

Decision Notice



Decision 024/2006 Mr F and the Scottish Ministers

Names of officials involved in drafting Circular 2/2001 on the conduct of sex education in schools

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Summary

In June 2005, Mr F requested the names of the officials involved in the development of Scottish Executive Education Circular 2/2001 on the conduct of sex education in schools. The Scottish Ministers (the Ministers) refused to provide this information on the basis of the exemption in section 30(c) of the Freedom of Information (Scotland) Act 2002 (FOISA), which exempts information the disclosure of which would, or would be likely to, prejudice substantially the effective conduct of public affairs.

Following an investigation, the Commissioner issued a decision in February 2006. He found that the information was not exempt under section 30(c) of FOISA and ordered the Ministers to disclose the names of the officials to Mr F. The Ministers appealed this decision to the Court of Session and the Commissioner subsequently conceded the appeal. This led to the Court of Session quashing the decision and remitting the case back to the Commissioner.

This replaces the decision which was issued in February 2006. Following further investigation, during which new information was provided to the Commissioner, he has found that the names of the individuals are exempt from disclosure under section 39(1) of FOISA, on the basis that the disclosure of the names would, or would be likely to, endanger the physical or mental health or the safety of the individuals involved.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions) and 39(1) (Health, safety and the environment)

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



Background

1. On 21 June 2005, Mr F wrote to the Ministers requesting the names of the officials involved in constructing, drafting, overseeing and passing for publication Circular 2/2001 on the conduct of sex education in Scottish schools (the Circular). He also asked if any of these people were still employed by the Ministers or the Civil Service.
2. The Ministers replied on 5 July 2005. They advised Mr F that the Circular had been issued in accordance with section 56 of the Standards in Scotland's Schools etc. Act 2000, which allows the Ministers to issue guidance to local authorities on the conduct of sex education in schools. The Circular had been drafted by officials in the Education Department and was issued widely for consultation in 2000. It was redrafted following consideration of the comments to the consultation.
3. The Ministers advised Mr F that the officials involved in developing the Circular were still employed by them, but refused to provide their names by virtue of sections 30(a) and 30(b) of FOISA, on the basis that disclosure would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers and would, or would be likely to, inhibit substantially the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.
4. The Ministers also concluded that it was not in the public interest to disclose the information, on the basis that the names of officials responsible for the development of the Circular were irrelevant, since the Circular was issued in the name of the Scottish Ministers.
5. On 5 July 2005, Mr F requested a review of this decision on the basis that he considered the public interest test was not intended to protect officials and that, in any event, it was in the public interest to release the names of the officials involved.
6. The Ministers carried out a review and informed Mr F on 26 July 2005 that they had upheld their decision to withhold the names. However, they had decided that it was more appropriate to apply the exemption in section 30(c) to the names, on the basis that disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs by jeopardising officials' ability to carry out work in the confidence that they operated within the Ministers' principle of collective responsibility. In the course of this response, the Ministers also advised Mr F that they considered that the public interest in withholding the names still outweighed that in disclosing them.
7. On 26 July 2005, Mr F applied to the Commissioner for a decision as to whether the Ministers had complied with Part 1 of FOISA in responding to his information request. Mr F again commented that he considered it to be in the public interest for the names of the officials responsible for the production of Circular to be released.



8. The case was then allocated to an investigating officer and Mr F's application was validated by establishing that he 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.
9. The Commissioner subsequently issued a decision on 13 February 2006. The Commissioner found that the information was not exempt under section 30(c) of FOISA and ordered the Ministers to disclose the names of the individuals in question to Mr F. In the decision, the Commissioner also commented that he considered that the names were not exempt under section 38(1)(b) of FOISA (which exempts personal data from disclosure in certain circumstances), although the Ministers had not previously cited the exemption or made any submissions to the Commissioner on that exemption.
10. The Ministers subsequently appealed the Commissioner's decision to the Court of Session under section 56(b)(ii) of FOISA on the basis that the Commissioner had failed to interpret the exemption in section 30(c) correctly when coming to his decision. The Ministers also appealed on the basis that the Commissioner had erred in law by failing to seek comments from them on the application of the exemption in section 38(1)(b) of FOISA.
11. A hearing date was subsequently arranged for March 2007. On reconsideration, the Commissioner agreed that he should have sought submissions from the Ministers on section 38(1)(b) and, as a result, he agreed to concede the appeal. At this point, the Commissioner became aware of the fact that there was additional information which was relevant to Mr F's application, but which the Commissioner had not been given an opportunity to consider. The Court subsequently quashed the initial decision and remitted the case back to the Commissioner for further investigation and to issue a new decision.
12. A further investigation was carried out, during which the Ministers confirmed that they wished to rely on the exemptions in sections 30(c), 38(1)(b) and 39(1) to withhold the information (the further investigation is described in more detail below).
13. Attempts were thereafter made to resolve this case informally (section 49(4) of FOISA provides that the Commissioner may endeavour to effect a settlement between an applicant and the authority), but in the end settlement did not prove to be possible.

