



Scottish Information  
Commissioner

**Decision 045/2006 Maurice Wright and the Scottish  
Parliamentary Corporate Body**

*Request for information concerning the appointment of the Scottish  
Public Services Ombudsman*

**Applicant: Maurice Wright**  
**Authority: Scottish Parliamentary Corporate Body**  
**Case No: 200501782**  
**Decision Date: 20 March 2006**

**Kevin Dunion**  
**Scottish Information Commissioner**

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## **Decision 045/2006 Maurice Wright and the Scottish Parliamentary Corporate Body**

### ***Request for information concerning the appointment of the Scottish Public Services Ombudsman – section 17 – information no longer held – decision upheld***

#### **Facts**

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Mr Wright asked the Scottish Parliamentary Corporate Body (the SPCB) for information relating to the selection process used for appointing the Scottish Public Services Ombudsman (the Ombudsman), including the name(s) and details of the person(s) who made the recommendation(s) for the appointment.

The SPCB responded providing this information, including details about the selection panel's role in recommending the candidate to the Parliament, and its role in recommending the Ombudsman to Her Majesty the Queen.

Mr Wright requested a review of the SPCB's handling of his request, stating that he wished to know other information including the names of the candidates' referees.

The SPCB informed Mr Wright that it was treating this as a new request, and subsequently informed him that the names of the referees had been destroyed in line with the SPCB's records retention policy.

Mr Wright stated he did not believe that the records had been disposed of and requested a review of the SPCB's decision. Upon review, the SPCB upheld its decision, and Mr Wright appealed to the Scottish Information Commissioner for a decision.

#### **Outcome**

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The Commissioner found that SPCB interpreted Mr Wright's initial request in a reasonable manner, and acted correctly in treating the questions he subsequently raised as a new request. In doing so, it complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA).



The Commissioner also found that the SPCB no longer holds the references for the appointment of the Ombudsman that were requested by Mr Wright, as the information had been destroyed correctly in line with the SPCB's retention and disposal policy.

Finally, he found that the SPCB acted in line with section 1(4) of the Act in stating that it had no obligation to contact candidates in order to find out the names of referees used in the selection process for the post of the Ombudsman.

## Appeal

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Should either the SPCB or Mr Wright wish to appeal against this decision, there is a right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

## Background

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1. On 31 January 2005, Mr Wright wrote to the SPCB asking for the following information:
  - The name(s) and details of the person(s) recommended for appointment by the Queen for appointment to the post of Ombudsman
  - The name(s) and details of the person(s) who made the recommendation(s) for the appointment
  - If more than one person was recommended, the name and details of the person that made the final choice on who was to be recommended for the appointment by the Queen
  - An indication as to whether the appointment was advertised, and if so, where this was placed
2. On 7 January 2005, the SPCB replied to Mr Wright, stating
  - Professor Alice Brown was appointed to the post of Ombudsman in June 2002
  - The post had been advertised in The Scotsman, The Herald, The Press and Journal, Scotland on Sunday, The Herald on Sunday, The Times, and the Sunday Times in late March 2002



- The Ombudsman was nominated by a Selection Panel, which was convened for this purpose under the SPCB's Standing Orders
  - The nomination of the successful candidate was made by means of a Motion to the Parliament in the name of Trish Godman MSP on behalf of the Selection Panel
  - In turn, the Parliament voted to recommend the nomination of Professor Alice Brown to Her Majesty the Queen for appointment on 27 June 2002.
3. The SPCB also volunteered the names of the deputy Ombudsmen who were nominated by the selection panel and provided a copy of the press release that was issued prior to Professor Brown's appointment.
  4. Mr Wright wrote back to the SPCB requesting a review of its decision on 9 February 2005. In his view they had not answered the first two questions in his initial request and he rephrased these to ask if Professor Brown put her own name forward to the Selection Panel, or if someone else had, and who her referees were. He also asked who else was considered by the Panel, who their referees were, and why Trish Godman, MSP for Greenock made the Motion to the Parliament, rather than another member of the panel.
  5. Mr Wright also asked for additional information concerning any of the Panel members' interests in the candidates who applied for the posts, and the persons or bodies that prepared and approved the terms of reference and powers of the Ombudsman.
  6. On 14 February 2005 the SPCB replied to Mr Wright stating that his latest letter raised new questions which did not form part of his original request, and that they would be treated as a new request for information.
  7. The SPCB wrote to Mr Wright again to inform him that
    - Some of the information requested could not be provided as the records of recruitment for the Ombudsman posts had been destroyed under the SPCB's records retention policy. The SPCB also advised Mr Wright that if the records had been retained, the disclosure of the names of candidates' referees would have been exempt under section 38 of FOISA, as disclosure would contravene the Data Protection Act 1998 (DPA)
    - Professor Brown and the other nominees for the Ombudsman posts had put their own names forward for consideration by the Selection Panel by responding to the advertisements placed in the press
    - To safeguard against any bias towards applicants for the posts, candidates' application forms were supplied to the Selection Panel with the personal details (i.e. name and address) removed. When the selections were made for interview, none of the Selection Panel members made a declaration of interest in respect of the candidates.



