



Scottish Information
Commissioner

Decision 017/2006 – Mrs X and Angus Council

Request for documentation on how the members of the appeal hearing committee reached their decision

Applicant: Mrs X
Authority: Angus Council
Case No: 200501927
Decision Date: 2 February 2006

Kevin Dunion
Scottish Information Commissioner

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Decision 017/2006 – Mrs X and Angus Council

Request for details of how the members of an appeal hearing committee reached their decision – section 30(b) free and frank provision of advice and exchange of views for the purposes of deliberation – section 30(c) effective conduct of public affairs – section 38 personal information

Facts

Mrs X submitted an information request to Angus Council (the Council). The request was for details of how the members of the Appeal Hearing Committee had reached their decision in relation to the exclusion of a pupil from a school under the Council's management. No information was provided to Mrs X in response to her request on the basis that the information was personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") of section 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA) was satisfied. The Council also argued that to release the information would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation, or would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs, and therefore that the information was exempt from release under section 30(1)(b) and (c) of FOISA. The decision was upheld by Angus Council on review and Mrs X applied to the Commissioner for a decision.

Outcome

The Commissioner found that Angus Council had complied with Part 1 of FOISA in withholding the information requested from Mrs X.

Appeal

Should either Mrs X or the 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 of receipt of this notice.



Background

1. On 12 March 2005, Mrs X submitted a request for information to the Council asking for details of how the members of the appeal hearing committee had reached their decision in relation to the exclusion of a pupil from a school under the Council's management.
2. The Council replied to Mrs X on 12 April 2005. The information was withheld from Mrs X on the basis of sections 30(b) and 30(c) of FOISA.
3. Mrs X was dissatisfied with the response from the Council and asked the Council to review its original decision on 26 April 2005.
4. The Council issued its review decision on 19 May 2005. The Council upheld its decision to withhold the information from Mrs X under section 30(b) and 30(c) of FOISA on the basis that release of the information would, or would be likely to, inhibit substantially the free and frank provision of advice; or the free and frank exchange of views for the purposes of deliberation; and would otherwise be likely to prejudice substantially the effective conduct of public affairs. It cited the need to give the Appeal Committee the opportunity to deliberate in private and the public interest in doing so. The Council advised Mrs X that it was also relying on section 38 of FOISA to exempt the information from disclosure on the basis that the information requested contained personal information about an individual, the release of which would breach the Data Protection Act 1998 (DPA).
5. On 21 May 2005, I received an application for a decision from Mrs X concerning the Council withholding the information she had requested. The case was subsequently allocated to an investigating officer within my office.

The Investigation

6. Mrs X's appeal was validated by establishing that she had made a valid information request to a Scottish public authority under FOISA and had appealed to me only after asking the Council to review the response to her request.
7. A letter was sent by the investigating officer to the Council on 30 June 2005, asking for its comments on Mrs X's application in terms of Section 49(3)(a) of FOISA. The Council was asked to provide:



A copy of the information withheld

- A detailed analysis of the application of section 30(b) & (c) of the Act. The Council was asked to identify clearly the 'advice' provided for this appeal hearing, the process of 'deliberation', and the views exchanged as part of this process. It was asked to include a detailed analysis of the public interest test.
 - A detailed analysis of the application of section 38 of the Act, including the subsection relied on. The Council was also asked to identify which of the Data Protection Principles it considered to be breached in the event that this information was released. Finally, it was asked to provide an analysis of the public interest test where appropriate.
8. A full response to this letter was received from the Council on 15 July 2005.

Submissions from the Council

9. In its submissions to my office the Council has cited the following exemptions under FOISA to justify withholding the information:
- Section 30(b)(i) Prejudice to effective conduct of public affairs (free and frank provision of advice);
 - Section 30(b)(ii) Prejudice to effective conduct of public affairs (free and frank exchange of views for the purposes of deliberation);
 - Section 30(c) Prejudice to the effective conduct of public affairs;
 - Section 38(1)(b) Personal Information.

I will consider the Council's reasoning for relying on each exemption further in my Analysis and Findings.



