

Decision Notice

Decision 017/2015 Mr Niall MacKinnon and Education Scotland

HMIE report of Glendinning Terrace Primary School, 2008

Reference No: 201400817

Decision Date: 10 February 2015



Scottish Information
Commissioner

Summary

On 6 November 2013, Mr MacKinnon asked Education Scotland for information from the report of the inspection of Glendinning Terrace Primary School carried out in 2008 by Her Majesty's Inspectorate of Education (HMIE). Education Scotland withheld the information, claiming that disclosure would prejudice the effective conduct of public affairs.

Following a review, which confirmed this decision, Mr MacKinnon remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner found that Education Scotland had wrongly withheld the information covered by Mr MacKinnon's request. She required Education Scotland to give Mr MacKinnon the information which had been wrongly withheld.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs)

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. In March 2008, HMIE carried out an inspection of Glendinning Terrace Primary School. Later that month, the head teacher, Irene Hogg, was found dead. A Fatal Accident Inquiry (FAI) Report into her death stated that there "can be no doubt that Irene Hogg's death is inextricably linked to the outcome of the Glendinning School inspection on March 2008."¹
2. On 6 November 2013, Mr MacKinnon wrote to Education Scotland with the following request:
"Please supply the content pertaining to the missing section of the HMIE report of Glendinning Terrace Primary School, 24 June 2008, on 'Leading and improving the school', in accordance with the format and methodology of HMIE reports then, and as would have been published, as follows:
 1. *The text of the report in the form in which it was on 21 March 2008 as it was read out to Irene Hogg at the inspection feedback from the records of the lead inspector.*
 2. *The evaluations (grades) which were communicated to Miss Hogg at that inspection feedback for:*
 - *Developing people and partnerships*
 - *Leadership of improvement and change (of the head teacher)*
 - *Improvement through self-evaluation."*

¹ <http://www.scotcourts.gov.uk/opinions/HOGG.html>

3. Education Scotland responded on 6 December 2013, withholding the information it held in terms of sections 30(b) and (c) of FOISA. In weighing up whether the public interest in disclosing the information outweighed the public interest in withholding the information, Education Scotland referred to its decision, taken at the time of publication of the report, not to comment publicly on the head teacher's leadership and management, out of respect.
4. On 5 February 2014, Mr MacKinnon wrote to Education Scotland requesting a review of its decision. Mr MacKinnon disagreed with the way in which Education Scotland had balanced the public interest in disclosing or withholding the information. He explained why he believed the information should be disclosed. In doing so he referred to concerns that he had previously communicated to HMIE and to the Scottish Public Services Ombudsman (the SPSO) about an HMIE inspection of a different school, of which he was the head teacher.
5. Education Scotland contacted Mr MacKinnon to clarify what information he wished it to consider when reviewing its response to his request. Mr MacKinnon provided clarification on 25 February 2014.
6. Education Scotland notified Mr MacKinnon of the outcome of its review on 5 March 2014. It continued to withhold the information held in terms of sections 30(b) and (c) of FOISA.
7. On 14 April 2014, Mr MacKinnon wrote to the Commissioner, 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.
8. The application was validated by establishing that Mr MacKinnon 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

9. Education Scotland is an agency of the Scottish Ministers (the Ministers) and, in line with agreed procedures, the Ministers were notified in writing on 29 April 2014 that an application had been received from Mr MacKinnon and that an investigation into the matter by the Commissioner had commenced. Education Scotland was asked to provide the Commissioner with the information withheld from Mr MacKinnon. The information was provided, and the case was then allocated to an investigating officer.
10. Subsequent references in this decision to submissions sought and received from Education Scotland are to be read as including submissions sought and received from the Ministers on behalf of Education Scotland.
11. The investigating officer subsequently contacted Education Scotland, 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, Education Scotland was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
12. Education Scotland provided submissions to the Commissioner. It initially relied on section 30(b) (submission dated 23 June 2014), but informed the investigating officer on 30 July 2014 that, instead, it wished to rely on section 30(c) of FOISA.
13. Mr Mackinnon was informed of Education Scotland's reliance on section 30(c). On 4 August 2014, he was invited to give his views on the use of the exemption and the public interest. He did so on 20 October 2014.

14. During the investigation, Mr MacKinnon confirmed that he was not seeking the personal data of any third-parties (i.e. parties other than Ms Hogg). The Commissioner, therefore, treated such third-party personal data as being outside the scope of the request, and not part of this decision.

Commissioner's analysis and findings

15. 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 MacKinnon and Education Scotland. She is satisfied that no matter of relevance has been overlooked.

