

# Decision Notice



Decision 076/2008 Ms Caroline Hughes and Carnegie College

Payments to former principal of College

Reference No: 200701110  
Decision Date: 8 July 2008

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Ms Hughes submitted an information request to Lauder College (as it was at the time: in the course of the investigation it changed its name to Carnegie College) (the College) for specified information relating to the College's obligations in relation to its outgoing principal's pension. The College responded by providing some information to Ms Hughes but relied on the exemptions in sections 36(2) and 38(1)(b) of FOISA for withholding other parts of the information requested. Following a review, which upheld the College's original decision, Ms Hughes remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the College had partially dealt with Ms Hughes request for information in accordance with Part 1 of FOISA. While accepting that the withheld information had been properly withheld under section 38(1)(b) of FOISA (being personal data the disclosure of which would contravene the first data protection principle), he found that the College should have notified Ms Hughes that certain information was not held.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2 (Effect of exemptions); 15 (Duty to provide advice and assistance); 17(1) (Notice that information is not held); 38(1)(b), (2) and (5) (Personal information).

Data Protection Act 1988 (the DPA) section 1 (Basic interpretative provisions); Schedule 1 (The data protection principles: the first principle).

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. On 8 June 2007, Ms Hughes wrote to the College, referring to entries in its annual accounts for the years ended 31 July 2005 and 31 July 2006 relating to obligations to the outgoing principal and requesting the following information:



1. *The reason for the difference between the £191,000 disclosed in the 2005 accounts and the £159,000 disclosed in the 2006 accounts.*
2. *Details in relation to the College's contractual obligation to the former principal including:*
  - i. *The person or body within the College who entered into the contractual obligation with the principal on behalf of the College*
  - ii. *The date on which this obligation was entered into*
  - iii. *Any correspondence between the College and the Scottish Funding Council (SFC) and the College and the Scottish Executive preceding or subsequent to the entering into this obligation.*
  - iv. *Any formal minutes of the College Board or any committee of the College Board that relate to the decision to enter into the contractual commitment.*
3. *Details of the circumstances under which the principal acquired a contractual right to early access to pension benefits. (I would assume that under the normal terms of their employment and the normal rules of the pension scheme employees would have a contractual right to benefits at a certain pre-defined age. I am unclear as to how a particular employee can acquire a contractual right to early access to such benefits).*
4. *The amount (years and months) by which the access to the benefits was "early".*
5. *Details of how the College took the decision to grant early access to pension benefits including:*
  - i. *The person or body within the College who took the decision*
  - ii. *The date upon which the decision was taken*
  - iii. *Any correspondence between the College and SFC and the College and the Scottish Executive preceding or subsequent to the decision*
  - iv. *Any formal minutes of the College Board or any committee of the College Board that relate to the decision to pay for the principal's early access to pension benefits.*
6. *Details of the balance of the exceptional charge of £191,000 mentioned in the accounts for the year ended 31 July 2005 (the note stated that it primarily related to pension contributions: what were the other elements?).*
7. *All correspondence with the SFC regarding the payment to the former principal.*
8. *The reason for the College not disclosing this amount paid to the former principal under the requirements of FE/03/00 and FE/13/04.*



2. The College responded to Ms Hughes's request on 6 July 2007. In this response, the College sought to address points 1 (in part), 2 i and ii, and 5 i and ii, relying on the exemptions in sections 36(2) and 38(1)(b) for withholding the remainder of the information requested.
3. Ms Hughes submitted a request for a review to the College on 24 July 2007, in relation to the College's decision to withhold certain information from her. In particular, she set out what she understood to be the distinction between information about the home and family life of the person involved and that relating to their public or professional life as drawn by the legislation and the Commissioner. Ms Hughes did not consider the College's response to have given enough weight to this distinction.
4. The College provided Ms Hughes with a response to her request for a review on 27 July 2007. In this response, the College advised that it had released all of the information that it could to in response to her request and was upholding its original decision to rely on the exemptions in sections 36(2) and 38(1)(b) for the remaining information. It also advised that had considered the distinction identified by Ms Hughes in relation to personal data.
5. Ms Hughes wrote to the Commissioner's Office on 11 August 2007, stating that she was dissatisfied with the outcome of the College'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 Ms Hughes 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

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7. On 1 October 2007, the College was notified in writing that an application had been received from Ms Hughes and asked to provide my Office with copies of the information withheld from Ms Hughes. The College responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the College, asking it to provide comments on the application and to respond to specific questions on its reasons for withholding information and certain other aspects of its handling of the request. Responses to these further enquiries were duly provided.
9. The College relied on the exemptions in sections 36(2) and 38(1)(b) of FOISA for withholding information from Ms Hughes. In the course of the investigation, the College also advised that it did not hold information which would address point 4 in her request. The arguments put forward by the College's and Ms Hughes will be considered further in the Commissioner's analysis and findings below.