Submissions from Mrs X

10. Mrs X submitted that a decision taken to overturn the exclusion of a self-confessed disruptive pupil cannot be in the public interest, especially with so much concern about poor discipline in schools. The grounds for the girl's exclusion were that her continued attendance at the school would be likely to be seriously detrimental to the order and discipline in the school or to the educational well-being of the pupils there. By overturning her exclusion the message to all teaching staff, pupils and the public was that this sort of behaviour was acceptable.
11. Mrs X has also indicated in her request for review that she understood that the Appeal Committee was strictly independent from the Council, as Education Authority. Mrs X went on to suggest that if the Appeal Committee made this information available to the Council despite being independent from it, then it should also make the information available to her.

The Commissioner's Analysis and Findings

12. In its response to my office the Council provided copies of the documents that they had withheld from Mrs X together with a schedule detailing the documents and an explanation of the exemptions that they were relying upon in not disclosing this information to Mrs X.
13. The Council have submitted 4 documents to my office and for each of them have relied on all the exemptions claimed for withholding the information.
14. The 4 documents that were submitted by the Council can be classified as follows:
 - (1) Notes taken by a Committee Officer during the meeting of the Appeal Committee.
 - (2) Notes taken by the Principal Solicitor during the meeting of the Appeal Committee.
 - (3) Papers for the meeting of the Appeal Committee.
 - (4) Minute of meeting of the Appeal Committee



15. The following documents which have been provided by the Council do not contain any of the information that has been requested by the applicant and so I have not considered these as part of the investigation. These documents are; minute of the meeting of the Appeal Committee, letter detailing when and where the appeal committee would be held, an agenda for the meeting and a document outlining the procedure that is followed by the Appeal Committee.
16. For the purposes of this investigation I regard document 3 as being the copy correspondence and other documents submitted by the parties and circulated as part of the papers for the Appeal Committee, most of which is correspondence between the parent (mother of the child) and the authority.
17. The exemption under section 30 is a qualified exemption which means that the application of this exemption is subject to the public interest test. Where a public authority finds that this exemption applies to the information that has been requested it must go on to consider whether, in all circumstances of the case, the public interest in withholding the information is outweighed by the public interest in disclosing the information. If the two are evenly balanced, the presumption should always be in favour of disclosure.
18. The exemption under section 38(1)(b) is an absolute exemption where the conditions in s38(2) or (3) are met and therefore there is no requirement for the public authority to apply the public interest test where it finds that the information requested falls within the scope of this exemption.

The application of Section 38(1)(b) – Personal Information

19. As has been explained previously the exemption under section 38(1)(b) is an absolute exemption.
20. In order for the public authority to be able to rely on this exemption it would have to show that the information which has been requested is personal data for the purposes of the DPA and satisfies either the first condition contained in subsection 2 of section 38 or the second condition contained in subsection 3 of section 38.
21. Basically, the first condition is that the disclosure of the information to a member of the public otherwise than under FOISA would contravene- (i) any of the data protection principles; or (ii) section 10 of the DPA (right to prevent processing likely to cause damage or distress).
22. The second condition is that, by virtue of any provision of Part IV of the DPA, the information is exempt from section 7(1)(c) of the DPA (data subject's right of access to personal data).



23. In justifying its use of the exemption the Council has indicated that it is firmly of the view that the names and other information by which individual school children could be identified is personal data in terms of Section 1 of the DPA. The Council has also cited the Court of Appeal case of Michael John Durant v Financial Services Authority to support its view that the information relating to school children which the Council regards as personal, is biographical about a living individual and has the individual as its focus.
24. The Council has also provided submissions as to why it believes that release of the information to the applicant would breach the first and second principles under the DPA. In relation to the first principle, which requires personal data to be processed fairly and lawfully, the Council has stated that release of the information would be unfair since the individuals concerned have no expectation or understanding that their details would be released to the public. The Council goes on to say that in particular, the very nature of the Appeal Committee procedure is such that there is an expectation of privacy with regard to the information. In respect of processing the data lawfully the Council has indicated that the Appeal Committee procedure is governed by the Education (Appeal Committee Procedures) (Scotland) Regulations 1982, which would permit the use of the information for that purpose. The Council states that it is not clear if release of the information for the purposes of an FOI request would be lawful in terms of the first principle.
25. The Council has also indicated that none of the conditions relevant for the purposes of the first principle under the DPA appear to have been met if the information is to be released. In particular, the data subjects have not consented to the processing of their personal data for this purpose.
26. The Council has stated that the release of the information would breach the second principle, which requires that personal data must be obtained only for one or more specified and lawful purpose and must not be processed in a manner which is incompatible with that purpose. The reason the Council gives for this is that the purpose of obtaining and recording the personal information was not to release the information to the public but rather to enable the Committee to deliberate and take a decision on the matter in question.
27. In addition, the Council is of the view that to release the information would cause damage and distress to the individuals concerned as they have an expectation that the information is kept private. In the Council's view, the public interest does not apply in the circumstances.