The information requested and its status regarding publication

Information requested

16. It is important to be clear what recorded information, falling within the scope of Mr MacKinnon's request, was held by Education Scotland at the time he made his request.
17. The HMIE report into Glendinning Terrace Primary School, published on 24 June 2008, is in the public domain². This report states:
"Tragically, the school's head teacher, Irene Hogg, died shortly after the inspection. She was held in high regard by staff, children and parents. Out of respect for Irene, no further comment on her role as head teacher is made in this report."
18. Mr MacKinnon's request is reproduced in full in paragraph 2 above. The first part seeks the feedback given to the late Miss Hogg, whilst the second part seeks information about the evaluation (grades) communicated to her during that feedback. Overall, this information is described as "the content pertaining to the missing section of the HMIE report."
19. Mr MacKinnon explained in his submission to the Commissioner that:
"I am only asking that information be published as verbally disseminated and as was intended by HMIE would be published."
20. The FAI determination, to which reference has already been made, states:
"On Friday 21 March 2008 the inspection team met with Irene Hogg for a feedback session. The feedback, which would form the basis of the HMIE report, was recorded by Karen Gray, the Quality Improvement Officer, and is number 8 of the Crown productions."
21. Education Scotland explained that it did not hold a copy of any information recorded by the above named Quality Improvement Officer, who was an employee of Scottish Borders Council.
22. Education Scotland stated that the information it had withheld from Mr MacKinnon was "copies of the evidence base which was collected by HM Inspectors during the inspection", which contained details of the evaluations and evidence gathered during the inspection. Education Scotland explained that it held four versions of the evidence template used by the inspectors during the inspection. These documents represented the form in which information was held when it was discussed with the head teacher during feedback on 21 March 2008.

² http://www.educationscotland.gov.uk/Images/GlendinningTerracePrIns20080619_tcm4-698466.pdf

23. Education Scotland stated that it did not consider this information to be its “report”. The inspection report, as such, did not exist on the date specified in point 1 of Mr MacKinnon’s request (21 March 2008), but would be based on information from the completed evidence templates. The published inspection report was not drafted until 28 April 2008.
24. Education Scotland supplied the Commissioner with the four versions of the evidence template. It is evident that the differences between the versions in documents 1, 3 and 4 relate only to small formatting changes.
25. Education Scotland explained that it was likely that initial feedback would have been shared with Miss Hogg throughout the inspection week and that initial thoughts on evaluations would have been shared with her at the end of the week. These initial thoughts would have been supported by evidence collected and recorded by the team throughout the week. Under the inspection process in operation in 2008, the recorded evidence would, normally, then have been considered and discussed by the inspection team. It would form the basis of a full inspection report, which would have included information from the withheld sections of the documents. This process was not followed through after the inspection of Glendinning Terrace Primary School, due to the tragic circumstances.
26. In relation to Mr MacKinnon’s request for information “pertaining to the missing section of the HMIE report of Glendinning Terrace Primary School, on leading and improving the school”, Education Scotland considered that the only information falling within the scope of the request was found within Section 7: Leading and Improving the school, specifically:
 - 9.3 Developing people and partnerships;
 - 9.4 Leadership of improvement and change (of the head teacher); and
 - 5.9 Improvement through self-evaluation.
27. Having considered all the information supplied to her by Education Scotland, the Commissioner is satisfied that the information identified by Education Scotland and detailed in the preceding paragraph is the information likely to have been communicated to Miss Hogg when she was provided with feedback from the inspectors during the inspection. The Commissioner is satisfied that Education Scotland does not hold any other information covered by Mr MacKinnon’s request.

Status regarding publication

28. Mr MacKinnon stated (in his application of 14 April 2014 and in his requirement for review of 25 February 2014) that “HMIE would, in the normal course of events have published this information. When it was written it was intended for publication.” Mr MacKinnon also commented that his request was for information from sections of an HMIE inspection report which were presented as inspection feedback to the head teacher and local authority representatives, and were intended for publication.
29. The Commissioner accepts that the information in the evidence template was likely to have been discussed with Miss Hogg and local authority staff, and would have formed the basis of the published inspection report. However, she does not accept that the withheld information would have been published as it stood, had the inspection followed the normal course. Although the withheld information would undoubtedly have informed what was published, it is not a complete, ready-for-publication text, but details of the evaluations and evidence gathered.