- Trish Godman, the MSP for Greenock was chosen to make the Motion to the Parliament nominating Professor Brown to the post of Ombudsman, as she was the Convener of the Committee which had scrutinized the legislation establishing the Ombudsman post.
  - The Ombudsman's powers were prepared and approved by the Scottish Parliament through the passing of the Scottish Public Services Ombudsman Act 2002.
8. Mr Wright requested a review of the SPCB's decision on 22 February 2005. He stated that he did not believe the recruitment records had been disposed of after 1 year, as he understood other bodies have to keep such records for 6 or even 10 years. Despite this, he believed that the information could be otherwise obtained by writing to the candidates concerned.
  9. He also did not accept that the disclosure of the referees for Professor Brown and the three deputies of the Ombudsman contravened the DPA. He believed that the necessity to show transparency in public appointments outweighed any reason for not disclosing the names of candidates' referees.
  10. A Review Panel reviewed the SPCB's decision and informed Mr Wright of this on 15 March 2005. The SPCB confirmed that the recruitment records had been destroyed in line with its records retention policy, and enclosed a copy of the relevant section. This showed that records of appointments were kept in the office for 12 months after the successful candidate was appointed, and then reviewed for destruction during the Summer Recess.
  11. The SPCB further stated it was not obliged to contact third parties on Mr Wright's behalf to obtain the information he requested and also confirmed that the referees contacted are asked to provide information in confidence regarding a candidates' suitability for the post in question. It confirmed its view that this information, if it still existed, would be exempt under section 38 of FOISA.
  12. Mr Wright contacted the SPCB on 28 March 2005 clarifying that he wished the names of the referees of the candidates, not their letters of recommendation. He further stated that he was dissatisfied with the 12 month retention period for appointment records and that the Review Panel had failed to answer points 3 & 4 of his letter of 22 February, which concerned Data Protection and the appointment and powers of the Scottish Public Services Ombudsman. In his opinion that the SPCB was supplying irrelevant information to 'cloud the issue'. He also asked the SPCB to confirm who the review panel were that they referred to in their letter of 15 March.



13. The SPCB replied to Mr Wright on 5 April 2005, stating that it could not supply the names of the Ombudsman's referees, since this would constitute unlawful processing of personal data and would breach the first Data Protection Principle set out in the DPA. This would make the information exempt under section 38 of FOISA. It also argued that disclosure of the names of referees would possibly dissuade potential referees from providing references for candidates which could in turn undermine the recruitment process.
14. The SPCB also supplied Mr Wright with the National Archives Guidance on Retention of Personnel Records to show that best practice was being followed, and details on the panel that reviewed his request referred to in its previous letter of 15 March.
15. On 18 May 2005, Mr Wright submitted an application to my Office for a decision in relation to his information request. In it, Mr Wright reiterated that he only wished to know the names of the candidates' referees, not the content of their statements. He was also concerned that the SPCB had treated his letter of 9 February 2005 as a new information request. The case was allocated to an investigating officer.

## The Investigation

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16. The application from Mr Wright was validated by establishing that he had made a valid request to a Scottish public authority and that he had appealed to me only after requesting that the authority review its decision.
17. A letter was sent to the SPCB on 25 May 2005, informing it that an appeal had been received and that an investigation into the matter had begun. The Council was invited to comment on the case under the terms of section 49(3) of FOISA.
18. The SPCB was also asked to provide me with a range of information in relation to this case. This included
  - a copy of the SPCB's full retention schedule
  - information outlining the disposal procedure used under the retention schedule
  - copies of minutes of the Selection Panel for the Ombudsman to ascertain if names of referees might be referred to there.