28. Having looked at the information that has been provided by the Council, together with its submissions, I am satisfied that document 3 together with the transcripts of the notes (documents 1 and 2) taken during the hearing would be covered by the first condition under section 38(1)(b), as their release would contravene first data protection principle. The information in these documents does come under the definition of data in section 1(1) of the Data Protection Act 1998. This information forms part of a record processed by an education authority for the purposes of its functions relating to the provision of school education and in relation to a pupil at a school provided by it and therefore is an accessible record for the purposes of the DPA.
29. The information contained in documents 1 and 2 contains a great deal of personal information, not only in relation to the subject of the appeal but also other witnesses who were present at the time of the incident to which the appeal refers. The transcripts also contain personal information about the applicant. I am satisfied that the information in the transcripts is biographical in relation to the individual who is the subject of the appeal and has that individual as its focus. Accordingly, I am satisfied that this information is that individual's personal data.
30. I am also satisfied that the information contained in document 3 constitutes personal data of the subject of the appeal and has the subject of the appeal at its focus.
31. I am satisfied that if the Council were to be required to release the information then in doing so it would breach the first data protection principle. I accept the Council's submission that there was no expectation on the part of the contributors that their information would be processed or used for any purpose other than that of the Committee hearing. Further, processing of the information for a purpose other than the Committee hearing would not satisfy any of the conditions laid down in Schedule 2 of the DPA. I have also taken into account that these types of hearings are considered in private. If the Council were required to release this information, I accept that it would be likely to cause damage and distress to the individual who was the focus of the hearing. In all the circumstances, I accept that to release the information under FOISA would not be fair or lawful and therefore would contravene the first principle.
32. I also accept that if the Council were to be required to release the information contained within documents 1, 2 and 3, then in doing so it would breach the second data protection principle. I am satisfied that this is the case as the information which was used to assist the members of the Appeal Committee with their deliberations was collected for the purposes of the Appeal Committee hearing only and that the individuals who provided that information did not have any expectation that it would be processed for any other purpose.



33. I recognise that it might be in the interests of the applicant for them to gain access to this information, but that does not mean that it would be consistent with the data protection principles. In any event, I have to be mindful of the fact that if the Council were required to release the information they would not simply be releasing this information to the applicant. The very nature of the Freedom of Information (Scotland) Act 2002 means that this information would be released into the public domain. It should be noted however that the applicant would be entitled to make a subject access request under the Data Protection Act 1998 to the public authority and this would allow the applicant to seek access to any information which the public authority held about them (although not about third parties).

The application of Section 30(b)(i) – Prejudice to the effective conduct of public affairs

34. In order for the public authority to be able to rely on this exemption they would have to show that disclosure of the information which has been requested would, or would be likely to, inhibit substantially the free and frank provision of advice.
35. As I have said in previous decisions (for example 025-2005, 041-2005 & 067-2005), it is my view that the standard to be met in applying the tests in section 30(b)(i)&(ii) is high. In applying these exemptions the chief consideration is not whether the information constitutes advice or opinion, but whether the release of the information would inhibit substantially the provision of advice or the exchange of views. In determining whether disclosure of information would have a substantially inhibiting effect consideration should be given to, whether the damage caused by disclosing the information would be real or very likely, not simply hypothetical. The harm caused must be significant not marginal and it would have to occur in the near future and not in some distant time.
36. The Council has stated that its interpretation of “advice” in the present situation was in terms of the submissions by the parties and the evidence of witnesses to the Appeal Committee in order that the Committee could be informed of the position and come to a conclusion on the matter. The Council’s position is that the parties and witnesses involved in the appeal against the exclusion of a pupil from school must be given the opportunity to advise the Committee of their position in private and that it is in the public interest for them to do so.



