



Scottish Information
Commissioner

189/2006 Decision Mr & Mrs N and Highland Council
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<i>Request for report into incidents of bullying</i>
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Applicant: Mr & Mrs N
Authority: Highland Council
Case No: 200503040
Decision Date: 26 October 2006

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 189/2006 Mr & Mrs N

Request for report into incidents of bullying – information withheld under section 38(1)(b) – section 38(1)(a) considered to apply – redacted information supplied to applicants during course of the investigation under Data Protection Act 1998 - application of section 38(1)(b) upheld in respect of remaining information

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); 16(1) Refusal of request; 19(b) Content of certain notices; 38(1)(a) and (b) (Personal information)

The text of these provisions are reproduced in the Appendix to this decision. The Appendix forms part of the decision.

Facts

Mr & Mrs N complained to Highland Council (the Council) regarding bullying of their child at school. Following an investigation Mr & Mrs N asked to see a copy of the Report into their complaints. The Council refused to supply a copy of the Report. In subsequent correspondence Mr & Mrs N again asked to see a copy of the Report. This was again refused by the Council. Mr & Mrs N complained to my Office. During the course of the investigation the Council supplied a redacted copy of the Report to Mr & Mrs N under the Data Protection Act 1998 (DPA). The Council continued to withhold information it considered was exempt by virtue of section 38(1)(b) of FOISA. Mr & Mrs N asked the Commissioner to reach a decision on whether the redacted information was correctly withheld under section 38(1)(b).

The Commissioner found that the information was withheld correctly under section 38(1)(b).



Background

1. Mr & Mrs N complained to the Council about the bullying of their child at school. The Council undertook an investigation into the complaints. On 14 June 2005 Mr & Mrs N wrote to the Council and requested a copy of the report written in respect of the investigation (the Report).
2. On 5 July 2005 the Council responded to this request. The Council advised that the investigation was undertaken with no plans to provide detail of the written content to any of the parties involved.
3. On 15 September 2005 Mr & Mrs N wrote again to the Council. They again requested a copy of the Report.
4. On 5 October 2005 the Council responded to this request. The Council advised that the investigation had been carried out on the basis that the details and content of the investigation would not be shared with parties. The Council advised that their investigating officer spoke with the Head Teacher, a class teacher and a number of pupils at the schools. The Council provided a brief summary of the Report and indicated that it concluded with a number of recommendations. The Council indicated that Mr & Mrs N had already been provided with details of the recommendations and the actions taken and proposed by the Council in the light of the recommendations.
5. The Council indicated that legal advice had been sought and it had been advised that release of the Report would be contrary to the understanding upon which parties relied when agreeing to co-operate with its preparation. More fundamentally, the Council advised, the Report clearly contained material emanating from and in respect of third parties and the consent of all such parties would need to be obtained prior to its release.
6. Mr & Mrs N were dissatisfied with this response and on 8 November 2005 applied to my Office. They indicated that they wished to see a copy of the Report and asked me to intervene.
7. The case was allocated to an investigating officer. Mr & Mrs N's appeal was validated by establishing that they had made a request to a Scottish public authority, and had appealed to me only after asking the authority to review its response to their request. I am satisfied that the follow up letter which Mr & Mrs N sent on 19 September 2005 to the Council constituted a valid request for review in that the applicants again requested sight of the Report that had previously been refused.



The investigation

8. The investigating officer contacted the Council on 15 November 2005 giving notice that an appeal had been received and that an investigation into the matter had begun. The Council was asked to comment on the issues raised by Mr & Mrs N's case in terms of section 49(3)(a) of FOISA and to provide supporting documentation for the purposes of the investigation.
9. In particular, the Council was asked to supply a copy of the Report withheld from the applicants and to provide analysis of the exemptions that applied to this information. The Council was also asked to provide copies of any internal correspondence relating to consideration of this request.

