



Scottish Information
Commissioner

**Decision 110/2007 Mr James Wright and the Scottish Executive
and Her Majesty's Inspectorate of Education**

*Requests for a list of establishments inspected by a particular member
of HMIE staff, and information relating to legal advice sought in respect
of a complaint filed by the applicant*

**Applicant: Mr James Wright
Authority: Scottish Executive and Her Majesty's
Inspectorate of Education
Case No: 200601748
Decision Date: 11 July 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement); 2(1) (Effect of exemptions); 17(1) (Notice that information is not held); 36(1) (Confidentiality) and 38 (Personal information).

Data Protection Act 1998 (DPA): sections 1 (Basic interpretative provisions); 10 (Right to prevent processing likely to cause damage or distress).

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 Wright (Mr Wright) made two separate requests for information held by the Scottish Executive (the Executive) and Her Majesty's Inspectorate of Education (HMIE), an agency of the Executive. The first sought information about inspections conducted by a specific employee of HMIE. HMIE withheld this information on the grounds that it was exempt under the terms of section 38(1)(b) of FOISA. Mr Wright's second request sought information relating to legal advice concerning a complaint he submitted following the inspection of a pre-school establishment by HMIE. The Executive withheld some of this information on the grounds that it was exempt under section 36(1) of FOISA, and gave notice that some of the information requested was not held.

Mr Wright was not satisfied with the responses to his two requests and asked the HMIE and Executive to review their decisions in relation to each. Following these reviews Mr Wright was notified in each case that the original decision would be upheld without amendment. Mr Wright remained dissatisfied and applied to the Commissioner for a decision in relation to these matters.



Following an investigation, the Commissioner found that HMIE and the Executive had dealt with Mr Wright's requests for information in accordance with Part 1 of FOISA.

Background

1. This decision is concerned with the handling of two separate but related information requests by the Executive and its agency HMIE. I have therefore taken the step of issuing one decision in relation to the two applications made to me.
2. In May 2004, a nursery in which Mr Wright has an interest was subject to an inspection conducted jointly by HMIE and the Care Commission. The managing inspector in this inspection was an employee who had been seconded to HMIE from an education authority. Following the inspection Mr Wright made a series of complaints about its conduct. Mr Wright was dissatisfied with the complaints procedure and the independent review and subsequently made two separate requests for related information to HMIE and the Executive.
3. On 20 June 2006, Mr Wright wrote to HMIE requesting a list of child care centres inspected by a particular employee (the employee) since November 2005, and a copy of the HMIE's annual report for 2003/2004. I shall refer to this request as Mr Wright's first request.
4. On 13 July 2006, Mr Wright wrote to the Executive requesting a breakdown of the time, costs and nature of the work involved in legal advice which he understood to have been provided by the Office of the Solicitor of the Scottish Executive (OSSE) to HMIE and the Care Commission with regard to Mr Wright's complaints about the May 2004 inspection. Mr Wright also requested the reasons given by HMIE and the Care Commission to justify the request for this legal advice. I shall refer to this as Mr Wright's second request.
5. Mr Wright was sent responses to his first and second requests on 20 July 2006 and 11 August 2006 respectively. With regard to Mr Wright's first request, HMIE provided details of how to access a copy of its annual report on its website (and I will comment no further on this part of the request as this was not part of the application subsequently made to me by Mr Wright) but withheld the list of child care centres inspected by the relevant employee since November 2005. This information was withheld on the basis that the exemptions in sections 38(1)(b) (Personal information); 39(1) (Health, safety and the environment) and 30(c) (Prejudice to effective conduct of public affairs) of FOISA applied.