Investigation

14. As noted above, after the Court of Session had quashed the original decision, the Commissioner undertook further investigation. He sought additional comments from the Ministers and asked them to confirm which exemptions they wished to rely on. The additional submissions from the Ministers are addressed below. Further submissions were also sought from Mr F.



15. As noted above, in their later submissions, the Ministers confirmed that they wished to rely on three separate exemptions for withholding the names of the officials involved, i.e. the exemptions in section 30(c), 38(1)(b) and 39(1). These submissions are, where necessary, addressed in more detail below, but can be summarised as follows.
16. In terms of section 30(c), the Ministers argued that the disclosure of the names of the officials would, or would be likely to, prejudice substantially the effective conduct of public affairs.
17. The exemption in section 30(c) is subject to the public interest test contained in section 2(1)(b) of FOISA. The Ministers submitted that the public interest lay in withholding the names of the officials. While the Ministers recognise that there may be a public interest in publicly identifying some officials in connection with the a particular piece of work and, as in this case, they can see no public interest in identifying officials in this specific context where the request is for details of who is “responsible” for producing the Circular.
18. In terms of the exemption in section 38(1)(b) (as read with section 38(2)(b)), the Ministers submitted that the names of the officials are personal data, the disclosure of which would breach the first data protection principle, which requires that personal data shall be processed fairly and lawfully and, in particular, that personal data shall not be processed unless at least one of the conditions in Schedule 2 to the DPA can be met. The Ministers considered that only condition 6 was likely to apply, but argued that Mr F did not have a legitimate interest in finding out the names of the officials.
19. In terms of section 39(1), the Ministers submitted that the disclosure of the names of the officials would, or would be likely to, endanger the physical or mental health or safety of the officials. The Ministers consider that, given the controversy surrounding sex education in schools, this is not just a perceived threat, but a very real threat.
20. The Ministers gave the Commissioner examples of harassment to which a number of the officials involved in the Circular were subjected during their work on the Circular. (It should be made clear at this stage that there is no suggestion that Mr F was in any way involved with such harassment.).
21. As with the exemption in section 30(c), the exemption in section 39(1) is subject to the public interest test in section 2(1)(b) of FOISA. The Ministers submitted that the public interest lay in maintaining the exemption.
22. The Commissioner gave Mr F an opportunity to comment on the additional submissions from the Ministers. Mr F commented that he considered that it was disingenuous of the Ministers to argue at such a late stage that the names of the civil servants should not be released because of danger to them. In Mr F’s view, this is being used by the Ministers to justify a “cover up”.



Commissioner's analysis and findings

23. In coming to a decision on this matter, the Commissioner has considered the withheld information and the submissions made to him by both Mr F and the Ministers, and is satisfied that no matter of relevance has been overlooked.
24. Despite the passage of time since Mr F made his initial request to the Ministers, the Commissioner must determine whether the request for information was dealt with by the Ministers in line with Part 1 of FOISA as at the date when the Ministers notified Mr F of the outcome of their review of his information request, i.e. as at 26 July 2005.
25. In the circumstances, the Commissioner has found it necessary only to consider the exemption in section 39(1) of FOISA.

