



Scottish Information
Commissioner

**Decision 234/2006 Mr James C Hunter and
Glasgow City Council**

Request for a copy of an external management report

**Applicant: Mr James C Hunter
Authority: Glasgow City Council
Case No: 200600085
Decision Date: 18 December 2006**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 234/2006 – Mr James C Hunter and Glasgow City Council

Request for a copy of an external management report into Kerelaw School – Report withheld. The Commissioner was satisfied that the exemptions relied on to withhold the report had been used correctly by Glasgow City Council.

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 section 1(1) (General entitlement); sections 30(b) and 30(c) (Prejudice to effective conduct of public affairs); sections 38(1)(a) and 38(1)(b) (read in conjunction with section 38(2)(a)) (personal information).

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

Facts

Mr James Hunter requested a copy of a report on the external line management of Kerelaw School (the Report) from Glasgow City Council (the Council). The Council refused to release a copy of the Report under sections 30 and 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). Mr Hunter wrote to the Council, explaining that he was dissatisfied with its response and asked it to review its decision. On review, the Council upheld its original decision that the information was exempt under sections 30 and 38(1)(b) of FOISA.

Mr Hunter was dissatisfied with the response he received from the Council as he considered the release of the Report was in the public interest. Mr Hunter applied to the Commissioner to obtain a copy of the Report which had been withheld from him.

Following an investigation, the Commissioner found that the Council had dealt with Mr Hunter's request for information in line with Part 1 of FOISA.

(During the investigation the Council clarified that the Report was being withheld under the exemptions contained in sections 30(b), 30(c), 38(1)(a) and 38(1)(b) of FOISA.)



Background

1. Mr Hunter emailed the Council on 1 September 2005, in which he requested a copy of the report on the external line management of Kerelaw School (the Report).
2. The Council emailed a response to Mr Hunter on 30 September 2005. In this email the Council stated that it was withholding the Report under sections 30 and 38(1)(b) of FOISA. The Council also provided arguments regarding the public interest test; in summary it felt that at this point in time the release of the Report was not in the public interest.
3. Mr Hunter wrote to the Council on 2 November 2005 stating he was dissatisfied with its refusal to release a copy of the Report. Mr Hunter stated that it was in the public interest for the Report to be released as the public should be made aware of the reasons for the school closure and the Council's policy to caring for underprivileged children. Mr Hunter also noted that some of the information in the report might assist him in a personal matter.
4. The Council responded in writing on 30 November 2005 to Mr Hunter's request for review. The Council upheld its original decision not to release the Report under sections 30 and 38(1)(b) of FOISA. However, the Council advised that a report summarising the conclusions of the investigation would be published on the Council's website the following day. In response to the comment about the personal matter raised by Mr Hunter, the Council also advised him that he could make a request for information about himself held by the Council.
5. Mr Hunter wrote to my Office on 2 January 2006, stating that he was dissatisfied with the outcome of the Council's review and applying to me for a decision in relation to the withheld Report. Mr Hunter asserted that the release of the Report was vital to the public interest as many people were employed at the school and some staff had been subject to disciplinary hearings. He noted that an edited version of the Report had been made available by the Council, but expressed his concern that the edited version may be a distortion of the original report.
6. The case was then allocated to an investigating officer and the application validated by establishing that Mr Hunter had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to his request.



The Investigation

7. The investigating officer wrote to the Council on 18 January 2006, giving notice that an appeal had been received and that an investigation into the matter had begun and inviting comments from the Council as required under section 49(3)(a) of FOISA. The Council was asked to supply my Office with, amongst other items, a copy of the Report, detailed analysis of its application of the exemptions in sections 30 and 38 of FOISA and application of the public interest test.
8. The Council responded in full on 7 February 2006, enclosing, amongst other items, a copy of the Report and meeting minutes incorporating discussions on the closure of the School.
9. The Council also contacted the investigating officer on 11 April 2006, informing her that Mr Hunter had made a subject access request under the Data Protection Act 1988 (the DPA) to the Council. This request had been refused and Mr Hunter had now complained to the Information Commissioner, based in Wilmslow, who has responsibility for enforcing the DPA throughout the UK.
10. During the investigation, the investigating officer and the Council discussed the possibility of releasing a redacted version of the Report to Mr Hunter. External to this request there were court proceedings that had an impact on the possibility of the Report being released.
11. On 8 September 2006, the Council emailed the investigating officer and advised that after considering all the factors surrounding the Report it had decided that a redacted version of the Report should not be released. The Report was withheld under sections 30(b), 30(c), 38(1)(a) and 38(1)(b) of FOISA. The Council also felt that the summary report published on the Council's website on 6 December 2005, provided Mr Hunter with sufficient background information about the closure of the school.

