

# Decision Notice

---

## Decision 153/2014 Mr Niall MacKinnon and Scottish Public Services Ombudsman

---

### Complaint information

Reference No: 201400906

Decision Date: 9 July 2014



Scottish Information  
Commissioner

## Summary

On 6 November 2013, Mr MacKinnon asked the Scottish Public Services Ombudsman (the SPSO) for information relating to specific complaints made against the HMIE/Education Scotland and legal advice. The SPSO told Mr MacKinnon that it did not hold some of the information he had asked for and that, in all other respects, his requests were repeated (which meant that it was not obliged to comply with them). Following an investigation, the Commissioner accepted these conclusions.

## Relevant statutory provisions

---

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 14(2) (Vexatious or repeated requests)

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 6 November 2013, Mr MacKinnon wrote to the SPSO and requested information, including the following:
  - a) How many cases of complaints of HMIE/Education Scotland in regard of school inspections have been taken to the SPSO? Please break this down by year, since the formation of the SPSO in 2002.
  - b) The case reference numbers of all cases of complaints of HMIE/Education Scotland in regard of school inspections taken to the SPSO, the date on which they were taken to the SPSO and the date of the final investigation report or decision letter.
  - c) If any further meetings were held between SPSO staff and Education Scotland/HMIE staff in regard of the legal and jurisdictional validity of school staff taking out a complaint of HMIE and then taking it on to the SPSO, the date and location of each meeting, the agenda and the conclusions reached, including any points to be followed up.
  - d) The legal advice (on the jurisdictional question referred to in c) above) received from Anderson Strathern solicitors by Alice Brown (or Eric Drake) ombudsman, with the letter sent by the SPSO to Anderson Strathern which formed the enquiry.
  - e) The communications from the SPSO to Anderson Strathern on this matter after 23 April 2009 (examples provided).
  - f) The reply or replies from Anderson Strathern, including any subsequent legal advice received.
2. The SPSO responded on 3 December 2013. It stated that it did not hold any information falling within the scope of point c) of his request. It considered the remaining points to be repeated (and therefore it was not required to respond to them), noting that (where it had not been provided before) the information he sought was subject to various exemptions.

3. On 3 February 2014, Mr Mackinnon wrote to the SPSO requesting a review of its decision. He set out various reasons why he did not agree with the responses he had received. In relation to point b), he stated that he only wished to know how many such cases there were.
4. The SPSO notified Mr MacKinnon of the outcome of its review on 27 February 2014. It upheld the original response that it need not respond to repeated requests and explained why.
5. On 25 April 2014, Mr MacKinnon wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SPSO'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 made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

## **Investigation**

---

7. The case was allocated to an investigating officer. As required by section 49(3)(a) of FOISA, the SPSO was notified in writing that an application had been received from Mr MacKinnon and was asked to comment on that application. In particular, the SPSO was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested. The SPSO provided submissions in response.
8. Mr MacKinnon provided the Commissioner with significant background information and correspondence, explaining that that he had raised complaints with Education Scotland and the SPSO. However, the Commissioner can only consider whether the SPSO complied with FOISA in dealing with Mr MacKinnon's request for information.

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

---

9. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both Mr MacKinnon and SPSO. She is satisfied that no matter of relevance has been overlooked.
10. In providing submissions to the Commissioner, the SPSO explained that it did not hold any information within the scope of point c) of Mr Mackinnon's request. In relation to all other parts of his request, the SPSO submitted that they should be classed as repeated requests (and therefore section 14(2) of FOISA applied). It provided the Commissioner with a copy of a request Mr MacKinnon made to it on 15 October 2011 and its response to the request. Mr MacKinnon also provided a copy.

## **Information held by SPSO**

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, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it.
12. 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 no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.

13. The SPSO provided submissions to the effect that it did not hold any information falling within point c) of Mr MacKinnon's request. It described the searches and enquiries it undertook to ascertain whether it held anything covered by this point, with confirmation that none of these identified any relevant information.
14. Having considered all relevant submissions and the terms of point c), the Commissioner accepts that the SPSO interpreted this point reasonably and took adequate, proportionate steps in the circumstances to establish what information it held and which fell within its scope. Given the explanations provided, she is satisfied that the SPSO did not hold the information requested by Mr MacKinnon.