30. In the circumstances in which the information was obtained and created by staff of Education Scotland, the Commissioner accepts that it was created on the understanding that it was for internal use, and not drafted for publication. In the Commissioner's view, simply providing feedback from this data to those involved in the inspection cannot be said to be equivalent to putting information into the public domain, or to have that effect.
31. Mr MacKinnon also argued that some of the information had been disclosed "in certain forums but in partial and haphazard form", citing press articles and the FAI into Miss Hogg's death. The Commissioner considered the argument that the information has been partially disclosed, but did not find it to be borne out. In relation to information in the FAI report, she accepts that it contains some information about the gradings awarded by the inspectors, but does not accept that the FAI report discloses the content of the withheld information to any significant extent.
32. Consequently, the Commissioner does not accept Mr MacKinnon's arguments that the withheld information was either intended for publication or has been made public (to any significant extent) through the feedback process during the inspection or in the FAI report.

Section 30(c) – Prejudice to effective conduct of public affairs

33. Education Scotland submitted that the information covered by Mr MacKinnon's request was exempt from disclosure under section 30(c) of FOISA.
34. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs." The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
35. The prejudice in question must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).

Prejudice to conduct of public affairs – effect of disclosure on future inspections

36. Education Scotland was of the view that disclosure of the withheld information into the public domain would substantially affect the ability of a school inspection team to conduct its business effectively. In its view, stakeholders would be reluctant to participate in discussions and provide their views fully and frankly to inspectors if they believed that their views were likely to be made public. Even if their name was not included, those who had issues they wished to raise would be likely to be concerned in many cases that they could be identified by others in the school from the substance of their comments. This would significantly harm Education Scotland's ability to carry out many aspects of its work, and could adversely affect its ability to gather all the evidence it needed to make fully informed decisions about a school's performance.
37. This, in turn, it was claimed, could harm the performance and improvement of many other schools that may not receive a full and considered inspection report, due to a lack of engagement with the school itself and its community.

38. Education Scotland's submissions indicated that, during the Glendinning Terrace Primary School inspection, inspectors would have consulted with stakeholders which included children, parents and staff. This would have been through discussions, observations and questionnaires, in order to gather the evidence they needed. All evidence would have been recorded on the evidence notepad and may have included details of a sensitive or identifiable nature recorded during meetings with parents or children.
39. Additionally, Education Scotland pointed out that the normal process of inspection could not be followed in this case. The head teacher was unable to comment on the evidence or provide additional evidence, due to the tragic events following the inspection.
40. In these circumstances, Education Scotland considered that disclosure of the withheld information would harm both the future effectiveness of the inspection process, and stakeholders' perceptions about its fairness. It argued that disclosure of the withheld information, which relates to a very public inspection which has undergone a great deal of scrutiny, "may irreparably damage the trust that Education Scotland has with its stakeholders, which is required for the inspection process to work effectively."
41. Education Scotland explained that, following a review of the inspection process in 2011, a number of changes to the inspection process were made. These included a change to a letter format inspection report which gives an overview of the inspection findings and is designed to be more understandable for the reader. As the letter no longer details all the evidence that was found during an inspection, the record of inspection findings is held on Education Scotland's files. The draft report and evidence is considered by the head teacher and education authority before publication and they are allowed the opportunity to comment and provide supplementary evidence. Following the completion and publication of the report, the final record of findings is proactively shared with the head teacher, education authority and chair of the parent council so that they can use the evidence as a way to inform their plans for improvement.
42. Education Scotland submitted that while there have been changes to the way in which it records and shares its inspection findings, "the fundamental aspect of the inspection process has remained the same."
43. Education Scotland explained that HM Inspectors still consult with children, parents and staff through discussions, observations and questionnaires. These discussions were described by Education Scotland as being "of a free and frank nature where parents, teachers and children are encouraged to speak about how they feel the school is performing and where there may be areas for improvement." Education Scotland submitted that it was essential that HM Inspectors were able to continue to have these discussions, often in confidence, and to keep records of these views in order for it to continue to conduct its business effectively by ensuring its inspections are able to consider properly any issues or concerns parents, children or teachers may have.
44. Mr Mackinnon was invited to comment on the argument that disclosure of the withheld information would substantially affect the ability of future school inspection teams to conduct their business effectively. Mr Mackinnon accepted that disclosure of the information could cause harm but believed that, by exposing the conduct of the inspectors, this would be of benefit to the conduct of public affairs. He argued that it would draw attention to the methods and conduct of the inspectors, allowing consideration of appropriate methods of institutional review and individual professional review at a time of immense change in school education.

45. Mr Mackinnon expressed strong concerns (which he has made public elsewhere) on the inspection process employed by school inspectors, and in particular, the use of “secret assertion” then used to make decisions about a school’s performance.
46. Mr Mackinnon also provided comments on the extent to which the inspection process has changed since 2008. In summary, he did not accept that the inspection process itself had altered significantly, although the descriptors against which schools must now self-evaluate have changed.

