

Decision Notice



Decision 141/2009 Mr David C Robertson and Her Majesty's Inspectorate of Education

Correspondence and minutes of meetings

Reference No: 200900637
Decision Date: 12 December 2009

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Summary

Mr David C Robertson requested from Her Majesty's Inspectorate of Education (HMIe) copies of correspondence held in connection with a letter previously sent by him to HMIe, records of meetings regarding a school inspection and any records of the destruction of documents falling within the scope of his request. HMIe responded by stating that it did not hold the information relating to correspondence and meetings, but it did hold a file checklist which indicated that the information sought had been destroyed prior to Mr Robertson's request. The file checklist was provided to Mr Robertson with certain information redacted under section 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). Mr Robertson remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that HMIe was correct to advise Mr Robertson that it did not hold certain requested information, but was incorrect to withhold all of the personal information under section 38(1)(b) of FOISA. He required HMIe to release the information identified in this decision.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) 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 38(1)(b), (2)(a)(i) and (b) (Personal information)

Data Protection Act 1998 (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 purposes of the first principle: processing of any personal data: condition 6)

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. On 18 November 2009, Mr Robertson wrote to Her Majesty's Inspectorate of Education (HMIe) requesting the following information:
 - a. Copies of correspondence held by HMIe in relation to Mr Robertson's letter dated 9 December 2004 to a named District Inspector. The scope of the request should include



- correspondence from or to the Education, Children & Families Department City of Edinburgh Council and within HMle.
- b. Copies of minutes of meetings held between HMle and staff in the Education, Children & Families Department City of Edinburgh Council before or after the inspection of Holy Cross Primary School in October 2004.
 - c. Copies of any destruction certificates if the above documents identified in points a and b had been destroyed.
2. HMle responded on 18 December 2008. HMle stated that it did not hold any of the correspondence or minutes requested by Mr Robertson. HMle provided Mr Robertson with a redacted copy of the Primary Inspection File Record Checklist (Checklist). This Checklist specified the types of records that could be held regarding a primary school inspection and it was also indicated on the Checklist that the Holy Cross Primary School paper file had been destroyed on 21 February 2007. The redacted information in the Checklist was withheld by HMle under section 38(1)(b) of FOISA.
 3. On 5 January 2009, Mr Robertson wrote to HMle requesting a review of its decision that it did not hold any of the correspondence or minutes that he had requested and its decision to redact certain information from the Checklist. Mr Robertson drew HMle's attention to its record management policy, in which it is stated that it is critical that records of decisions are complete and accurate and HMle must be able to provide a full history of its decisions and actions.
 4. HMle notified Mr Robertson of the outcome of its review on 30 January 2009 upholding its original decision without amendment.
 5. On 1 April 2009, Mr Robertson wrote to the Commissioner, stating that he was dissatisfied with the outcome of HMle'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 Robertson 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. The case was then allocated to an investigating officer.

Investigation

7. HMle is an agency of the Scottish Ministers ("the Ministers") and, in line with agreed procedures the Ministers were notified in writing that an application had been received from Mr Robertson and that an investigation into the matter had commenced. Subsequent reference to submissions etc. being received from HMle are therefore references to submissions etc. made by the Ministers' Freedom of Information Unit on behalf of HMle.



8. The investigating officer gave HMIE an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked it to respond to specific questions. In particular, HMIE was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested, to describe the searches undertaken for the requested information and to provide details of HMIE's record management policies and copies of relevant destruction certificates. HMIE was also asked to provide the Commissioner with a copy of the withheld information.
9. HMIE responded on 15 June 2009, providing detailed responses to the investigating officer's questions. HMIE also provided further details of the nature of the personal information withheld by it, comments as to whether the requested information was ever held by it and its practices in relation to the recording of electronic information.
10. The investigating officer also contacted Mr Robertson during the investigation seeking his submissions on the matters to be considered in the case. Mr Robertson's submissions are also summarised and considered in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Robertson and HMIE and is satisfied that no matter of relevance has been overlooked.

