

# Decision Notice

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## Decision 227/2014 Mr Niall MacKinnon and Education Scotland

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### **Correspondence and meetings**

Reference No: 201400816

Decision Date: 27 October 2014



Scottish Information  
Commissioner



## Summary

On 4 November 2013, Mr MacKinnon asked Education Scotland for correspondence about a school inspection and information regarding various meetings. Education Scotland informed Mr MacKinnon that it did not hold the information. Following an investigation, the Commissioner accepted this.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Notice that information is not held)

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

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1. On 4 November 2013, Mr MacKinnon asked Education Scotland (amongst other requests not the subject of this decision) for the following information (original numbering of the parts of the request has been retained):
  2. Items in regard of text of letter of reply of 14 November 2011. Internal meetings held in regard of this inspection<sup>1</sup>, and particularly in regard of this school's first draft response: dates, agendas, minutes, decisions taken. [...] also to include telephone calls and written internal correspondence (emails, letters, memos), and specifically between [name withheld] and [name withheld] who were the lead inspectors, and [name withheld], the sole assessor who carried out the inspection, and [name withheld], who responded on behalf of the lead inspectors in some communications.
  3. I formally request to be sent the minute of the meeting of 11 March 2009 between Alice Brown, ombudsman, and Graham Donaldson, then HMSCI and Kenneth Muir of HMIE. What was the agenda of the meeting; what was discussed; what were its agreed conclusions; what was to be followed up – by HMIE, by SPSO and between them jointly in, say, a future Memorandum of Understanding, input into legislation, or the redrafting of the HMIE complaints procedure?
  6. Please supply me with the minutes or file notes of meetings/committees/board meetings at which [name of Complaints Investigator]'s letter of 7 December 2009 to Graham Donaldson was discussed, and of the letter of Jim Martin, ombudsman, to me of 7 December 2009, which [Complaints Investigator] forwarded to Mr Donaldson. Also please forward to me details of minutes meetings/committees/boards at which the issues of these two letters were discussed, given that they have set a different final stage of the HMIE-SPSO complaints procedure than in the published version then extant, and the revised complaints procedure of Education Scotland 2012.

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<sup>1</sup> a school inspection in October 2006  
Print date: 04/11/2014

2. HMIE and Learning and Teaching Scotland merged in July 2011 to create Education Scotland<sup>2</sup>.
3. Education Scotland responded on 6 December 2013. It informed Mr MacKinnon that it did not hold any information with respect to each part of the request listed above.
4. On 3 February 2014, Mr MacKinnon asked Education Scotland to conduct a review of its response, as he did not agree with the response issued.
5. Education Scotland notified Mr MacKinnon of the outcome of its review on 3 March 2014. It upheld its previous response without amendment.
6. On 4 April 2014, Mr MacKinnon emailed the Commissioner, stating that he was dissatisfied with the outcome of Education Scotland's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr MacKinnon had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

## **Investigation**

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8. Education Scotland is an agency of the Scottish Ministers (the Ministers). Subsequent references to contact with or submissions from Education Scotland should be read as references to contact with or submissions made by the Ministers on behalf of Education Scotland.
9. On 3 June 2014, in line with agreed procedures, the investigating officer notified the Ministers in writing that an application had been received from Mr MacKinnon. The Ministers were invited to comment on the application (as required by section 49(3)(a) of FOISA) and were asked to respond to specific questions. The Ministers were asked to provide detailed submissions as to whether they held any information falling within the scope of the requests under consideration. The Ministers responded on 27 June 2014.
10. The Ministers were asked for further submissions on the searches Education Scotland had conducted in ascertaining whether it held any information falling within scope of part 3 of the request. The Ministers responded on 7 August 2014.
11. On 19 August 2014, Mr MacKinnon provided copies of two documents he had obtained from another public authority which he considered fell within scope of the request.
12. These documents were provided to the Ministers who were asked to conduct further searches to establish whether these two documents, or similar communications, were held by Education Scotland. The Ministers stated that these documents did not fall within scope of part 2 of the request. The Commissioner is satisfied that the information in these documents does not fall within the scope of part 2 of the request, as they do not comprise the internal communications specified there. The information also falls outside the scope of parts 3 and 6 of the request. The information in these documents will not be considered further in this decision.
13. On 7 October 2014, the investigating officer requested details of the searches that had been conducted in 2011 and 2013 for information covered by all parts of the request, and the searches conducted in 2014 in relation to parts 3 and 6 of the request. The Ministers

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<sup>2</sup> <http://www.scotland.gov.uk/News/Releases/2010/10/14145207>

provided details on 15 October 2014, and confirmed that they did not hold any information falling within the scope of the request.

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

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14. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to her by both Mr MacKinnon and Education Scotland. She is satisfied that no matter of relevance has been overlooked.
15. As background to this decision, the school inspection referred to in this request took place in October 2006. Mr MacKinnon submitted a complaint to the SPSO about the school inspection report, to which the SPSO responded in 2009.
16. The request submitted by Mr MacKinnon on 4 November 2013 was prompted by the response he had received to a related information request, submitted to Education Scotland on 15 October 2011 ("the earlier request") and to which he received a response on 14 November 2011. This is relevant in relation to the searches carried out by Education Scotland for information covered by Mr MacKinnon's requests, as explained below.