19. The SPCB provided all of the information referred to above, except the minutes of the Selection Panel, which it explained had been destroyed as part of its move to its Holyrood site. Instead, it provided a note of the appointment process detailed in the Parliament's Standing Orders (section 3.11) to show that consideration of referees' statements would not play a part in the Panel's selection of the candidate they wish to nominate to the post, where referees would be asked for comments as part of a pre-appointment process after the Panel has made its decision.
20. As evidence of its destruction process, the SPCB explained that records which have completed their active life in the office but which must be retained for a further period are stored in its offsite storage. Each box of records stored there contains a list of the files contained in it and this catalogue is also retained on line. Each file or group of files is allocated a retention period according to the generic records retention schedule which was provided. Information Access Team staff contact the relevant offices when the records stored at the offsite storage are due for destruction to request sign off before arranging for them to be destroyed. The destruction process that is carried out offsite was provided in a flowchart.
21. The search carried out by the SPCB for records relating to the appointment of the Ombudsman ascertained that these were held onsite by the Corporate Policy Unit. They checked file types against the retention schedule and ascertained that the files had been destroyed in line with the retention schedule. Further verbal communications followed with the Personnel Office to check if any copies of the application form on which the names of the referees would appear had been retained. The Personnel Office has confirmed that this is not the case.
22. It also stated that it does hold a general policy file on the Ombudsman covering details of appointment, office establishment etc., but not the actual selection process itself.
23. Mr Wright then asked to comment on the SPCB's statements, and he was provided with its correspondence as part of an information request made to my Office under FOISA.
24. Mr Wright submitted that unnecessary "contextual" information about the procedure was provided in its statements, which he felt did not focus on his query, i.e. who the referees for the Ombudsman were. He re-iterated that he is not interested in the content of the references, but just the names of the referees.
25. He also expressed surprise that the SPCB's retention schedule allows some records to be destroyed after 2 years, or even 1 year.



26. Mr Wright stated that he does not accept that no-one knows who the referees were or the reasons put forward by the SPCB for its refusal to supply the information.

## **The Commissioner's Analysis and Findings**

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### **Was the initial request handled correctly?**

27. Mr Wright asserts that his initial request of 31 January 2005 made it clear that he was seeking the names of referees. Since this relates to his statement of 9 February 2005 that the SPCB did not answer his first two questions of 31 January 2005, it is necessary to look at these questions, the answers that were provided and the clarification that was made by Mr Wright, which prompted the SPCB to treat his letter of 9 February 2005 as a new request for information.
28. It is necessary, first of all, to see if the information requested by Mr Wright was described accurately enough to allow the SPCB to provide what he was expecting.
29. The first two questions posed by Mr Wright on 31 January 2005, used the phrases 'who was or were recommended for the appointment' and 'who recommended that person or these persons'. Further, there was no explicit request made anywhere in this letter for the names of referees provided by applicants.
30. In using the term 'recommended' in both sentences, Mr Wright has unintentionally given the impression that he is referring to the end of the selection process, when the Selection Panel has made its decisions about who to recommend to the SPCB for appointment. This has understandably caused the SPCB to interpret his questions as requests for the names of those recommended to SPCB and the Queen for appointment, and the names of the persons or body that recommended the nominees to be appointed by SPCB at the end of the selection process. Furthermore, the question was phrased in such a way as to give the impression that there was no ambiguity about the information requested, and therefore no need to clarify this.
31. It is in an applicant's interest to describe the information requested in as much detail as possible to assist the authority to be able to identify and locate it. Since there was no explicit request by Mr Wright in his letter of 31 January for the names of those who were considered for the posts, and those who acted as referees, I find that his initial request of 31 January 2005 was interpreted in an acceptable manner by the SPCB, and answered to the best of its ability.





32. In comparing Mr Wright's first letter of 31 January 2005 (questions detailed in point 1), with his subsequent letter of 9 February 2005 (questions detailed in point 4) it is clear to me that the second letter could only ever be treated as a new request for information. Therefore, I also find that the SPCB followed correct procedure in treating all of his questions of 9 February 2005 as a new request for information, since all of them concerned issues that were separate to the reasonable interpretation of his request of 31 January 2005.
33. Mr Wright also asserts that the SPCB supplied extraneous information in its responses to him. On considering the correspondence between Mr Wright and the SPCB, detailed in points 1-14 above, I found that all the information provided to him was relevant to his requests.