Information not held – section 17 of FOISA

12. Section 17(1) of FOISA requires that, where an authority receives a request for information that it does not hold, it must give an applicant notice in writing that the information is not held.
13. HMIE advised Mr Robertson that it did not hold any information falling within the scope of parts a and b of his request and that all the records in relation to the inspection of Holy Cross primary school in 2004 had been destroyed on 21 February 2007. This response was upheld upon review.
14. In order to determine whether HMIE dealt with Mr Robertson's request correctly, the Commissioner must establish whether, at the time it received Mr Robertson's request, HMIE held any information which would fall within the scope of his request.



15. HMIE provided detailed submissions to explain the steps it had taken in order to ascertain if any relevant information was held. HMIE stated that the paper records for Holy Cross primary school were held at one of its offices in Edinburgh and an electronic copy of the paper information was also held on a central network drive. HMIE confirmed that the search for relevant documents encompassed the school and District Inspector files (both electronic and hard copy) which constituted all available systems. In addition HMIE confirmed that the physical search focused on the Inspector name and reference to any meetings that took place between the District Inspector and Local Authority.
16. HMIE went on to state that the information sought by Mr Robertson would have been held in the part of the paper copy of the school inspection file that contained general correspondence and that the paper file had been destroyed on 21 February 2007. HMIE also stated that it had contacted the named District Inspector who confirmed that she did recall Mr Robertson's letter and would have raised the issues therein at one of her regular District Inspector – Director of Education meetings. However, HMIE noted that these meetings have an informal and wide-ranging agenda which is not committed to paper and no minutes are kept of such meetings..
17. HMIE also stated that no formal destruction certificates existed for the information requested by Mr Robertson, however the destruction of certain documents within the file was noted on the Checklist. This showed the initials of the officer who carried out the weeding of the file and the date when it occurred.
18. In his correspondence with the investigating officer, Mr Robertson enquired whether any audit trail existed as to the deletion date of the electronic records. HMIE confirmed to the investigating officer that electronic copies of the information requested by Mr Robertson relating to his letter of 9 December 2004 and related correspondence were never created. However, as noted above, the electronic files were thoroughly searched following Mr Robertson's information request. HMIE also explained that back up tapes of the electronic files are overwritten every five weeks and consequently it would no longer be possible to re-instate any electronic files more than four weeks old.
19. Having considered the submissions received from both HMIE and Mr Robertson, the Commissioner is satisfied that HMIE does not (and did not at the time of Mr Robertson's information request) hold the information requested in points a and b of Mr Robertson's request. The Commissioner has concluded that HMIE took reasonable steps to search for the relevant information and were correct to inform Mr Robertson that it did not hold information that fell within the scope of his request.
20. The Commissioner therefore finds that HMIE complied with Part 1 of FOISA in responding to parts a and b of Mr Robertson's request.



Section 38(1)(b) – personal information

21. The exemption in section 38(1)(b) of FOISA, read in conjunction with either section 38(2)(a)(i) or (as appropriate) section 38(2)(b), provides that information is exempt information if it constitutes personal data (as defined in section 1(1) of the DPA) and its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in the DPA. This is an absolute exemption and therefore is not subject to the public interest test laid down by section 2(1)(b) of FOISA.
22. In order for a public authority to rely on this exemption, it must show firstly that the information which has been requested is personal data for the purposes of the DPA, and secondly that disclosure of the information would contravene at least one of the data protection principles laid down in the DPA. In this case, HMIE applied the exemption in section 38(1)(b) of FOISA to the initials of two individuals which had been redacted from the Checklist released to Mr Robertson.

Is the information personal data?

23. “Personal data” is defined in section 1(1) of the DPA which is reproduced in the Appendix to this decision.
24. The information that has been redacted comprises solely the initials of the individuals. However, the Commissioner accepts that this is sufficient information to enable identification of the individuals concerned, and constitutes personal data as defined by the DPA for the purposes of section 1(1) of the DPA..