Section 39(1) – physical or mental health or safety

26. As noted above, the Ministers relied on the exemption in section 39(1) to withhold the information from Mr F on the basis that disclosure of the information under FOISA (i.e. into the public domain) would, or would be likely to, endanger the physical or mental health of an individual. This exemption is subject to the public interest test contained in section 2(1)(b) of FOISA.
27. The Commissioner takes the view that danger to physical health could mean danger to someone as a result of physical injury, illness or disease. It could also mean causing someone mental ill health as a result of the release of the information.
28. Generally, there is little difference between endangerment to someone's "physical or mental health" or to their "safety". However, the two separate terms do have slightly different definitions. "Safety" refers to a person's wellbeing or to their security. It suggests freedom from danger as well as protection from, or not being exposed to, the risk of harm or injury.
29. It may be a single individual whose health and safety is likely to be endangered by the disclosure of information, or it may be one of more members of a group of people who share an interest in non-disclosure. However, a public authority must be able to evidence that there will be some endangerment to the health and safety of the persons in question.
31. The term "endanger" is not defined in FOISA, but the Commissioner's view is that the term is broad enough to apply where there is a threat to the health or safety of a person which would foreseeably arise in the future as well as immediate harm, since the exemption does not specify that any threat should be imminent before it applies. There must, however, be some well-founded apprehension of danger.
32. The meaning of the word "likely" is open to interpretation. The general legal principle was explained by Chadwick LJ (in *Three Rivers District Council v Governor and Company of the Bank of England (No 4)* [2002] EWCA Civ 1182, [2003] 1 WLR 210) when he said that "likely" does not carry any necessary connotation of "more probable than not". It is a word which



takes its meaning from the context. In other judgements “likely” has been taken to mean “may well”, or it has been held that “likely” implies a substantial rather than a merely speculative possibility, a possibility that cannot sensibly be ignored.

33. In line with this interpretation, the Commissioner considers that for him to conclude that endangerment would be likely, he will require there to be a well-founded apprehension of actual harm, such that the prospect of harm could be regarded as a real possibility.
34. Where there is a real possibility that disclosure of information would, or would be likely to, endanger the physical or mental health or the safety of an individual, the Commissioner would clearly wish to safeguard against that eventuality. However, he will require the public authority to provide him with evidence not just that such an eventuality is within the bounds of possibility, but that such an eventuality has some realistic prospect or degree of likelihood of occurring.
40. In determining whether the exemption in section 39(1) applies, the Commissioner considers it useful to put Mr F’s request into context.
41. As noted above, the Circular provides guidance regarding the conduct of Sex Education in Schools in terms of section 56 of the Standards in Scotland’s Schools etc. Act 2000. It also sets out the background to the guidance, explaining the appointment by the Ministers of a Working Group on Sex Education in Scottish Schools. The remit of the review to be undertaken by the Working Group was specifically in light of the repeal of section 2A of the Local Government Act 1986, which prohibited local authorities from intentionally promoting homosexuality or publishing material with the intention of promoting homosexuality.
42. The Working Group published its final report in June 2000. The Group made recommendations to be implemented in advance of the repeal of section 2A and made recommendations with the aim of securing general improvements in the quality of sex education in Scotland.
43. During the investigation, the Ministers commented that issues relating to the repeal of section 2A and the matter of conducting sex education in schools are interlinked and that controversy and tensions surround the conduct of sex education in schools. The issues are highly emotive, with bodies and individuals fervently voicing strongly held beliefs. According to the Ministers, this was true at the time of the repeal of section 2A, and true around the time they dealt with Mr F’s request.
44. The Ministers commented that certain groups objected vociferously to the Ministers’ approach to sex education in schools and noted that the volume of correspondence on the issue was so high at the time of the drafting of the Circular that a special unit was established to deal with it.



45. It is clear that work on the Circular was being carried out in an atmosphere of heightened tension. While the Ministers note that it is of course open to people to object and to voice such objections, they comment that the means and terms in which those objections were voiced were not always fair or well balanced. The Ministers have, for example, referred to a senior official describing the public and press campaign about the repeal of section 2A as being “exceptionally difficult, generating some very heated and seriously misinformed views.” The Ministers have also described this period of policy work as “a distressing time.”
46. According to the Ministers, there is a genuine concern that if the names are disclosed they would be used in a manner leading to those individuals experiencing personal harassment, particularly given that Mr F has made what the Ministers describe as serious accusations of misconduct against officials. (Mr F has referred to the officials in question as having “wilfully and knowingly embarked on a course of action that deliberately misled or gave false hope to more than 1 million Scottish Citizens for the protection of their children.”) To this extent, the Ministers believe that disclosure of the names would be incompatible with Articles 2, 3 and 8 of the Human Rights Act 1998, which deal with the right to life, the protection against inhuman or degrading treatment and the right to privacy respectively.
47. The Ministers believe that, given the continuing controversy surrounding sex education in schools, there is a very real, not just a perceived, threat that disclosure of the names under FOISA will endanger the physical or mental health or safety of the officials.
48. The Ministers gave the Commissioner examples of harassment (physical, verbal, by telephone and by mail) which the officials involved in the Circular were subjected to during their work on the Circular. The Commissioner in coming to a decision has taken account of these examples, but does not consider it necessary to detail them here.
49. As noted above, the Commissioner gave Mr F an opportunity to comment on these submissions from the Ministers. Mr F commented that he considered that it was disingenuous of the Ministers to argue at such a late stage that the names of the civil servants should not be released because of danger to them. In Mr F’s view, this is being used by the Ministers to justify a “cover up”.
50. While the Commissioner understands Mr F’s frustration that these matters were not raised by the Ministers during the initial investigation, it is clear that he is under a duty to consider the submissions on section 39(1) from the Ministers.