### **Section 14(2) - Repeated request**

15. The SPSO wished to rely on section 14(2) of FOISA for the rest of Mr MacKinnon's request. Section 14(2) states that:

*Where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.*

16. If section 14(2) applies to a request, the applicant (in this case Mr MacKinnon) is not entitled to be given the requested information.
17. To be repeated, the initial and subsequent requests must have been made by the same person. This is not disputed: they were both made by Mr MacKinnon.
18. For section 14(2) of FOISA, the following need to be considered:
  - whether Mr MacKinnon's previous request was identical or substantially similar to the request under consideration here;
  - whether the SPSO complied with Mr MacKinnon's previous request; and, if so,
  - whether there was a reasonable period of time between the submission of the first request and the submission of the subsequent request.

*Was the previous request identical or substantially similar to the first?*

19. A request will be "identical" to a previous request if both its wording and scope match that of the previous request. A request will be "substantially similar" where the information sought in the two requests is the same in all its key aspects, even if the wording of the two requests may differ.
20. As noted above, the SPSO referred the Commissioner to a previous request made by Mr MacKinnon on 15 October 2011. Mr MacKinnon acknowledged that he had made this previous request and provided a detailed explanation of the context of the request.
21. The Commissioner has considered both requests, along with all relevant submissions. She accepts that, in the respects covered by points a), b), d), e) and f) above, the request under consideration in this case is substantially similar to that made by Mr MacKinnon on 15 October 2011. The only respect in which the later request diverges from the equivalent points in the former is in seeking the case reference numbers referred to in point b). However, as Mr MacKinnon's requirement for review stated that he only wished to know how

many such cases there were, this is not an issue the Commissioner will consider further in this decision: to all intents and purposes, she is satisfied that the two requests, as expressed in seeking a review and in the respects set out above, are substantially similar. (In any event, Mr MacKinnon has confirmed that he has the reference numbers already.)

*Was the previous request complied with?*

22. The SPSO supplied the investigating officer with evidence of how it had dealt with Mr MacKinnon's previous request. In response to those points the Commissioner considers repeated, it either provided the information or withheld it under section 26(a) (Prohibitions on disclosure) and/or section 36(1) (Confidentiality) of FOISA. It notified Mr MacKinnon of how to seek a review and then apply to the Commissioner, if he were dissatisfied with the decision.
23. The SPSO confirmed that it had no record of Mr MacKinnon requesting a review for the previous request. Mr MacKinnon has referred to the previous request extensively in correspondence with the investigating officer, but there is nothing to suggest that he sought a review in relation to it at any point. In the circumstances, the Commissioner must conclude that no attempt was made to challenge the previous decision
24. In the absence of any review being sought at the relevant time, the Commissioner must conclude that the SPSO's response of 15 November 2011 complied with Mr MacKinnon's previous information request.

*Had a reasonable period of time passed?*

25. There is no attempt to define "a reasonable period of time" in the legislation, because that will depend on the circumstances of the case. Consideration should be given to two questions which will help to assess whether a reasonable period of time has elapsed. These are:
  - has the information changed?
  - have the circumstances changed?
26. The Commissioner has considered all of the SPSO's submissions in respect of the information it holds and which falls within the scope of points a), b), d), e) and f). She accepts that this information has not changed since the SPSO responded to the previous request. While providing detailed submissions on why it should be released, Mr MacKinnon does not appear to suggest that it has changed.
27. Noting the nature of the exemptions it relied on in 2011, the SPSO did not consider the circumstances to have changed. While Mr MacKinnon put forward full reasons why he believed the information should be released, referring to the issue as "live" and "of immense public interest", he did not appear to suggest that any of these factors had changed since he first asked for the information
28. The Commissioner acknowledges that the simple passage of time between requests may eventually be sufficient to allow the conclusion that a reasonable period of time has passed between two identical or substantially similar requests, irrespective of whether there has been any other change in the circumstances surrounding the request.
29. In this case, however, taking into account the nature of the information and the absence of any change in circumstances, the Commissioner does not accept that the time which has passed can be considered reasonable. Mr MacKinnon had remedies available to him in

2011 and appears to have chosen not to take them up: no reason has been identified which would suggest that he should be permitted to resurrect the matter now.

30. In all the circumstances, therefore, the Commissioner finds that the SPSO was entitled to refuse to comply with Mr MacKinnon's request on the grounds that section 14(2) applied.
31. The SPSO also cited exemptions it considered applicable to the information, should the Commissioner not accept the application of section 14(2). Given that the Commissioner is satisfied that the SPSO was entitled to refuse to comply with the request on the basis that it was repeated, she is not required to consider the application of any exemption.

## **Decision**

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

## **Appeal**

---

Should either Mr MacKinnon or SPSO 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

---

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.  
...
- (6) This section is subject to sections 2, 9, 12 and 14.

#### 14 Vexatious or repeated requests

- ...
- (2) Where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.

**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**