### **Should the SPCB still hold the names of the referees?**

34. Upon being informed that the SPCB had destroyed records of appointments which would contain any names of referees, Mr Wright stated that he understood such records should be kept for 6 or even 10 years after the selection process had finished, and, even so, it should still be possible for the SPCB to contact the candidates to ask them to confirm who their referees were.
35. In order to consider the arguments of both Mr Wright and the evidence provided by the SPCB, it is first necessary to detail the requirements for record keeping laid out in FOISA and more specifically any provision that exists for records of recruitment. I will then consider the evidence provided by the SPCB relating to its retention and disposal policy.
36. Paragraph 9.6 of the Code of Practice on Records Management made under section 61(6) of FOISA (the Section 61 Code) states that each authority should establish and maintain a record selection policy stating in broad terms the periods for which records should be retained. Annex B of the Code lists some of the key considerations for deciding how long records should be retained. Amongst these considerations authorities are advised to consider if any legislation or official regulation governs how long it must be kept, if it is likely to be of ongoing or recurrent public interest and if there is current guidance on record retention for specific sectors.



37. There is no legislation which requires records of recruitment to be kept for a set period of time. However, the Section 61 Code commends the records management guidance issued by The National Archives to Scottish public authorities as a further resource for them to use in developing and maintaining their records management systems. I note in particular that the Retention Scheduling Guidance on Personnel records produced by The National Archives (available on [http://www.nationalarchives.gov.uk/recordsmanagement/advice/pdf/sched\\_personnel.pdf](http://www.nationalarchives.gov.uk/recordsmanagement/advice/pdf/sched_personnel.pdf)) states that recruitment, appointment and/or promotion board selection papers should be kept for 1 year.
38. The SPCB provided both Mr Wright and myself with a copy of the relevant section of its records retention schedule, developed as part of its record selection policy and showing that the SPCB keeps records of recruitment for 1 year before reviewing them for destruction. Furthermore, it referred Mr Wright to the Guidance issued by The National Archives which shows that its policy is based upon a best practice guideline on retention of recruitment records that is recognised throughout the UK.
39. It is clear to me that records of recruitment, and in particular, the references collected as part of the selection process, do not require to be kept for 6 to 10 years, despite the assertions of Mr Wright. Whilst I accept that there may be an initial public interest in retaining names and details of references to provide proof that they were requested, the retention of such information would not serve any purpose beyond a reasonable time for appealing the appointment.
40. Furthermore, different types of records will have different values assigned to them by authorities, either according to their needs, legislation or guidance requiring them to retain types of records for certain periods. Mr Wright correctly states that tax records are required to be retained for a certain period under statute, but records of recruitment are different from tax records, and are not covered by similar legislation. It is therefore for the authorities to decide how long these should be retained for, according to need and the guidance that is available. Clearly the SPCB has done this in developing a retention policy for recruitment records that takes The National Archives Guidance on the retention of Personnel records into account.

#### **Are the referees names still held by the SPCB?**

41. From the evidence detailed above, it can be seen that the SPCB has a retention and disposal policy and implements a clear procedure for the destruction of its records. It has also conducted a thorough search for the records containing the references requested by Mr Wright using all the systems available to it, but has not been able to find anything. I therefore accept that the SPCB has destroyed the records of recruitment relating to the appointment of the Ombudsman which contain the references requested.



42. Regarding Mr Wright's dissatisfaction that the SPCB will not contact candidates for the names of their referees and cannot remember who they were, section 1(4) of FOISA states that 'the information to be given by the authority is that held by it at the time the request is received'. This means that the information covered by FOISA is that which the authority holds in a recorded form at the time of the request. Therefore, the SPCB has no obligation to contact candidates and recreate information in order to answer Mr Wright's request.

### **Consideration of the Section 38 exemption (Personal Information)**

43. In proving that the information requested by Mr Wright has been destroyed in line with national guidance and its own internal policy, and that it is not held elsewhere in their retention schedule, the SPCB have satisfied me that it is not possible for them to provide Mr Wright with the names of the referees or other candidates. Accordingly, I am not obliged to address the issue of whether the referees' names in this case constitute exempt personal information under section 38 of FOISA since they are no longer held by the SPCB.



## Decision

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I find that The Scottish Parliamentary Corporate Body (SPCB) interpreted Mr Wright's initial request in a reasonable manner, and acted correctly in treating the questions he subsequently raised as a new request. In doing so, it complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA).

I also find that the SPCB no longer holds the references for the appointment of the Scottish Public Services Ombudsman that were requested by Mr Wright, as the information had been destroyed correctly in line with the SPCB's retention and disposal policy.

Finally, I find that the SPCB acted in line with section 1(4) of the Act in stating that it had no obligation to contact candidates in order to find out the names of referees used in the selection process for the post of the Scottish Public Services Ombudsman.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**20 March 2006**