## Commissioner's analysis and findings

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10. In coming to a decision on this matter, the Commissioner has considered all of the submissions and other information presented to him by both Ms Hughes and the College and he is satisfied that no matter of relevance has been overlooked.

### Section 17 – Notice that information is not held

11. In its responses to Ms Hughes, the College relied on the exemptions in sections 36(2) and 38(1)(b) for withholding information which would address her point 4. However, in its submissions to the Commissioner, the College advised that it did not in fact hold any recorded information which would address this part of the request.
12. The College advised that it had carried out searches of the former principal's personnel file, the College's human resources database and papers and minutes of meetings of the College Board, but that no relevant recorded information had been identified. The College further explained that these were all of the areas where it would expect this type of information to be held.
13. Having considered the submissions which have been made by the College, the Commissioner is satisfied that it carried out adequate searches for any relevant information and that no recorded information which would address this part of Ms Hughes request could be located. While it does appear surprising that the College would not hold this information, the Commissioner notes that the relevant decision appears to have been made some time before both the departure of the previous principal and the coming into force of FOISA. In the circumstances, the Commissioner accepts that the College does not (and did not at the time of Ms Hughes's request) hold any recorded information which would address this part of her request.
14. Taking account of the terms of the College's response to Ms Hughes's point 8 and its subsequent submissions on this point, along with the withheld information identified by the College, Commissioner also considers that the appropriate response in relation to this information would have been that it was not held by the College.
15. The Commissioner is therefore not satisfied that the College responded properly to point 4 or point 8 of Ms Hughes's request, as in doing so it should have given her notice that the information was not held under section 17(1) of FOISA. In all the circumstances, however, the Commissioner can see no purpose in requiring the College to take any action in this respect now.



### Section 38(1)(b) – Personal information

16. The exemption under section 38(1)(b), read in conjunction with section 38(2)(a)(i) or (b) of FOISA, is an absolute exemption and so is not subject to the public interest test laid down by section 2(1)(b) of FOISA. In order for a Scottish public authority to rely on this exemption it must show that the information which has been requested is personal data for the purposes of the DPA, and that disclosure of the information to a member of the public otherwise than under FOISA would contravene any of the data protection principles laid down in Schedule 1 to the DPA.
17. 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 other information which is in the possession of, or 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”.
18. The information which has been withheld in this case comprises correspondence and minutes of meetings discussing aspects of the subject matter of the applicant’s request for information.
19. Having considered the information withheld from Ms Hughes, together with the submissions from the College, the Commissioner is satisfied that this information is the personal data of the former principal. The former principal can be identified from the information, which is biographical in a significant sense and focuses on that individual. The Commissioner therefore accepts that it relates to the former principal.
20. The College argued that disclosure of the withheld information would be in contravention of the first data protection principle. It argued that no condition in Schedule 2 to the DPA could be met and that disclosure would not be otherwise fair, and therefore that disclosure would amount to unfair processing in breach of the first principle. It explained that in applying the exemption it had taken into account the factors listed in the Commissioner’s briefing on section 38, that is:
  - The expectation of the data subject
  - Whether any distress or damage would be caused to the data subject as a result of the disclosure
  - Any express refusal by the data subject
  - Whether the information relates to the data subject’s public or private life. A person’s private life is likely to deserve more protection.

Having done so, it was satisfied that the former principal did not expect disclosure, believed she would suffer distress or damage as a result and had expressly refused consent to disclosure. It referred to a number of the Commissioner’s decisions which it considered relevant.





21. While accepting that any decision as to disclosure of the withheld information was ultimately one for itself alone, the College referred to a letter received from the former principal's solicitors, from which it was clear that they considered disclosure to be a breach of the first principle and that their client's consent to disclosure was refused. They argued that it was not reasonable for their client to expect that information relating to her pension, financial circumstances and associated negotiations would be disclosed by the College to a member of the public. They advised that their client would have no option but to consider raising a court action for breach of the DPA should disclosure take place.
22. The College further submitted that the former principal had an expectation of privacy with regard to her contract of employment, together with details of her salary and pension arrangements. She would, the College argued, have expected that details of her remuneration would appear in the annual accounts in limited detail, but not that further confidential information would be made available to third parties.
23. In her submissions to the Commissioner with her application, Ms Hughes indicated that there was considerable disquiet and public debate about substantial severance payments made to public servants. She stated that in this instance the subsequent appointment of the former principal to the SFC, the body which regulates the College and all other Scottish colleges, meant that the public interest case for disclosure was that much stronger.
24. Ms Hughes considers that the information that she has requested should be in the public domain, as it would help to inform the debate on severance payments paid to public servants.
25. The first data protection principle requires 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 (to the DPA) is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met. "Sensitive personal data" is defined in section 2 of the DPA: having considered the information in question in the light of this definition, the Commissioner is satisfied that it is not sensitive personal data and therefore that the conditions in Schedule 3 are not relevant to it.
26. The (UK) Information Commissioner, who is responsible for overseeing and regulating the application of the DPA, considers the question of fairness in his *Freedom of Information Act Awareness Guidance No 1 – Personal Data* ([http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/awareness\\_guidance%201\\_%20personal\\_information\\_v2.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance%201_%20personal_information_v2.pdf)). Examples given in this guidance of the types of questions which should be asked when assessing whether the disclosure of personal data (which would be a form of processing) would be fair are:
  - Would disclosure cause unnecessary or unjustified distress or damage to the person who the information is about?
  - Would the third party expect that his or her information might be disclosed to others? Is disclosure incompatible with the purposes for which it was obtained?
  - Has the person been led to believe that his or her information would be kept secret?