Submissions from the Council

Section 30

12. The Council has argued that one of the aims of the Report is to help it identify any shortcomings which could be rectified or avoided in future and that, as such, it was essential such reports should proceed on the basis of complete candour. If the report were to be released in full, then it would significantly discourage people from cooperating with such an investigation. The Council stated, however, that once matters had reached a final conclusion, it may release part of the Report in future.



13. The Council acknowledged that there was significant public interest in openness and transparency of the Council. However, on this occasion, it felt that it was appropriate to release the relevant information concerning the decisions but not all the debate surrounding those decisions. (This led to the Council releasing an edited version of the Report on its website.)
14. The Council acknowledged that it had already taken a decision on whether the school should be closed, but stated that there were a number of outstanding issues still to be addressed.

Section 38

15. The Council also commented that sections of the Report would have to be edited out as it contained personal information relating to both Mr Hunter and other third parties. Even if this information were to be redacted, it would still be possible to identify a number of individuals discussed in the Report.

Submissions from Mr Hunter

16. Mr Hunter has argued that the Report should be released in the public interest as it would reveal the decision making process and line management action which led to closure of the school. Mr Hunter also commented that the Council has a duty to inform the public fully and the release of the Report would allow the public to assess the council's policies and actions.
17. As noted above, Mr Hunter is concerned that the summarised report (dated 6 December 2005) may be a distortion of the original Report and may only be based on interviews with external line-managers. Mr Hunter also stated in his letter, that to suppress the publication of the Report is attempt to nullify or modify the shortcomings of the Council and to continue to deliberately obfuscate the public's view of the school.

Background of the Report

18. The information in this section of the decision has been taken from the summary report dated 6 December 2005, published on the Council's website.
19. As a result of a complaint in February 2004 by members of staff against a manager at Kerelaw School, the Council initiated an investigation. In the course of this a number of serious allegations were made by young people concerning their treatment, including physical abuse by staff. As a result, a full time investigating team was established by the Council in August 2004. A number of staff have been suspended, some have been subject to disciplinary proceedings and some have been dismissed. A number of other staff have been subject to police investigation resulting in some cases in criminal charges being brought.



20. In parallel with the main investigation, the Chief Executive of the Council, in April 2005, ordered an independent investigation into the external management arrangements at Kerelaw School following concerns expressed by members of the Council's Personnel and Administration Services (Appeals) Sub-committee.
21. This investigation was carried out by the Depute Director of Direct and Care Services and the Head of Legal and Administrative Services and the resulting report has reached a number of conclusions about the external management arrangements in place at Kerelaw School.
22. The main focus of the Report was therefore not the closure of the school, but an examination of the management of the school over the last few years.

The Commissioner's Analysis and Findings

23. I shall consider each of the exemptions used by the Council to withhold the Report in turn. In coming to this decision, I have taken account of the submissions made to me by both the Council and Mr Hunter.

Section 38(1)(a) personal information

24. The Council exempted sections of the Report under section 38(1)(a) of FOISA.
25. As detailed in paragraph 18, the Report examined the management of the school. Sections of the Report do include the names of individuals, their role and other comments about their time at the school, including Mr Hunter's details. Whilst other sections of the Report comprise details of the school's purpose and set-up. It is the former that the Council is withholding under section 38(1)(a) of FOISA.
26. It should be noted from the outset that where an applicant makes a request for information held by a public authority that relates to the applicant, this will in most cases be a request for personal information which should be considered under the provisions of the DPA. Section 38(1)(a) of FOISA states that information is exempt information if it constitutes personal data of which the applicant is the data subject.