51. On the basis of the evidence put before the Commissioner by the Ministers, the Commissioner is satisfied that in this case the apprehension of harm is sufficiently well-founded to conclude that disclosure of the names under FOISA at the time the Ministers dealt with Mr F's request for review would have endangered, or would have been likely to endanger, the physical or mental health or the safety of the individuals involved. There are clear examples of the officials in question having been subject to harm, the threat of harm or having been approached so that they fear for their safety. The officials (at least at the relevant time), continued to work for the Ministers and the Commissioner considers that this increased the likelihood of endangerment, particularly given the continuing sensitivity of this policy area.
52. As noted above, while the Commissioner wishes to make it clear that there is no suggestion that Mr F has ever been involved in such harassment himself, he must take account of the fact that if he were to disclose the names of the officials under FOISA, the names would be put fully into the public domain. He recognises the strength of feeling on this matter (which was undoubtedly even stronger at the time Mr F's request for review was dealt with in 2005) and the controversy surrounding the whole area.
53. The exemption in section 39(1) is subject to the public interest test contained in section 2(1)(b) of FOISA. This means that, although the Commissioner has found that the exemption applies, he must still order the information to be disclosed unless, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
54. In their submissions, the Ministers recognise the public interest in openness and comment that such interest is recognised by officials being identified publicly in relation to policy areas in which they are employed. However, the Ministers also believe that there is a public interest with regard to those staff working in this contentious and sensitive area where there are threats of action against them. The Ministers argue that there is a strong public interest in ensuring that the officials can conduct their duties in an environment where they are supported and in ensuring that they are not working in an environment where they are constantly concerned that they are about to be exposed incorrectly, according to the Ministers, as those "to blame" for policy delivery, given that they are responsible for such policy, not individual officials.
55. Mr F did not make any specific submissions on the public interest test as it related to this exemption put forward by the Ministers. However, the Commissioner notes that, earlier in the investigation, Mr F commented that he considered the public interest test was not intended to protect officials and that, in any event, it was in the public interest to release the names of the officials involved. From other submissions from Mr F, it is clear that he considers that the officials in question misled the public. By extension, the Commissioner has considered this as an argument in favour of disclosing the names in the public interest.
56. The Commissioner has considered the public interest in favour of disclosure of the information and the public interest in favour of maintaining the exemption and has weighed up the two.



57. As can be seen from a number of his previous decisions, the Commissioner generally believes that it is correct that the names of officials, particularly those with public facing roles, should be in the public domain. He believes that this increases accountability and encourages openness. He also notes Mr F's belief that the officials have been involved in a "cover-up" and have misled the people of Scotland. Clearly, if that were the case, then disclosure of the names could be considered to be in the public interest.
58. However, against that, the Commissioner must weigh the public interest in ensuring that officials can work in safety and in an environment where they are not subject to unwarranted harassment or threat (in finding that the exemption in section 39(1) applies, the Commissioner has accepted that disclosure of the names of the individuals would, or would be likely to, endanger the individuals). While noting Mr F's views about a "cover-up", he agrees with the Ministers in this instance that the responsibility for the direction of the policy lies with them and not with the officials. Consequently, he takes the view that there would be little public interest in disclosing the names. As such, he has found that the public interest in maintaining the exemption in section 39(1) outweighs the public interest in the disclosure of the names.

DECISION

The Commissioner finds that the Scottish Ministers were entitled to withhold the names of the officials from Mr F and, accordingly, that they complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to Mr F's information request.

Appeal

Should either Mr F or the Ministers 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
7 August 2009



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

- (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 1, section 1 applies only to the extent that –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

39 Health, safety and the environment

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual.