRE's records).

#### *Information held by the Secretary to the CDRE*

22. During the investigation, Mr Longmuir argued that the Secretary to the CDRE was an employee of the Scottish Government and served a dual purpose in the process of which the CDRE formed part. Consequently, the information held by that individual should be held for the purposes of FOISA. Mr Longmuir supplied the investigating officer with documentation which he felt supported his view that the Secretary was also acting on behalf of the Ministers in relation to work of the CDRE. Mr Longmuir did not accept that Scottish Government employees conducting what he considered to be Scottish Government business should be exempt from FOISA on the basis that they were also working as part of the CDRE.



23. The Commissioner has considered the documentation in question and does not accept that it supports Mr Longmuir's position. The email in question simply provides a prediction of the Scottish Ministers' (immediate – not substantive) response to the final report. It does not, in the Commissioner's view – suggest that this individual was responding on behalf of the Ministers.
24. The Ministers submitted that, although the individual in question continued to be paid by the Scottish Government while acting as Secretary to the CDRE, they were performing that role under the direction of the independent Chair of the CDRE. The Commissioner has taken this into account in reaching her conclusions.

#### *The Commissioner's conclusions*

25. As part of the investigation, the investigating officer requested (and was provided with) a sample of the information considered to be held by the Ministers on behalf of the CDRE. These documents consisted of minutes of the meetings of the CDRE and information relating to the provision of evidence/research to the CDRE. The Commissioner is satisfied that these all relate to the work of the CDRE.
26. In all the circumstances, the Commissioner is satisfied that the Ministers were correct to rely on section 3(2)(a)(i) of FOISA in responding to Mr Longmuir's request (that is, in concluding that the information was held on behalf of the CDRE). In reaching this conclusion she has taken account of the UK Information Commissioner's guidance on determining whether information is held by a public authority for the purposes of the Freedom of Information Act 2000<sup>1</sup>.
27. The Commissioner has also taken account of the remit and membership of the CDRE in reaching her conclusion. The CDRE was established by the Scottish Government and COSLA to explore and report on a single issue, rather than being a standing commission established by statute to perform a specific function. She has also taken account of the Ministers' submissions on the manner in which the information is held and the arrangements for access to it.

## **DECISION**

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

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[http://www.ico.org.uk/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/information\\_held\\_by\\_a\\_public\\_authority\\_for\\_purposes\\_of\\_foia.ashx](http://www.ico.org.uk/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/information_held_by_a_public_authority_for_purposes_of_foia.ashx)

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## Appeal

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Should either Mr Longmuir or the Scottish Ministers 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.

**Margaret Keyse**  
**Head of Enforcement**  
**6 August 2013**



## 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.

...

##### 3 Scottish public authorities

...

- (2) For the purposes of this Act but subject to subsection (4), information is held by an authority if it is held-
- (a) by the authority otherwise than-
- (i) on behalf of another person; or

...