

# Decision Notice

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## Decision 152/2014 Mr Niall MacKinnon and Education Scotland

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### **Pre-inspection and school visit reports**

Reference No: 201400788

Decision Date: 9 July 2014



Scottish Information  
Commissioner

## Summary

On 4 November 2013, Mr MacKinnon asked Education Scotland for pre-inspection and school visit reports about a named school, received from Highland Council. Education Scotland informed Mr MacKinnon that it did not hold any pre-inspection reports. It provided copies of Highland Council's school visit reports, withholding some personal data from one report.

Following an investigation, the Commissioner found that Education Scotland had correctly responded to Mr MacKinnon's request.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Notice that information is not held); 38(1)(b), (2)(a)(i) and (b) and (5) (definitions of "the data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA) section 1(1) (definition of "personal data") (Basic interpretative provisions); Schedules 1 (The data protection principles, Part I - the principles) (the first data protection principle) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (conditions 1 and 6)

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

## Background

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1. On 4 November 2013, Mr MacKinnon asked Education Scotland (amongst other requests not the subject of this decision) for the following information:
  1. The pre-inspection report supplied by Highland Council in regard of the HMIE inspection of [a named primary school] carried out 17-21 November 2008.
  9. All Quality Development Officer/Quality Improvement Officer school visit reports sent by Highland Council to HMIE/Education Scotland from 2005.(HMIE and Learning and Teaching Scotland were merged in July 2011 to create Education Scotland<sup>1</sup>.)
2. Education Scotland responded on 6 December 2013. It stated that it did not hold any information with respect to part 1 of the request and withheld three reports that fell within scope of part 9 of the request.
3. On 5 February 2014, Mr MacKinnon asked Education Scotland to conduct a review of its response to parts 1 and 9 of his request, as he considered that incorrect responses had been provided.
4. Education Scotland notified Mr MacKinnon of the outcome of its review on 5 March 2014. It upheld its response with respect to part 1 of the request. In relation to part 9 of the request, it disclosed copies of three reports. One of the reports was disclosed in redacted form, with some information considered to be personal data exempt from disclosure under FOISA.

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<sup>1</sup> <http://www.scotland.gov.uk/News/Releases/2010/10/14145207>

5. On 5 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.
6. 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. The case was then allocated to an investigating officer.

## **Investigation**

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7. Mr MacKinnon was informed of the scope of the Commissioner's investigation and was asked if he still wanted the Commissioner to consider whether Education Scotland was correct to withhold personal data in one of the disclosed reports. Mr MacKinnon confirmed that he did.
8. Education Scotland is an agency of the Scottish Ministers (the Ministers). On 12 May 2014, in line with agreed procedures, the investigating officer notified the Ministers in writing that an application had been received from Mr MacKinnon. The Ministers were invited to comment on the application (as required by section 49(3)(a) of FOISA) and were asked to respond to specific questions. The Ministers were asked whether Education Scotland held any further information falling within the scope of the request, and to provide their reasons for withholding some information from one of the reports. The Ministers responded on 4 June 2014.
9. Subsequent references to contact with or submissions from Education Scotland should be read as references to contact with or submissions made by the Ministers on behalf of Education Scotland.

## **Commissioner's analysis and findings**

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10. 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.
11. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority. This is subject to certain qualifying provisions which do not apply here. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). If the authority does not hold any information covered by the request, it is required to give the applicant notice in writing to that effect, under section 17(1) of FOISA.

### **Information covered by Mr MacKinnon's request**

12. Education Scotland provided details of the searches it had conducted in responding to Mr MacKinnon's request, to show why it was satisfied that it had retrieved all relevant information and why it was satisfied that it did not hold any information covered by part 1 of the request, or any information covered by part 9 of the request apart from the three reports it had already provided.

13. Education Scotland explained that the information on the named primary school is held in both paper and electronic format. The files are owned by the divisional office responsible for the relevant local authority and all files are accessible by all other office locations.
14. Following receipt of the request, all paper files were requested and sent to the person responding to the initial request; this person also searched the electronic files for the requested information. During the investigation, Education Scotland provided “screen shots” of the electronic folders it held on the named primary school, to demonstrate what information it held electronically.
15. Education Scotland stated that it has an Area Lead Officer (ALO) for all local authorities. The ALO owns an electronic file on each authority for which they are responsible. Access to this file is available to all staff, and the file was searched by the person responding to the initial request.
16. In relation to part 1 of the request, Education Scotland submitted that, at the time of the named primary school inspection in 2009, schools were not required to provide a self-evaluation in advance but were asked to prepare this for the Monday morning meeting during the inspection week. Guidelines which were current at this time indicate that it was not mandatory that education authorities provided information on the school. Education Scotland reiterated that it had never received a pre-inspection report from Highland Council.
17. Education Scotland also provided a copy of the reviewer’s file note, which confirmed that the school file did not contain a pre-inspection report or any indication on the file checklist that such a report had ever been received. The reviewer had also contacted officials involved in the inspections, who had confirmed that there were no other records to consider. On the basis of these searches and inquiries, Education Scotland was satisfied that it did not hold any information relation to part 1 of the request.
18. In relation to part 9 of Mr MacKinnon’s request, Education Scotland explained that the school visits of the type referred to were made by education authority staff (Highland Council staff) and were not attended by Education Scotland staff. It stated that there is no expectation that progress reports drafted by authority staff for internal use should be shared with Education Scotland.
19. Education Scotland provided a destruction record for the records of the named primary school. The Commissioner notes that school inspection information is generally held for a year after inspection or a year after publication, and in this case the transient records were destroyed in 2012.
20. Having considered Education Scotland’s submissions, and the searches undertaken, the Commissioner is satisfied that it does not hold the pre-inspection report requested by Mr MacKinnon, or any more reports covered by part 9 of the request besides those already identified and provided. In relation to request 1, the Commissioner is satisfied that Education Scotland was entitled to inform Mr MacKinnon, in terms of section 17(1) of FOISA, that it did not hold the information he had asked for.

