

Decision Notice

Decision 071/2017: Mr John Brown and the Scottish Further and Higher Education Funding Council

Names of people interviewed: Glasgow Clyde College governance report

Reference No: 201700202
Decision Date: 8 May 2017



Scottish Information
Commissioner

Summary

The SFC was asked for names of those interviewed in connection with a report into processes, procedures and governance at Glasgow Clyde College, following the suspension of its Principal. The SFC refused to disclose the information. The Commissioner found that the SFC had wrongly withheld the information and required the SFC to disclose it.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(c) (Effect of exemptions); 36(2) (Confidentiality)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. In November 2015, Mr Brown requested information from the Scottish Further and Higher Education Funding Council (the SFC) in respect of the Review Report ("the Report") by solicitors DLA Piper LLP, who were commissioned by the SFC to report into the governance and procedures of Glasgow Clyde College ("the College") following the suspension of its Principal. This request is the subject of *Decision 049/2017 Mr John Brown and the Scottish Further and Higher Education Funding Council*¹. During the investigation of the case, the Commissioner advised Mr Brown that she was unable to consider one of the matters he raised in his application: whether the SFC was entitled to withhold the names of individuals interviewed in connection with the Report. The reasons for this are set out in *Decision 049/2017*. Mr Brown was advised to make a new request to the SFC for this information.
2. On 29 November 2016, Mr Brown made a request for information to the SFC, for the list of interviewees in the Report. The list is contained in Annex 2 to DLA Piper's Report.
3. The SFC responded on 20 December 2016. It withheld the names of the interviewees under the exemptions in section 36(1) and (2) (Confidentiality) and section 38(1)(b) (Personal information) of FOISA.
4. On the same day, Mr Brown wrote to the SFC requesting a review of its decision. He submitted that the names were integral to the Report and its findings, and that those reading the report (which had been disclosed in redacted form) should be able to know who had given evidence. He believed it was in the public interest that the interviewees were named. He commented that the Report was a statutory report about public duties and he could see

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201600403.aspx>

no risk to any of those interviewed, if the names were disclosed. He accepted that if there was any such risk, the name could be redacted.

5. The SFC notified Mr Brown of the outcome of its review on 25 January 2017. It continued to withhold the list of interviewees in Annex 2 of the Report, but withdrew its reliance on section 38(1)(b) and section 36(1) of FOISA, stating that only the exemption in section 36(2) applied to the withheld information.
6. On 31 January 2017, Mr Brown applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He was dissatisfied with the outcome of the SFC's review because he did not accept that section 36(2) of FOISA could apply to the names of those interviewed.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr Brown made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. On 21 February 2017, the SFC was notified in writing that Mr Brown had made a valid application.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The SFC was invited to comment on this application and answer specific question including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.

Commissioner's analysis and findings

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 Brown and the SFC. She is satisfied that no matter of relevance has been overlooked.

Background to the request

11. The Report is a review conducted in terms of section 7C(7) of the Further and Higher Education (Scotland) Act 2005 ("the 2005 Act"). This states:

"The [SFC] may, whenever it considers appropriate, review whether a college which is assigned by order under subsection (1) is a body for which there are suitable provisions, procedures and arrangements of the type described by or under section 7(2)."

12. Section 7C(8) of the 2005 Act provides:

"On completing a review, the [SFC] must provide a report of the review to the Scottish Ministers which—

(a) sets out the conclusions which it has reached;

(b) explains why it has reached those conclusions; and

(c) makes any recommendations for action in consequence of those conclusions as it considers appropriate."

13. A redacted version of the Report was initially circulated to some organisations and persons, with some personal data removed. The redacted Report does not include Annex 2 (a list of

those interviewed by DLA Piper). Some persons did, however, receive an unredacted copy of the Report. In February 2016, the SFC disclosed the redacted Report to Mr Brown, under FOISA.

Section 36(2) - Confidentiality

14. Section 36(2) of FOISA provides that information is exempt if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure by the authority so obtaining it to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA. However, it is generally accepted in common law that an obligation of confidence will not be enforced to restrain the disclosure of information which is necessary in the public interest.
15. In its submission, the SFC referred back to its review response to Mr Brown, which stated that the information in the DLA Piper report was collected through individual interviews and correspondence, with DLA Piper acting on behalf of SFC. The SFC referred to an excerpt of DLA Piper's correspondence with interviewees:

"The Council [the SFC] does not anticipate that its report of the Review will include references to named individuals, except where it is necessary in order to describe specific actions or decisions taken in the course of fulfilling their duties as officeholders."
16. The SFC said that verbal assurances on confidentiality were also given to interviewees at the outset of meetings with DLA Piper. It submitted that, consequently, there was an implicit obligation on SFC to maintain this confidence. The SFC said:

"It can also be reasonably assumed that the disclosure of the identities of the individuals named in Annex would cause them distress. For these reasons disclosure can be judged to be 'actionable' under [FOISA]."
17. The SFC explained that it is empowered by the 2005 Act to carry out reviews and enquiries into the governance and procedures of the College (i.e. the type of reviews and enquiries carried out by DLA Piper). It stated that its accountability to the Scottish Government and Scottish Parliament for the effective use of public funding mandates that the SFC periodically carries out such reviews. It does not have any power to compel individuals to provide evidence, and submitted that, to discharge its statutory functions effectively, it is necessary for the SFC to give an assurance of confidentiality to those individuals whose evidence is central to these reviews. The SFC believed that disclosure of Annex 2 would significantly undermine such assurances.
18. In its review response, the SFC also explained that Annex 2 was shared with the Scottish Government and Audit Scotland under conditions of confidentiality. The SFC had found no evidence that Annex 2 could be regarded as in the public domain.
19. Mr Brown accepts that the information transcribed from the interviews may have the quality of confidence, and he does not seek that information, but he disputes that the names of the interviewees are confidential.

Obtained from another person

20. Section 36(2) contains a two stage test, both parts of which must be fulfilled before the exemption can be relied upon. The first is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another

individual, another Scottish public authority or any other legal entity, such as a company or partnership.

21. The SFC's review explained that the information contained in the Report was collected from individuals through interviews.
22. The Commissioner has considered carefully whether the names of interviewees, without any reference to what was said during the interviews, comprise information which the SFC can be said to have "obtained" from another person. In this case, the Commissioner has concluded, on balance, that they do.
23. The Commissioner is therefore satisfied that the first test can be fulfilled.

Actionable breach of confidence

24. The second part of the test for section 36(2) is that the disclosure of the information by the public authority must constitute a breach of confidence actionable either by the person who gave the information to the public authority or by any other person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled.
25. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
 - (i) the information must have the necessary quality of confidence;
 - (ii) the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
 - (iii) unauthorised disclosure must be to the detriment of the person who communicated the information.

Necessary quality of confidence

26. The SFC submitted that the unredacted Report, containing the list of interviewees, had been shared with a limited number of persons and that its circulation was under conditions of confidentiality. The SFC Report could therefore not be regarded as having been put in the public domain.
27. The Commissioner accepts that the full Report had a limited circulation and is not in the public domain. However, the redacted Report has had a wider circulation, and was supplied to Mr Brown, under FOISA, on 31 March 2016, putting it into the public domain.
28. There is little in the text of the redacted Report that would show which individuals were interviewed by DLA Piper. There are references to those giving evidence, mostly describing them as a class or group (e.g. "other Board members"). Nevertheless, there are also a few references to office-bearers by title, e.g. "The Chair". So, while the names of the interviewees have not been disclosed, there was some information in the public domain about the identities of at least some of the interviewees at the time when Mr Brown made his request for information.
29. However, the Commissioner accepts that, at the time of the request and the time of the review, the identities of most of the interviewees is information which had the necessary quality of confidence, in that their names were not common knowledge and could not readily be obtained by Mr Brown through any other means.

Obligation to maintain confidentiality

30. An obligation to maintain confidentiality can be either "express" or "implied". An implied obligation of confidentiality can arise as a result of the relationship between the parties or the particular circumstances in which information was obtained. The SFC presented arguments regarding both express and implied confidentiality.
31. The Report states that the interviews were "conducted on a confidential basis in order to ensure a frank and open discussion with interviewees." It goes on:
- "However, the focus of the interviews was to identify key themes, concerns, behaviours and approach and then to report to the Council [the SFC] on these at a higher level without identifying individuals or attributing comments to specific persons (where it is possible to do so)."*
32. The SFC contended that the information obtained from interviewees had been communicated under an obligation of confidence. However, Mr Brown has pointed out that the Report includes the statement: "The SFC reserves the right to publish the report in whole or in part". He argued that those who were interviewed would have known that they were likely to be named as giving evidence.
33. In the Commissioner's view, the confidentiality offered to the interviewees extended to what they said when interviewed, in that they were told that their comments would not be attributed to them where possible. The Commissioner is not satisfied that the identity of those interviewed is information received in circumstances which imposed upon the SFC (explicitly or implicitly) an obligation to maintain confidentiality in respect of that identity. She is not satisfied that there was an obligation of confidentiality relating to the fact that an individual had been interviewed. This was not made explicit to the interviewees. There could be no implicit guarantee of confidentiality, given that most of the interviewees had responsibilities or held positions within the College or on its Board which made them likely to be interviewed.