Would disclosure of the information breach the first data protection principle?

25. HMIE argued that disclosure of the personal data in the Checklist would contravene the first data protection principle in the DPA, which 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 of the DPA is met, and in the case of sensitive personal data, at least one of the conditions in Schedule 3 of the DPA is also met. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA and, he is satisfied that the personal data in this case does not fall into this category. Therefore, it is not necessary to consider the conditions in Schedule 3 of the DPA in this particular case..
26. 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 inter-linked. If there is a specific condition which permits the personal data to be disclosed, it is likely that the disclosure will be fair and lawful.
27. The Commissioner will now go on to consider whether there are any conditions in Schedule 2 of the DPA which would permit the personal data to be disclosed. If any of these conditions can be met, he will then go on to consider whether the disclosure of this personal data would otherwise be fair and lawful. If no conditions can be met, he must find that the disclosure would breach the first data protection principle.



Can any of the conditions in Schedule 2 of the DPA be met?

28. The Ministers considered that of the conditions for processing contained in Schedule 2, only the sixth may be potentially applicable in this case. The Commissioner agrees with this view.

Condition 6(1)

29. Condition 6(1) allows personal data to be processed (in this case, disclosed in response to Mr Robertson's information request) 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 subject (in this case, the individuals who initialled the Checklist).
30. There are, therefore, a number of tests which must be considered before condition 6(1) can apply. These are:
- Does Mr Robertson have a legitimate interest in obtaining this personal data?
 - If so, is the disclosure necessary to achieve those legitimate aims? In other words, is disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the data subject?
 - Even if the processing is necessary for the legitimate purposes of the applicant, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects? This will involve a balancing exercise between the legitimate interests of Mr Robertson and those of the data subjects. Only if the legitimate interests of Mr Robertson outweigh those of the data subjects can the personal data be disclosed.

Is there a legitimate interest?

31. In his submissions to the Commissioner, Mr Robertson expressed concern that the information he sought had been destroyed prior to his information request and he required confirmation of this fact. The redacted copy of the Checklist included the date when the records were destroyed but the initials of the individuals who undertook and supervised this destruction had been withheld. Mr Robertson stated that the release of the withheld information would provide him with confirmation that HMIe destroyed the information as advised in its correspondence and that HMIe employees of a senior position supervised the destruction of the records.
32. In this case, the Commissioner is satisfied that Mr Robertson has a legitimate interest in being able to fully scrutinise the process by which HMIe came to destroy the information being sought. The Commissioner also considers there is a general legitimate interest in ensuring transparency in such a process, which extends to those directly involved in that process.



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

33. The Commissioner must now consider whether disclosure is necessary for those legitimate interests. Having accepted Mr Robertson's legitimate interest in receiving the redacted information, the Commissioner is satisfied that disclosure is proportionate and that Mr Robertson's aims could not be achieved by any other means which would interfere less with the privacy of the individuals in question.

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

34. The Commissioner must now consider whether disclosure would nevertheless cause unwarranted prejudice to the rights, freedoms and legitimate interests of the individuals identified in the redacted information. As noted above, this involves a balancing exercise between the legitimate interests of Mr Robertson and the individuals in question. Only if the legitimate interests of Mr Robertson outweigh those of the individuals in question can the information be disclosed without breaching the first data protection principle.
35. In the Commissioner's briefing on section 38 of FOISA¹, the Commissioner notes a number of factors which should be taken into account in carrying out this balancing exercise. These include:
- a) 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).
 - b) the potential harm or distress that may be caused by the disclosure.
 - c) whether the individual has objected to the disclosure
 - d) the reasonable expectations of the individuals as to whether the information would be disclosed.
36. The Commissioner has also taken into account guidance from the (UK) Information Commissioner which advises that where personal data relates to an individual's public function rather than their private life, it is relevant to consider their seniority when deciding whether the information should be disclosed.
37. HMIE submitted that the staff concerned would not have expected their personal details to be placed in the public domain and, in particular, one of the officers was employed at the most junior grade within HMIE.