**Part 9 of request – information withheld under section 38(1)(b) (personal data)**

21. Education Scotland applied the exemption in section 38(1)(b) of FOISA to information in one of reports that was disclosed to Mr MacKinnon in relation to part 9 of his request, arguing that the information in question was personal data, and disclosure of this information would breach the first data protection principle.

22. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (b) (as appropriate), exempts personal data from release if its disclosure to a member of the public, otherwise than under FOISA, would contravene any of the data protection principles.
23. In considering the application of this exemption, the Commissioner will therefore first consider whether the information in question is personal data as defined in section 1(1) of the DPA. If it is, she will go on to consider whether disclosure of the information would breach the first data protection principle.
24. It must be borne in mind that this particular exemption is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.

*Is the information personal data?*

25. 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 (the full definition is set out in the Appendix).
26. The Commissioner is satisfied that the information redacted from the report is personal data relating to identifiable individual(s), including name(s) and some details about professional performance or progress.
27. Having concluded that the withheld information is personal data as defined in section 1(1) of the DPA, the Commissioner must now go on to consider whether disclosure of this information would contravene any of the data protection principles cited by Education Scotland.

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

28. The first data protection principle requires that personal data shall be processed fairly and lawfully and, in particular, shall not be processed (in this case, disclosed into the public domain in response to Mr MacKinnon's request) unless at least one of the conditions in Schedule 2 to the DPA is met and, in the case of sensitive personal data (as defined by section 2 of the DPA), at least one of the conditions in Schedule 3 to the DPA is also met. (The Commissioner is satisfied that the personal data in question is not sensitive personal data for the purposes of section 2 of the DPA, so it is not necessary for the Commissioner to consider the conditions in Schedule 3.)
29. When considering the conditions, the Commissioner has noted Lord Hope's comment in the case of *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 472 (the CSA case) that the conditions require careful treatment in the context of a request for information under FOISA, given that they were not designed to facilitate the release of information, but rather to protect personal data from being processed in a way that might prejudice the rights, freedoms or legitimate interests of the data subject (i.e. the named individual to which the data relates).
30. Condition 1 of Schedule 2 permits personal data to be processed if the data subject consents to the data being processed. In its submissions, Education Scotland explained that it does not know whether the individual(s) still work(s) within the education sector and has no contact details. The Commissioner has therefore concluded that condition 1 in Schedule 2 cannot be met in this case.

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<sup>2</sup> <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>

31. The Commissioner considers that the only other condition in Schedule 2 to the DPA which might apply in this case is condition 6. Condition 6 allows personal data to be processed if that processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
32. There are, therefore, a number of tests which must be met before condition 6(1) can apply. These are:
  - Does Mr MacKinnon have a legitimate interest in obtaining the personal data?
  - If so, is the disclosure necessary to achieve those legitimate interests? In other words, is disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate interests be achieved by means which interfere less with the privacy of the data subject?
  - Even if making the information available is necessary for the legitimate purposes of Mr MacKinnon, would it nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects? This will involve a balancing exercise between the legitimate interests of Mr MacKinnon and those of the data subjects. Only if (or to the extent that) the legitimate interests of Mr MacKinnon outweigh those of the data subjects can the personal data be made available.

*Does Mr MacKinnon have a legitimate interest?*

33. Mr MacKinnon stated that he required the full, unredacted version of the report as he wanted to be certain what information had been passed from Highland Council to Education Scotland.
34. Education Scotland did not consider that Mr MacKinnon had a legitimate interest in the withheld information. It understood that his concerns were about the inspections and process, while the withheld information relates to the job performance of a third party or parties, unrelated to Mr MacKinnon or his issues.
35. The Commissioner takes the view that, while it is natural and understandable for Mr MacKinnon to seek as much information as possible about a matter of deep concern to him, he has not shown that he has a legitimate interest in the specific information withheld from the report. The Commissioner notes that the vast majority of the report has been disclosed. Only information relating to the professional performance and progress has been withheld.
36. The Commissioner takes the view that the redaction of the personal information in the body of the report will not affect understanding of the inspection process or conclusions to any significant extent. In these circumstances, the Commissioner finds that Mr MacKinnon does not have a legitimate interest in the personal data withheld by Education Scotland.
37. The Commissioner therefore finds that none of the conditions in schedule 1 of the DPA can be met, and accordingly, that Education Scotland was entitled to withhold the information in question under section 38(1)(b) of FOISA.

## **Decision**

The Commissioner finds that Education Scotland complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Niall MacKinnon.

## **Appeal**

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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.

**Margaret Keyse**  
**Head of Enforcement**  
**9 July 2014**

## 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.
- ...
- (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.

##### 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**

(1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified

–

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

## **Schedule 1 – The data protection principles**

### **Part I – The principles**

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

...

**Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data**

1. The data subject has given his consent to the processing.

...

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

...

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