27. The term “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 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.
28. The Report does include Mr Hunter’s name, role in the school and other work related information. Therefore sections of the report do contain information which relates to a living individual who can be identified from that information. I also find that further information in the Report could be used in conjunction with other information in possession of the data controller (i.e. the Council) in order to identify the individuals concerned. As such, I am satisfied that these sections of the Report are personal data.
29. As stated in paragraph 9, Mr Hunter made a subject access request under the DPA to the Council. This request had been refused by the Council and was appealed to the Office of the Information Commissioner, based in Wilmslow, who has responsibility for enforcing the DPA.
30. Consequently having considered all the facts detailed above, in my view, Mr Hunter’s request to the Council constituted a request for personal information of which he is the data subject and the Council was correct to consider the request as being exempt by virtue of section 38(1)(a) of FOISA.

Section 38(1)(b) personal information

31. The Council also exempted sections of the Report under section 38(1)(b) of FOISA.
32. In deciding whether the release of the report to Mr Hunter would be a breach of section 38(1)(b) of FOISA, I shall first consider whether the information contained in the report was, in fact, personal data under the terms of the DPA, as detailed in paragraph 27 above.
33. The report incorporates details of staff employed at the school and their role in the management of the school. I find that sections of the report contain information which relates to living individuals who can be identified from that information. I also find that further information in the report could be used in conjunction with other information in possession of the data controller (i.e. the Council) in order to identify the individuals concerned. As such, I am satisfied that much of the information contained in the report is personal data.
34. I must now go on to consider whether the release of the information would breach any of the data protection principles.



35. The Information Commissioner, who is responsible for enforcing the DPA, has issued guidance on the consideration of the data protection principles within the context of freedom of information legislation (Freedom of Information Act Awareness Guidance No 1 – Personal Information). In this guidance, the Commissioner recognises that it is likely to be the first data protection principle which is most relevant when considering whether the release of third party personal information would breach the DPA. The first data protection principle provides that information must be processed fairly and lawfully. The Commissioner provides examples of the types of questions which should be considered by authorities when assessing whether the release of personal data would amount to ‘fair’ processing. These include:
- a. would disclosure cause unnecessary or unjustified distress or damage to the data subject?
 - b. would the data subject expect that his or her information might be disclosed to others?
 - c. has the person been led to believe that his or her information would be kept secret?
36. As detailed above, individuals named in the Report were employed in a public capacity and their details may be public knowledge, but due to the sensitive nature of the Report it would be difficult to extract and release such public information without releasing non-public information.
37. Additionally, I consider that the individuals cited within the report would not expect their personal data to be released. Furthermore, releasing personal data contained within the report may be likely to cause distress to the individuals concerned due to the nature of the situation which led to the report being produced. I conclude that to release the personal data contained within the report would be to breach the first data protection principle, in that the release of the information would be unfair, and therefore find that the Council was correct to withhold the personal information within the report under section 38(1)(b) of FOISA.
38. Since I have upheld the Council’s application of sections 38(1)(a) and 38(1)(b) of FOISA to sections that contain personal information within the withheld Report, I do not intend to consider the application of sections 30(c) and 30(b) of FOISA to these sections.



Application of section 30(b) of FOISA

39. Sections 30(b)(i) and (ii) of FOISA state that information is exempt if its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation, respectively. I am of the view that it is difficult to see how information not falling within these types of information would engage the exemptions in section 30(b) given that the authority must demonstrate that future practice in these areas would be inhibited by disclosure.
40. The majority of the Report is with regard to the external management of the School. The authors do provide commentary on the management of the School and the effect of staff being employed at the School on the way the School was managed.
41. The Council did accept that not every section of the Report contained advice or views and some of the information was factual. However, the Council considered that the publication of the summary report in December 2005 had provided all the factual information from the Report.
42. I have looked through the Report and consider that some information does amount to an expression of views or provision of advice. However, some isolated sections of the Report are purely factual information about the school and its history.
43. Where a document contains both factual information and advice and opinions, attempts should be made to extract the factual information and supply this to the applicant. In Decision 41/2005, for example, I ordered the release of the document with the exception of a few paragraphs which I considered were exempt under section 30(b).
44. Even if the information falls within the categories identified in section 30(b) the authority must still demonstrate that release of the information would or would be likely to inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
45. In its submissions to me the Council argued that it was essential that such reports of this type proceed on the basis of complete candour and such candid discussion would be inhibited if information of this type were to be routinely released, to the substantial prejudice to the quality of the investigative and decision making process and, in consequence, to the free and frank provision of advice and exchange of views for the purposes of deliberation.