Council's submissions

10. The Council responded to this request on 29 November 2005. The Council advised that the Report had been compiled by the Quality Development Manager. A number of pupils, parents and staff were interviewed as part of the investigation of the bullying incident in order to provide a report to the Area Education Manager. The Council indicated that at no time were any parents or pupils informed that the Report or the notes of their interviews would be published.
11. The Council advised that traditionally these investigation reports had not been disclosed to either victims or perpetrators and had been used to inform managers and head teachers of incidents and issues in question and required actions. The Council advised that there had been an assumption that the information collected for the Report would be treated as confidential and that this was the expectation of the parents and pupils interviewed.
12. The Council advised that the Report detailed the actions and opinions of a number of different people and was written in such a way that these details were inseparable. The Council considered that these actions and opinions represented the personal data of the interviewees and that they must therefore be held in compliance with the data protection principles. The Council advised that redacting the Report had been considered but it had become evident that only the applicants' submission and the conclusions that had already been provided would remain.
13. The Council indicated that some sections of the Report were exempt under section 38(1)(b) in that they represented the personal information of the pupils involved in the incident and under section 38(2)(a)(i) because the parents and pupils were informed that the report was being compiled for the Area Education Manager and were not informed that it would be made public.



Information supplied to the applicants during the course of investigation

14. Given the nature of the Report it understandably contains information about Mr & Mrs N and their child. Information which amounts to the applicants' personal data (and which amounts to their son's personal data, which, given his age, Mr & Mrs N have a right to access under DPA), falls outwith the scope of FOISA by virtue of section 38(1)(a) and instead is required to be considered under DPA.
15. The Council was therefore asked to indicate, as far as possible, the information that it considered fell within the scope of DPA and the information it considered was exempt by virtue of section 38(1)(b) of FOISA. This exercise was carried out by the Council and copies supplied to my Office.
16. During the course of the investigation the Council supplied a redacted copy of the Report to Mr & Mrs N under DPA. However, it still maintained that certain information was exempt by virtue of section 38(1)(b) and therefore would not be released.

Commissioner's analysis and findings

Scope of this decision

17. Mr & Mrs N would like a full and unredacted copy of the Report. They have indicated to me that information about the pupils accused of bullying should be made public on the basis that if the matter was before a court of law such information would be in the public domain.
18. This Decision is confined to assessing the information about the pupils contained in the Council's Report and whether this information is exempt by virtue of section 38(1)(b). For the purposes of this application, the information being considered includes the names of the pupils, the complaints made by Mr & Mrs N (and their child) against those pupils and the pupils' responses to those allegations. Some of this information will already be known to Mr & Mrs N because they are the original complainants. However, it does not follow that the same information would be supplied under FOISA.
19. Indeed, the Council also supplied a copy of the Report to Mr & Mrs N which had been redacted for the purposes of a request under FOISA. In this Report all third party information about the pupils had been redacted, as well as information relating to Mr & Mrs N and their child.

Application of section 38(1)(b)



20. The Council is relying on section 38(1)(b) to withhold information about the pupils from Mr & Mrs N.
21. Section 38(1)(b) of FOISA states that information is exempt information if it constitutes personal data and the disclosure of the information to a member of the public would contravene any of the data protection principles.
22. “Personal data” is defined in section 1(1) of the DPA as:
 - “data which relate to a living individual who can be identified –
 - a) from those data, or
 - b) from those data and from other information which is in the possession of or is likely to come into the possession of, the data controllerand 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.”
23. The definition is subject to the interpretation contained in *Durant v Financial Services Authority* [2003] EWCA Civ 1746 (*Durant case*). In this decision, the (English) Court of Appeal held that if information is to be viewed as personal data, the information has to be biographical in a significant sense, i.e. go beyond the recording of the individual’s involvement in a matter or event that has no personal connotations. The individual also has to be the focus of the information, rather than some other person with whom that individual may have been involved. The Court of Appeal summarised these two aspects as information affecting a person’s privacy, whether in his personal or family life, business or professional capacity.
24. I am satisfied that given the definition contained in section 1(1) of the DPA and the discussion provided in the *Durant case* that the information relating to the pupils in this case, including their names, amounts to their personal data.
25. Personal data is exempt from release under section 38(1)(b) of FOISA (read in conjunction with section 38(2)(a)(i)) if the disclosure of the information to a member of the public would contravene any of the data protection principles contained in the DPA.