6. In response to Mr Wright's second request, the Executive issued a notice stating that information relating to the time and cost of legal advice was not held in terms of section 17 of FOISA. The Executive withheld information relating to the nature of legal advice provided and the reason for it being sought on the basis that the exemption in section 36(1) (Confidentiality) of FOISA applied.
7. On 14 and 15 August 2006, Mr Wright wrote to request reviews of the handling of his first and second requests respectively. In particular, with respect to the first request, Mr Wright questioned HMIE's reliance on the exemption in section 38 of FOISA. With respect to the second request, Mr Wright suggested that the Executive was required to maintain a record of the time and costs incurred in providing legal advice.
8. Mr Wright was notified of the outcome of HMIE and the Executive's reviews on 8 September 2006 and 17 October 2006 respectively. In each case, the original decision was maintained without amendment.
9. On 2 November 2006, Mr Wright wrote to my office, stating that he was dissatisfied with the outcome of the reviews conducted by the Executive and HMIE and applying to me for a decision in relation to each in terms of section 47(1) of FOISA.
10. The application was validated by establishing that in relation to each request Mr Wright had made his 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 that request.

The Investigation

11. On 19 December 2006, the Executive (which also responds centrally to enquiries from my office in relation to investigations concerning HMIE) was notified in writing that an application had been received from Mr Wright in respect of both of Mr Wright's requests. It was asked to provide my office with specified items of information required for the purposes of the investigation.
12. On 26 January 2007, the Executive supplied my office with its statements on this case and all information withheld from Mr Wright. The case was then allocated to an investigating officer.



13. The investigating officer subsequently contacted the Executive, asking it to respond to specific questions on the application. In particular, clarification was sought with respect to the Executive's submissions concerning Mr Wright's first request for information.

The Commissioner's Analysis and Findings

14. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Wright and the Executive and I am satisfied that no matter of relevance has been overlooked.
15. I will address the matters raised by Mr Wright's two information requests in turn below. As noted above, these sought :

The first request: A list of the childcare centres inspected by a particular employee since November 2005.

The second request: A breakdown of the time, costs and nature of the work involved in any legal advice which may have been provided by the OSSE to HMIE and the Care Commission relating to the complaint submitted by Mr Wright about the inspection report published following the May 2004 inspection. Mr Wright also requested the reasons given by the HMIE and the Care Commission to justify any such request for legal advice.

Request 1: establishments inspected by a particular employee - section 38

16. Mr Wright's first information request was submitted to HMIE and his correspondence concerning this matter was with that agency. However, as noted above, in line with the general practice where a case concerns an Executive Agency, submissions to my office on this matter were made on HMIE's behalf by the Executive's central FOI unit.
17. The Executive has relied on the exemption in section 38(1)(b), read in conjunction with section 38(2)(a)(ii) to withhold details of the inspections carried out since November 2005 by the named employee.
18. This particular exemption allows personal data relating to a person other than the applicant to be withheld if disclosure of the data to a member of the public would contravene section 10 of the DPA. This exemption is subject to the public interest test required by section 2(1)(b) of FOISA.



19. Under section 10 of the DPA a notice (commonly known as a “Section 10 Notice”) can be issued by an individual requiring a data controller to stop processing data about an individual if the processing of the data is causing, or is likely to cause, the data subject or another person unwarranted substantial damage or distress.
20. The data controller in this case is HMIE. Releasing information as a result of a request having been made under FOISA is considered to be processing under the terms of the DPA. A Section 10 Notice needs to be accepted by the data controller before it stops processing the data about the individual. Guidance from the Information Commissioner’s Office (ICO) states that a Section 10 Notice should be complied with unless there is some overriding justification for the processing.
21. The Executive has supplied my office with copies of the employee’s Section 10 Notice and HMIE’s response to this in terms of section 10(3) of the DPA. The Executive also confirmed the date of receipt of the Section 10 Notice.
22. I note that, at the time of the request, a Section 10 Notice had not been submitted to HMIE but that, as a result of the requests made by Mr Wright, the employee in question submitted a Section 10 Notice which was subsequently accepted by the HMIE.
23. The first question I must consider is whether the information requested constitutes personal data as defined by section 1 of the DPA.
24. I am satisfied that specific information relating to inspections carried out by this particular employee is personal data as it is biographical in the sense that it concerns the work of just one individual carried out on behalf of the HMIE.
25. I am also satisfied that by releasing this data the Executive would breach section 10 of the DPA, given that a Section 10 Notice has been served on and accepted by HMIE. As a result, I find that the exemption in section 38(1)(b) applies to this information.