37. As stated above the application of the exemption under section 30 is subject to the public interest test. The public interest has been described as something which is of serious concern and benefit to the public not merely something of individual interest. It is not something which is of interest to the public but something which is in the interest of the public.
38. The Council has argued that there is a very strong public interest consideration that the Appeal Committee is provided with an accurate statement of facts that can assist it in making its deliberations. Accordingly, it is imperative that those advising the Committee do not feel constrained in the belief that what they say will be made public and therefore they might not be as forthright if that were the case.
39. My first task is establish whether the exemption applies, and only if it does would I then go on to consider the public interest test. Having looked at the information provided by the Council I am not satisfied that documents 1, 2 and 3 would be exempt under section 30(b) (i). As I have said already the test that has to be satisfied to show that information is exempt under this section is high. I am not satisfied that the statements and correspondence contain advice for the purposes of the Act; I am of the view that they contain evidence or information which has been provided by the contributors for the purposes of the hearing. In addition, I am not satisfied that the Council has put forward sufficient arguments to show that the release of this information would have a substantially inhibiting effect on the provision of advice.
40. As I am not satisfied that this information is exempt under section 30(b)(i) I have not taken into consideration the public interest test.

The application of Section 30(b)(ii) – Prejudice to the effective conduct of public affairs.

41. In order for the Council to be able to rely on this exemption it would have to show that disclosure of the information requested would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.
42. In paragraph 34, I have summarised the standard to be met in applying this test. The main consideration is whether the release of the information would inhibit substantially the provision of advice or the exchange of views.
43. In its submissions to my office the Council has advised that the process of deliberation was an exchange of views between the Committee members. This focussed on a consideration by the Committee members of the submissions made by both parties, the evidence of witnesses and the written information which had been circulated prior to the meeting. The Council's position is that the Appeal Committee must be given the opportunity to deliberate in private and that it is in the public interest for it to be able to do so.



44. Again in this case the Council is required to take into account the application of the public interest test. In doing so the Council has submitted that, there is a very strong public interest consideration that the members of the Appeal Committee can speak with candour and freedom in the making of their deliberations and they need to be confident that their deliberations are made without reserve.
45. The Council has submitted that in terms of the Education (Appeal Committee Procedures) (Scotland) Regulations 1982, which govern the appeal process, Regulation 13 provides that only certain individuals are entitled to be present at the Appeal Hearing. The implication, therefore, is that the hearing takes place in private. The Council has drawn comparisons between this type of hearing and any subsequent appeal which would be held by the Sheriff in Chambers. The Council believes that it was the intention of Parliament that such hearings should take place in private and that this is in the public interest. The Council submits that it gave serious consideration to the meaning/application of the exemption; however it concluded that, as regards the public interest test, the balance tipped in favour of withholding the information for the various reasons noted above. The Council was unable to establish how releasing the information would be in the public interest and felt strongly that to release the information would be detrimental to the individuals concerned and the effective working of the Appeal Committee. The Council is of the view that it is in the public interest to maintain an Appeal Committee system that encourages the free and frank provision of advice and exchange of views and that accords with the spirit of the legislation that governs the appeal process.
46. Again my first task is establish whether the exemption applies, and only if it does would I then go on to consider the public interest test. In reviewing the documentation that has been withheld from Mrs X, particularly the transcripts of the hearing, and in taking into account the submissions from the Council together with an application of the public interest test, I am not satisfied that section 30(b)(ii) applies. I accept that the exemption could apply to records of this kind but in this particular case, although the transcripts record opinions put forward by members of the Committee in the course of or following deliberation, these opinions are not capable of being attributed to particular individuals. Therefore, I cannot accept that disclosure could reasonably be expected to have the inhibiting effect suggested by the Council.