- Has the third party expressly refused consent to disclosure of the information?
  - Does the legitimate interest of a member of the public seeking information about a public authority, including personal information, outweigh the rights, freedoms and legitimate interests of the data subject?
27. The guidance distinguishes between information relating to an individual's private and public lives, suggesting that information about an individual acting in an official or work capacity is less likely to deserve protection. Potential damage or distress to the individual in a personal or private capacity should be taken into account, although the section 38(1)(b) exemption should not be used simply to spare officials embarrassment in their working lives. It accepts that there will be information relating to a public authority's employees which it would be unfair to disclose, while also acknowledging that the strong public interest in the expenditure of public funds may mean that it is not unfair to disclose certain information about staff. In all of this, an important consideration will be the seniority of the staff concerned, it being less likely that disclosure will be unfair the more senior the official is.
28. While the Commissioner has difficulty accepting the arguments presented by the College as to the risk of damage or distress being suffered by the former principal as a consequence of disclosure, it is always appropriate to consider the data subject's reasonable expectations as to disclosure of the information in question. In doing so, the Commissioner notes the former principal's stated objection to the information being disclosed (while accepting that this is relevant but not necessarily conclusive in the circumstances).
29. In coming to decision on the question of fairness, the Commissioner also notes that certain of the relevant information is contained in minutes from sections of meetings which would have been closed to the public. The relative minutes and other papers would only be available to members of the College Board or (as the case may be) the relevant committee. Members of the public would be entitled to see what items were discussed in closed session, but not any detail of the discussion which went on (i.e. not the full minute).
30. The Commissioner accepts the assertions of the College that the former principal would have had within her reasonable expectation that certain information about her pension would be disclosed within the College Annual Accounts, but not that further detail falling within the scope of Ms Hughes's request would be made publicly available. He recognises that there is a public interest in making sure that public authorities are accountable regarding the spending of public money, and that (as he said in decision *191/2007 Mr David Ewen and Aberdeen City Council*) there is a reasonable expectation that senior officials acting in their professional capacity are open to increased scrutiny, which may extend to include their salaries or terms and conditions of employment.





31. In this case, however, the Commissioner notes the disclosure that has been made in the Annual Accounts, together with the fact that the withheld information relates to decisions made some time before FOISA came into force, or for that matter was enacted. He also accepts that the detail of the withheld information (at least in part) goes beyond recording details of the former principal's professional duties and responsibilities, and crosses over into her personal, home and family life to a significant extent, as it relates to her personal finances. He does not consider that disclosure of this information would have been within her reasonable expectations.
32. In all the circumstances, therefore, the Commissioner has concluded that it would not be fair to release the withheld information and therefore that disclosure would contravene the first data protection principle. Having reached this conclusion, he is not required to go on to consider whether disclosure would be lawful, or whether any condition in Schedule 2 would apply. Accordingly, the Commissioner is satisfied that the College was correct to withhold the information under section 38(1)(b) of FOISA.
33. Having concluded that the withheld information has been properly withheld under section 38(1)(b) of FOISA, the Commissioner is not required to go on to consider the application of section 36(2) of FOISA in this case.

## DECISION

The Commissioner finds that Carnegie College partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms Hughes, the information withheld all being exempt under section 38(1)(b) of FOISA.

However, the Commissioner also finds that section 38(1)(b) was wrongly applied to points 4 and 8 in Ms Hughes's request, the information in question not being held by the College. He does not require the College to take any action in this respect.



## Appeal

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Should either Ms Hughes or Carnegie College 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**  
**8 July 2008**



## Appendix

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### Relevant statutory provisions

#### Freedom of Information (Scotland) Act 2002

##### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- (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
  - ...
- (2) ...
  - (e) in subsection (1) of section 38 –
    - ...
    - (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-

...

(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.

...

(5) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;

"data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;

...

## 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,

...