Public interest test

26. As mentioned above, this particular exemption is subject to the public interest test required by section 2(1)(b). This means that even if the exemption applies, the information should still be released unless, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption. If the public interest lies in disclosure, the information must be released.



27. Within its submissions to my office the Executive stated that there was no public interest in individuals being targeted and being put in a situation where their physical and mental health could be adversely affected.
28. The Executive also made it clear that it was not seeking to withhold specific inspection reports, as these are published as a matter of routine.
29. The Executive also highlighted that although it is the policy of HMIE to publish inspection reports - which name the managing inspector - on its website, this publication does not necessarily give an accurate reflection of all the inspections an individual has participated in. The Executive explained that the inspections are carried out by a team, and not all participating inspectors' names will appear in the resultant report.
30. Having reviewed the evidence supplied by the Executive, I am satisfied that the release of this information would cause unwarranted and substantial distress to this particular individual. I am also satisfied that the information sought cannot be confirmed through access to publicly available documents.
31. I accept that there is considerable public interest in transparency in the conduct of public bodies, and among those undertaking work of a public nature. In general, I take the view that where information requested under FOISA consists of the names of officials, their grades, job functions or decisions which they have made in their official capacity, then disclosure should be made. However, this will not always be the case.
32. In this case, I have noted that any reports resulting from inspections in which this particular employee participated are published as a matter of course. Taking into account the unique circumstances of this case, I am not persuaded that any significant additional public interest would be served by disclosing a list of establishments inspected by this particular employee when the public interest in such disclosure is weighed against the distress to that individual that is likely to result.
33. On balance, I am satisfied that the public interest in maintaining the exemption that applies to this information outweighs the public interest in disclosing the information.
34. I therefore conclude that HMIE acted in accordance with Part 1 of FOISA by withholding the information sought in Mr Wright's first information request under the terms of section 38(1)(b) read in conjunction with section 38(2)(a)(ii).
35. Having judged that this information has been correctly withheld, I will not go on to consider any other exemptions in relation to this request.



Request 2: Time and cost in providing legal advice-section 17 of FOISA

36. In its response to Mr Wright's second request, the Executive informed him that OSSE did not provide legal advice to the Care Commission, and that the Care Commission has its own solicitors. I am satisfied that no relevant information is held by the Executive concerning advice to the Care Commission. However, the Executive has confirmed that relevant advice was provided by OSSE to HMIE.
37. With regard to Mr Wright's request for the time and cost of the legal advice provided by the OSSE to HMIE, the Executive issued Mr Wright with a notice that the information was not held in terms of section 17 of FOISA.
38. The Executive submits that the cost of advice provided by the OSSE is not charged directly to departments or agencies. The Executive further explained that timesheets detailing the hours spent by OSSE staff on a particular issue are not compiled. Consequently, the information requested is not recorded.
39. It should be noted that the right to receive information under FOISA only extends to recorded information. I am satisfied, given the explanation provided by Executive, that it acted in accordance with Part 1 of FOISA by notifying Mr Wright in terms of section 17 of FOISA that the time and cost in providing legal advice was not recorded and that, consequently this information is not held by the Executive.

Request 2: Reasons why advice sought and nature of advice - section 36(1)

40. Mr Wright's second request also sought information on the reasons why legal advice was sought and the nature of the work done. Although the Executive acknowledged that Mr Wright was not seeking the actual legal advice provided, it asserted that information relating to the reasons for the advice being sought and the nature of the work done was inextricably linked to the content of the advice given.
41. The Executive submitted that the disclosure of the information regarding the nature of the legal advice given or the reasons for it being sought, would be a breach of the 'privilege' of confidentiality between legal advisor (OSSE) and client (HMIE).
42. In its submissions to my office, the Executive supplied all documents held which related to the legal advice surrounding Mr Wright's complaint. These comprised 15 documents which primarily reflect exchanges between the OSSE and HMIE relating to Mr Wright's complaints.