47. The Council have also included the information contained in document 3 under this exemption. In reviewing this documentation I am satisfied that this too contains opinions on the part of the parent of the appellant and the management of the school and that these would have been taken into account by the Committee members in the course of their deliberations. They are certainly expressed more frankly than might have been the case had the writers expected them to be placed in the public domain. However, the views were not expressed for the purposes of or in connection with the Committee's deliberations, or as part of or in connection with any other deliberative process. Therefore I cannot accept that their disclosure could reasonably be expected to have an inhibiting effect on any such process and am not satisfied that this information should be exempt under section 30(b)(ii).
48. As I am not satisfied that this information is exempt under section 30(b)(ii) I have not taken into consideration the public interest test.

The application of section 30(c) – Prejudice to effective conduct of public affairs

49. In order for the Council to be able to rely on the exemption under section 30(c) the disclosure of the information which has been withheld would have to otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. This is a broad exemption, and I expect any public authority citing it to show what specific harm would be caused to the conduct of public affairs by release of the information.
50. In its submissions to my office the Council has relied on the arguments that it has put forward in relation to their reliance on the exemptions under section 30(b)(i) and 30(b)(ii). The Council has added that, a consequence of releasing such information is that there is a serious risk that the members of the Appeal Committee, and indeed any parties and witnesses involved in future Hearings, may not feel that they are in a position to be as open as they would wish to be for fear of repercussions or that they could be perceived to be "saying the wrong thing".
51. Like the other two exemptions that have been relied upon under section 30 this exemption is a qualified exemption and as such the Council are required to apply the public interest test. In applying the public interest test the Council has submitted that, again there is a very strong public interest consideration that all the parties involved can speak freely in the knowledge that this information is necessary in order to ensure that all angles can be covered and the correct decision taken.



52. Again my first task is establish whether the exemption applies, and only if it does would I then go on to consider the public interest test. Having taken into account the submissions from the Council I am satisfied that the information which has been withheld from Mrs X in respect of the written (document 3) and oral (most of documents 1 and 2) submissions of the parties and witnesses at the hearing should be exempt under section 30(c) of the Act. In my view the system of Appeal Committee Hearings would be substantially prejudiced if disclosure was made, as this would be likely to affect the willingness of parties and witnesses involved in future Hearings to be as open as they would be if the Hearing was in private and that as a consequence this would substantially prejudice the ability of the Appeal Committee to secure the information relevant to come to their decision on the appeal.
53. Having established that the exemption applies I then considered the public interest test I have taken into account the general public interest in whether disclosure would enhance the scrutiny of the decision making process and thereby improve accountability. I have considered this along with the submission from Mrs X in relation to her view that it would be in the public interest for this information to be released due to the public concern about poor discipline in schools. It does not seem to me to be the case that the information is being sought to establish whether the Appeal Hearing was conducted in the manner which is laid down by Education (Appeal Committee Procedures) (Scotland) Regulations 1982. There has been no suggestion that it was not. Rather it appears to me that the information is being sought to try to understand why in this particular case the decision of the school to exclude the pupil was overturned by the Committee. I appreciate that this might be of particular interest to Mrs X but I am not clear that it is in the public interest that this information should be disclosed as it does not tell us about the views of authorities or Appeal Committees on matters of school discipline but only about their views on the particular case before them. What public interest there is in disclosure is, to my mind, outweighed by the public interest in ensuring that the Appeal Committee is able to go about its work and secure the information from parties and witnesses to allow it to come to a well informed decision. I am satisfied that on balance the public interest in withholding the information (on which I accept the Council's arguments) outweighs that of disclosure. I am therefore satisfied that the Council has applied the exemption under section 30(c) correctly.



Decision

I find that Angus Council has dealt with the applicant's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 in withholding information about the deliberations of the appeal hearing from Mrs X. The exemptions in 30(c) and 38(1)(b) were relied upon correctly by the Council and, as a result, section 1(1) was applied correctly.

I find that Angus Council has not dealt with the applicant's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 in applying the exemption under section 30(b)(i) and 30(b)(ii) and, as a result, section 1(1) was not applied correctly in this respect. I do not require the authority to carry out any action in relation to this breach as the information to which this exemption was applied was found to be exempt under section 30(c).

Kevin Dunion
Scottish Information Commissioner
2 February 2006