Unauthorised disclosure which would cause detriment

34. Although she is not required to consider this test (having not accepted that there was an obligation to maintain confidentiality), the Commissioner will consider, for fullness, whether the third requirement is met: that unauthorised disclosure of the information must be to the detriment of the person who communicated it. To meet this requirement, the damage need not be substantial and indeed could follow from the mere fact of unauthorised use or disclosure in breach of confidence.
35. In its review response to Mr Brown, the SFC stated:
- "It can also be reasonably assumed that the disclosure of the identities of the individuals named in Annex 2 would cause them distress."*
36. The SFC has suggested that disclosure of the interviewees identities could result in legal actions for breach of confidentiality or distress and damage. However, it did not explain what the distress or damage would be, or whether it considered that disclosure of the interviewee's name would be equally distressing or damaging in all cases. The SFC seemed to be arguing that any of the interviewees would experience harm or detriment if it was known they had been interviewed by DLA Piper.

37. The Commissioner considers it relevant that, at the time of Mr Brown's request, there was already information in the public domain about who held positions of responsibility within the College and was involved in its governance.
38. The Commissioner has considered whether disclosure of the names would increase the risk that an individual interviewee could be associated with any part of the content of the redacted Report. The Commissioner is satisfied that, for the most part, the identities of those interviewed cannot be linked to any statements in the Report. Comments and opinions are generally attributed to "a number of interviewees", "several individuals", or the like.
39. The Commissioner believes it would be reasonable to expect that certain persons would be interviewed by DLA Piper, because they hold a public position and are known to have some responsibility for the governance and management of the College.
40. Having considered with great care the submissions put forward by both the SFC and Mr Brown, the Commissioner is not satisfied that disclosure of the names of the interviewees would be sufficiently detrimental to meet the requirements for an actionable breach of confidence (even if she were to accept that the other tests for section 36(2) are met). The SFC has failed to supply evidence or reasons to support its view that the detriment to which it refers is likely or that disclosure would cause distress at the level it has indicated. The Commissioner therefore finds that the tests for an actionable breach of confidence are not met in this case, and that the SFC was wrong to rely upon the exemption in section 36(2) to withhold information which would identify the interviewees.

Decision

The Commissioner finds that the Scottish Further and Higher Education Funding Council (the SFC) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Brown.

The Commissioner finds that the SFC wrongly relied on section 36(2) of FOISA to withhold the names of those interviewed during an investigation.

The Commissioner therefore requires the SFC to disclose the information in Annex 2 of the Report to Mr Brown. The SFC must take these steps by 22 June 2017.

Appeal

Should either Mr Brown or the SFC 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.

Enforcement

If the SFC fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the SFC has failed to comply. The Court has the right to inquire into the matter and may deal with the SFC as if it had committed a contempt of court.

Margaret Keyse
Acting Scottish Information Commissioner

8 May 2017

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) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- c) section 36(2)

...

36 Confidentiality

...

- (2) Information is exempt information if-

- (a) it was obtained by a Scottish public authority from another person (including another such authority); and

- (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

...

Further and Higher Education (Scotland) Act 2005

7C Assignment of colleges

- (1) The Scottish Ministers may by order assign colleges of further education to a regional strategic body.
- (2) An order may assign a college which is not, immediately before the order is made, either –
 - (a) a fundable post-16 education body; or
 - (b) assigned to another regional strategic body,only if the Council has proposed, or has approved, the assignment.
- (3) For the purposes of considering whether or not to propose or approve any assignment under subsection (2), the Council must have regard to the desirability of ensuring that the college concerned is a body for which there are suitable provisions, procedures and arrangements of the type described by or under section 7(2).
- (4) Without prejudice to section 34(2), the power to make an order under subsection (1) includes power to –
 - (a) remove from schedule 2 any entry relating to a college to which the order relates;
 - (b) make such further provision in relation to such a college as the Scottish Ministers consider appropriate.
- (5) But an order under subsection (1) may remove an entry relating to a college from schedule 2 only if the Council has proposed, or has approved, the removal.
- (6) Before making an order under this section, the Scottish Ministers must consult –
 - (a) the regional strategic body (except where not already established);
 - (b) every college to which the order relates (except any not already established);
 - (c) the representatives of any trade union which is recognised by any college to which the order relates or which otherwise appears to the Scottish Ministers to be representative of the staff of such a college;
 - (d) the students' association of the colleges to which the order relates;
 - (e) the Council;
 - (f) any local authority for an area in which any of the colleges to which the order relates is situated; and
 - (g) any other person appearing to the Scottish Ministers as likely to be affected by the order.

- (7) The Council may, wherever it considers appropriate, review whether a college which is assigned by order under subsection (1) is a body for which there are suitable provisions, procedures and arrangements of the type described by or under section 7(2).
- (8) On completing a review, the Council must provide a report of the review to the Scottish Ministers which –
 - (a) sets out the conclusions which it has reached;
 - (b) explains why it has reached those conclusions; and
 - (c) makes any recommendations for action in consequence of those conclusions as it considers appropriate.
- (9) References in this Act to a regional strategic body's colleges are references to the governing bodies of the colleges assigned to it by an order under this section.

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