The Commissioner’s views

47. The Commissioner is aware that the inspection process followed in 2008 has undergone review and change since then. She has considered the extent to which this is relevant in relation to arguments that disclosure of information from an inspection carried out under the old arrangements could now substantially prejudice inspections carried out under the new process, given that the changes to processes were not fundamental, and the actual process followed at the time was atypical.
48. The Commissioner notes that the information was created within an inspection process which was, in some respects, different from the inspection process that is now used, but notes that in the context of stakeholder engagement the change is minimal. The Commissioner studied the withheld information and Education Scotland’s submissions, and found little evidence that the content relates directly to discussions or comments from stakeholders such as parents, children and teachers. This, in turn, lessens the weight of Education Scotland’s argument that disclosure would inhibit stakeholders from participating frankly in future inspections.
49. In this context it is difficult for the Commissioner to accept that disclosure of information created would significantly harm Education Scotland’s ability to carry out many aspects of its work, or adversely affect its ability to gather all the evidence it needs to make fully informed decisions about a school’s performance.
50. The Commissioner acknowledges that the withheld information in this case cannot be seen in isolation from the uniquely tragic circumstances following the school inspection in question. Generally, the sensitivity of information is likely to decline with the passage of time. In this case, Mr MacKinnon made his request for information created in March 2008 some five years later, in November 2013. The Commissioner acknowledges that the events with which this school inspection is now associated will always cause pain and distress to some people. But however compelling this is, she considers the full discussion at the Fatal Accident Inquiry and the passage of time have diminished the sensitivity.
51. When Education Scotland issued its report on the inspection of Glendinning Terrace Primary School in 2008, it withheld some information out of respect for the memory of Miss Hogg. Mr MacKinnon himself acknowledged the necessity for utmost respect to be shown to the memory of Miss Hogg and her family, when making his request. The Commissioner accepts that this is a natural human reaction, and one with which most people would identify. Here she is required to consider this in the context of the impact on effective conduct of public affairs.

52. It could be argued that disclosure of the withheld information would be likely to damage trust in the inspection process, because it is known to relate to such a tragic case and because it is known that Education Scotland took a decision not to publish the withheld information out of respect for Miss Hogg. In these circumstances, disclosure in response to Mr MacKinnon's request might well be seen as a betrayal of trust.
53. The Commissioner accepts that the feeling of respect for Miss Hogg's memory and a reluctance to do anything which might seem disrespectful to that memory could be a relevant consideration in this case, in relation to the exemption in section 30(c) of FOISA. However, she must base her decision on the arguments presented by Education Scotland. In this case Education Scotland did not make strong arguments in this respect, and based on them, the Commissioner does not accept Education Scotland's submission that disclosure of information withheld out of respect would be likely to lead to a general breakdown of trust affecting other inspections.
54. It could be argued that simply *because* the circumstances surrounding this case are unique and have been widely discussed in the context of the FAI, disclosure of information from the inspectors' evidence notes in this case could be made without fear that this would erode trust in the inspection process as a whole. The atypical process followed and the unique nature of the case means it is unlikely to be seen as setting a general precedent for disclosure of information from inspectors' notes.
55. The Commissioner must consider whether disclosure of the information would cause the level of harm to justify its exemption from disclosure under section 30(c) of FOISA; in other words, whether its disclosure, in response to Mr MacKinnon's request, would or would have been likely to cause substantial prejudice to the conduct of public affairs.
56. On balance, the Commissioner does not accept that disclosure of the withheld information would be likely to damage trust in the inspection process by significantly harming or limiting Education Scotland's ability to carry out effective inspections.
57. The Commissioner has reached this conclusion for the reasons she has given above, acknowledging that the withheld information relates to such a tragic case, with its own unique circumstances. In all the circumstances, the Commissioner does not accept that Education Scotland was correct to apply the exemption in section 30(c) of FOISA to the withheld information.

Action

58. The Commissioner requires Education Scotland to provide Mr MacKinnon with the information which it withheld from him, ensuring that personal data outwith the scope of the request is redacted. The Commissioner will provide Education Scotland details of the information to be disclosed to Mr MacKinnon.

Decision

The Commissioner finds that Education Scotland did not comply with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr MacKinnon. In particular, the Commissioner finds that Education Scotland was wrong to withhold information under the exemption in section 30(c) of FOISA.

The Commissioner requires Education Scotland to provide Mr MacKinnon with the information which was wrongly withheld by 30 March 2015.

Appeal

Should either Mr MacKinnon 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.

Enforcement

If Education Scotland fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that Education Scotland has failed to comply. The Court has the right to inquire into the matter and may deal with Education Scotland as if it had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner
10 February 2015

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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (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 –
 - ...
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

- ...
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info