46. As detailed in decision 41/2005, I emphasised in that case that advice and expressions of opinion are to be exempt from disclosure only where this would have a substantially inhibiting effect in future. In assessing the inhibiting effect disclosure might have the authority should consider:
 - a. the subject matter of the advice or opinion,
 - b. the content of the advice and opinion itself,
 - c. the manner in which the advice or opinion is expressed, and
 - d. whether the timing of release would have any bearing (releasing advice or opinion whilst a decision was being considered, and for which further views were still being sought, might be more substantially inhibiting than once a decision has been taken).
47. I have looked through the information withheld in this case. As I said above, I consider that sections of the Report are factual. However, the remainder of the Report does express the authors' advice and views.
48. The content of the Report deals with sensitive matters and it would be difficult to release factual sections of the Report without releasing non-factual information.
49. Having considered all the circumstances of the case I am satisfied that disclosure of the Report would or would be likely to inhibit substantially the free and frank exchange of views or provision of advice. I find that the exemptions under section 30(b)(i) and (ii) have been appropriately applied to the withheld Report.
50. Having found that the whole report is exempt by virtue of either section 38 and section 30(b)(i) and (ii), I will not go on to consider the application of the exemption section 30(c).

The Public Interest Test

51. The exemptions in section 30(b)(i) and (ii) are subject to the public interest. This means that although I consider the information to be exempt under sections 30(b)(i) and (ii) I must go on to consider whether, in all the circumstances of the case, the public interest in the release of the information is outweighed by the public interest in the maintenance of the exemptions.
52. In his letters to the Council and my Office, Mr Hunter has expressed the view that the release of the Report is in the public interest to reveal the decision making processes and line management action. He believed that accusations have been made and sees it as appropriate for a copy of the Report to be released so that the accusations can be refuted. He has argued that disclosure of the information requested would lead to greater transparency in the manner in which the Council conducted itself in closing the school.



53. The Report itself examines the facts associated with the management of the school and offers views as to the relationships between staff. Whilst this is of particular interest, in the circumstances, to Mr Hunter I accept that there is a general public interest in disclosure of the information requested in order to make transparent the way the Council manages such schools, and how it accounts for and responds to shortcomings.
54. However I note that the Council has published a summary report which highlighted the major shortcomings and actions for the future. The Council has gone some way to achieving its original aim of making the Council more open and transparent by the release of relevant information concerning the decisions but without revealing views on the specific personal and professional shortcomings which informed those decisions. I do not accept that the release of the Report would necessarily serve to highlight any additional shortcomings which have not already been included in the summary report.
55. The Council has written in its letter to both Mr Hunter and my Office that once matters have reached a final conclusion that the balance of the public interest may change to the extent that the Council may release part of the report in the future.
56. Having considered the public interest arguments in favour and against release, it is my view that the balance of the public interest, at the time of request, lay in withholding the information requested. There is a general and specific interest in knowing what the Council took into account when coming to its conclusions about the external management of Kerelaw. However this is outweighed by the public interest in ensuring that the Council is able to gather that information and to be provided with a frank and detailed account of events, so that it may deliberate properly on what action should be taken. Disclosure may have undermined the capacity of authorities to take action following the findings of the report and to respond to external events.
57. Therefore, I have decided, in all the circumstances of the case that the public interest in disclosing the information is outweighed by that in maintaining the exemption.

Decision

I find that Glasgow City Council (the Council) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to Mr James C Hunter's request for information.



Appeal

Should either Glasgow City Council or Mr James C Hunter 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 of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
18 December 2006



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.

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

- (a) ...
- (b) would, or would be likely to, inhibit substantially-
 - (i) the free and frank provision of advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation; or
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

38 Personal information

- (1) Information is exempt information if it constitutes-
 - (a) personal data of which the applicant is the data subject;
 - (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;
 - (c) ...
 - (d) ...
- (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
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress); and
 - (b) ...