¹ <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=3085&sID=133>



38. Having balanced the legitimate interests of the data subjects against the legitimate interests identified by Mr Robertson, the Commissioner has concluded that disclosure would be unwarranted in this case in relation to the junior member of staff whose role within HMIE is purely administrative and who would not have expected their personal details to be released into the public domain. Accordingly, the Commissioner is satisfied that Condition 6 of Schedule 2 is not met in relation to this individual. For the same reasons, the Commissioner has concluded that disclosure would be unfair and, in breaching the first data protection principle, unlawful. Accordingly, the Commissioner finds that HMIE was correct to withhold the personal data of junior member of staff under section 38(1)(b) of FOISA.
39. The Commissioner has however concluded that the disclosure would not be unwarranted in relation to the senior member of staff whose personal data is under consideration. The Commissioner's view is that an officer of such seniority would reasonably expect that their identity, and involvement in an administrative aspect of the inspection process (i.e. overseeing a file record checklist) would be in the public domain. The Commissioner is not therefore satisfied that the disclosure of the personal data of this individual would breach the first data protection principle.
40. Having concluded that the disclosure of the personal data in relation to this individual would not breach the first data protection principle, the Commissioner has gone on to consider whether (as required by the first data protection principle) disclosure would also be fair and lawful.
41. The Commissioner considers that disclosure would be fair, for the reasons already outlined in relation to condition 6. HMIE has not put forward any arguments as to why the disclosure of the information would be unlawful (other than in terms of a breach of the data protection principles) and, in any event, the Commissioner can identify no reason why disclosure should be considered unlawful. .
42. The Commissioner therefore finds that HMIE was wrong to withhold the personal data of the senior officer under the exemption in section 38(1)(b) of FOISA and requires HMIE to release this information to Mr Robertson.

Recent Court of Session Opinion

43. The Commissioner notes that the information request by Mr Robertson was for copies of documents and that in the case of *Glasgow City Council and Dundee City Council v Scottish Information Commissioner* [2009] CSIH 73, the Court of Session emphasised that FOISA gives a right to information, not documents. However, the Court also said, in paragraph 45 of its Opinion, that where a request refers to a document which may contain the relevant information, it may nonetheless be reasonably clear in the circumstances that it is the information recorded in the document that is relevant. The Court also said that, if there is any doubt as to the information requested, or as to whether there is a valid request for information at all, the public authority can obtain clarification by performing its duty under section 15 of FOISA, which requires a public authority, 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.



44. In this case, the Commissioner notes that there is no indication in the correspondence he has seen between Mr Robertson and HMIE that HMIE questioned the validity of the information request. In addition, there is nothing to suggest from correspondence which HMIE has subsequently had with the Commissioner that HMIE was unclear as to what the information requested sought.
45. The Commissioner is satisfied that the request is reasonably clear and that the request is therefore valid.

DECISION

The Commissioner finds that Her Majesty's Inspectorate of Education (HMIE) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Robertson.

The Commissioner finds that HMIE was correct in advising Mr Robertson that it did not hold some of the information he sought in terms of section 17(1) of FOISA and in doing so complied with Part 1 of FOISA.

The Commissioner also finds that by withholding the personal data of one individual under section 38(1)(b) of FOISA, HMIE complied with Part 1 of FOISA.

However, by incorrectly applying section 38(1)(b) to the personal data of one individual, HMIE failed to comply with Part 1 of FOISA.

The Commissioner therefore requires HMIE to supply Mr Robertson with the information noted in paragraph 42 above by 28 January 2010.



Appeal

Should either Mr Robertson or HMIE 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.

Kevin Dunion
Scottish Information Commissioner
14 December 2009



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.

(.....)

- (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
 - (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-
 - (a) personal data of which the applicant is the data subject;
 - (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.

Data Protection Act 1998

1 Basic interpretative provisions

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

...

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.

...