43. The Executive has withheld this information on the grounds that it is exempt from disclosure under the terms of section 36(1) of FOISA. Section 36(1) provides that information in respect of which a claim to confidentiality of communications can be maintained in legal proceedings is exempt information.
44. One type of communication covered by this exemption is communication between legal adviser and client. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled. For example, the information being withheld must relate to communications with a legal adviser. The legal adviser must be acting in a professional capacity and the communications must occur in the context of a professional relationship with the client.
45. Having considered Mr Wright's request for the reasons why legal advice was sought and the nature of the work carried out and secondly, having reviewed the recorded information held by the Executive relating to this request, I am satisfied the information sought by Mr Wright is inextricably linked to the substance of the legal advice itself. I am satisfied that the correspondence comprises information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result I am satisfied that the legal advice is exempt in terms of section 36(1) of FOISA.

Public interest test

46. Section 36(1) of FOISA is a qualified exemption and is subject to the public interest test required by section 2(1)(b). Where an authority considers the information to be exempt it must still consider, whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption. If the public interest lies in disclosure, the information must be released.
47. There will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client. As a result, I am likely only to order the release of communications in highly compelling cases.
48. The Executive submitted that any public interest in seeing this information is outweighed by the public interest in ensuring that solicitors and their clients can discuss relevant issues and give and receive legal advice in confidence. The Executive highlighted that decisions by the HMIE must be taken, where appropriate, in a fully informed legal context which may set out the arguments for and against a particular course of action.
49. Having considered the comments made by both the Executive and Mr Wright, in this instance I can see no overriding public interest in disclosing this information which relates to the handling of a specific complaint.



50. Consequently, I am satisfied that the public interest in maintaining the exemption under section 36(1) outweighs that in disclosure. I am satisfied that the Executive correctly maintained the exemption in section 36(1) in withholding these documents.

Decision

I find that Her Majesty's Inspectorate of Education (HMIE) acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the first information request made by Mr James Wright.

I find that Scottish Executive acted in accordance with Part 1 of FOISA in responding to the second information request made by Mr James Wright.

Appeal

Should Mr Wright wish to appeal against my decision in relation to his first or second information request, there is an appeal to the Court of Session on a point of law only. Similarly, should HMIE or the Executive wish to appeal against my decision in relation to Mr Wright's first and second information requests respectively, there is an appeal to the Court of Session on a point of law only. All such appeals must be made within 42 days of receipt of this decision notice.

Kevin Dunion
Scottish Information Commissioner
11 July 2007



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.

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
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

17 Notice that information is not held

- (1) Where-
 - (a) a Scottish public authority receives a request which would require it either-
 - (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.



36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

38 Personal information

- (1) Information is exempt information if it constitutes-
[...]
 - (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;
[...]
- (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

Data Protection Act 1998

1 Basic interpretative provisions

1(1) [...]

"Personal data" means data which relate to living individual who can be identified-

- (a) 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

[...]

10 Right to prevent processing likely to cause damage of distress

(1) Subject to subsection (2), an individual is entitled at any time by notice in writing to a data controller to require the data controller at the end of such a period as is reasonable in the circumstances to cease, or not to begin, processing, or processing for a specified purpose or in a specified manner, any personal data in respect of which he is the data subject, on the ground that, for specified reasons-

(a) the processing of those data or their processing for that purpose or in that manner is causing or is likely to cause substantial damage or substantial distress to him or another, and

(b) that damage or distress is or would be unwarranted.

[...]

(3) The data controller must within twenty-one days of receiving a notice under subsection (1) ("the data subject notice") give the individual who gave it a written notice-

(a) stating that he has complied or intends to comply with the data subject notice, or

(b) stating his reasons for regarding the data subject notice as to any extent unjustified and the extent (if any) to which he has complied or intends to comply with it.