26. The first data protection principle will, in most circumstances, be the most relevant principle to consider. This states that the processing of personal data (such as the release of data in response to a request made under FOISA), must be fair and lawful. The Information Commissioner, who is responsible for enforcing the DPA, has provided guidance (Freedom of Information Act Awareness Guidance No 1) on the consideration of the data protection principles within the context of freedom of information legislation. This guidance recommends that public authorities should consider the following questions when deciding if release of information would breach the first data protection principle:
- would disclosure cause unnecessary or unjustified distress or damage to the data subject?
 - would the data subject expect that his or her information might be disclosed to others?
 - has the person been led to believe that his or her information would be kept secret?
27. In deciding whether disclosure of this information would be fair and lawful I need to consider whether the information can be released to a “member of the public”. Therefore, in this case there may be information which could be released to Mr & Mrs N because they are the original complainants in the case but could not be released to any member of the public who requested it. I am deciding, in essence, whether the information can be released into the public domain.
28. Mr N has compared this situation to a court of law where the allegations would be tried and tested in open court. In fact, the identities of children accused of crimes are afforded protection by the Scottish criminal justice system. Almost all cases where a person under 16 is alleged to have committed an offence will be referred to the children’s hearing system. Children’s Hearings are held in private and only those people who have a legal right to be there will be present.
29. In the rare cases where a child is prosecuted in court, there is a prohibition on disclosing the identity of a child involved in the proceedings.
30. In its submissions to me (set out in paragraphs 10 - 13 above) the Council provided information about the expectations of the individual pupils who contributed to the Report. Having considered these submissions and the circumstances in which the Report was prepared I am satisfied that the pupils would not have expected their names, opinions and actions to be disclosed directly to the public.



31. Have considered the Information Commissioner's guidance on assessing the data protection principles and the equivalent procedures in respect of allegations of a criminal nature I am satisfied that disclosure of the information about the pupils would be in breach of the first data protection principle in that it would be unfair.
32. The Council did not explicitly indicate that the processing would also be unlawful although it referred to expectations of confidentiality on the part of those participating in the investigation. Given that I have concluded that the processing of the data would be unfair I do not consider it necessary to reach a conclusion on its lawfulness.
33. I am satisfied that the information withheld by the Council is exempt by virtue of section 38(1)(b).

Technical breaches of FOISA

34. While the Council responded within 20 working days to Mr & Mrs N's request and subsequent request for review it did not issue a notice in terms of section 16(1) of FOISA advising that the information was being withheld.
35. Further in responding to Mr & Mrs N's request and request for review the Council failed to advise the applicants of their rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1) as required by section 19(b) of FOISA.

Decision

I find that Highland Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) by withholding certain information from Mr & Mrs N in that the information is exempt by virtue of section 38(1)(b).

I find that the Council failed to comply with Part 1 of FOISA by failing to issue a refusal notice in terms of section 16(1) and failing to advise the applicants of their rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1) as required by section 19(b).

I do not require the Council to take any remedial steps in respect of these technical breaches.



Appeal

Should either the Council or Mr & Mrs N wish to appeal against this decision, there is a right to 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.

Kevin Dunion
Scottish Information Commissioner
26 October 2006



APPENDIX

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing ... which –
- (a) discloses that it holds the information;
 - (b) states that it so claims;
 - (c) specifies the exemption in question and;
 - (d) states (if not otherwise apparent) why the exemption applies.

19 Content of certain notices

A notice ... must contain particulars –

- (a) of the procedure provided by the authority for dealing with complaints about the handling of requests for information; and
- (b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).

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 the 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 ...