### **Whether information held**

17. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received.
18. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give an applicant notice in writing to that effect. In this case, Education Scotland gave Mr MacKinnon notice that it did not hold any information covered by parts 2, 3 and 6 of his request.
19. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. She will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
20. Education Scotland provided details of the searches it had conducted in preparing its response to Mr MacKinnon's requests, to show why it was satisfied that it did not hold any information covered by his requests.
21. Education Scotland was asked if the employees identified in each part of Mr MacKinnon's request had been asked to search their records for the requested information. Education Scotland explained that only one of the named individuals still worked for it; this individual had checked their records, but confirmed that they did not hold any relevant information. Education Scotland searched the records of its former staff, where these were still held, but identified no relevant information.
22. During the investigation, Education Scotland provided further details of the searches it had conducted in responding to both the earlier request and to the request of November 2013. Education Scotland provided screen shots of the searches it had completed in October 2014 in relation to parts 3 and 6 of the request (having already provided screen shots of its searches relating to part 2 of the request). It considered that this evidence substantiated its statement that it held no information falling within the scope of the request.

23. Education Scotland provided a copy of its record and retention policy (created by HMIE and dating from October 2005), which states that General Inspection and Review files (relating to school inspections) would be reviewed annually and “all material not of continued procedural use or considered worth of historical preservation” would be destroyed one year after a school inspection report is published, unless it is of “continual procedural use or considered worth of historical preservation”. All other records are kept for a period of one year only, unless the record relates to a specific policy, in which case it is kept for five years. Education Scotland confirmed that the 2005 record and retention policy was still in use in 2011, when it responded to Mr Mackinnon’s earlier request.
24. Education Scotland provided a list of the documents it still held regarding the school inspection in question, and confirmed that none of this information fell within the scope of the request.

## **Part 2 of the request (information about an inspection)**

25. Education Scotland explained that discussions would have taken place between the inspection team, following the inspection. At this stage of the inspection process, the team members would draft the report based on the evidence and observations recorded during the inspection, taking the chance to deliberate over the evidence and evaluations and make any changes. The head teacher and education authority would also have the opportunity, at this point, to provide further evidence to support the inspection.
26. Education Scotland stated that it held no recorded information about the meeting dates, agendas or minutes, or about the decisions taken at any of these discussions. It confirmed that it does not hold any correspondence or notes of phone conversations between any of the people listed in Mr Mackinnon’s request in relation to this inspection. It stated that agendas or minutes would not have been routinely required for these discussions, and any notes taken or emails exchanged would not have been retained in the long term as they were not required for the official record.
27. Education Scotland explained that, due to the size of the school in question, there had been only one inspector on the team; and this person has now moved on and all of their files (including emails) have been destroyed in line with records retention policies. Additional staff, including the Lead Inspector, District Inspector and Assistant Chief had already been asked to check their files in 2011, in response to an earlier, related request made by Mr MacKinnon. The only staff member now remaining in post, among those listed by Mr MacKinnon, was the Lead Inspector, who did not hold any information covered by his request.
28. Education Scotland stated that, after reviewing the searches and information identified relating to the 2011 request, it had concluded that it was unnecessary to conduct further searches before responding to the request of 4 November 2013. It was known that the staff members named by Mr MacKinnon had left the organisation and could not have created further relevant information, and that their files had subsequently been destroyed and emails in their inboxes deleted in line with Education Scotland’s retention policy.
29. During the investigation, Education Scotland provided a screen shot of searches carried out on the remaining employee’s electronic files, which had retrieved no information falling in scope of this part of the request.
30. Having considered Education Scotland’s submissions, and the searches it has undertaken, the Commissioner is satisfied that, on the balance of probabilities, Education Scotland does not hold information covered by part 2 of Mr MacKinnon’s request.

31. The Commissioner is satisfied that Education Scotland was correct to give Mr MacKinnon notice, in terms of section 17(1) of FOISA, that it did not hold the information he had asked for in this part of his request.

**Part 3 of request (meeting between SPSO and HMIE)**

32. Education Scotland asserted that the meeting referred to in part 3 of the request was of an informal nature and it was not considered necessary to have any record of the meeting; no formal procedures were engaged.
33. Education Scotland explained that, when responding to Mr MacKinnon's request of 15 October 2011 (his earlier request), it had undertaken thorough searches of relevant files held by the individuals named in his request as well as searching centrally-held files for information relating to the SPSO, for the period relevant to this request.
34. Education Scotland stated that, after reviewing the searches it had conducted in 2011, it had concluded that it was unnecessary to carry out any further searches before responding to the request of 4 November 2013, as the staff members named by Mr MacKinnon had left the organisation and would not have created further relevant information.
35. Having considered Education Scotland's submissions, and the searches undertaken, the Commissioner is satisfied, on the balance of probabilities, that it does not hold information covered by part 3 of Mr MacKinnon's request.
36. The Commissioner is satisfied that Education Scotland was entitled to inform Mr MacKinnon, in terms of section 17(1) of FOISA, that it did not hold the information he had asked for in this request.

**Part 6 of the request (discussion of two letters)**

37. Education Scotland submitted that, in order to ascertain what information it held about the two letters sent on 7 December 2009, it had checked the agendas and minutes of senior management meetings and management board meetings for references to discussions about the letters in question. This included checking electronic and paper files and also files held on CD-ROM. It did not identify any information within the scope of Mr MacKinnon's request.
38. Education Scotland noted that the SPSO's letter of 7 December 2009 had stated that the case in question was being closed. It submitted that, after saving a copy of the letter in the appropriate complaint file, no further action was required of Education Scotland and it was not considered necessary to undertake any further communication on this subject.
39. Having considered Education Scotland's submissions, and the searches undertaken, the Commissioner is satisfied that, on the balance of probabilities, it does not hold the information requested by Mr MacKinnon, covered by part 6 of the request.
40. The Commissioner is satisfied that Education Scotland was correct to give notice to Mr MacKinnon, in terms of section 17(1) of FOISA, that it did not hold the information he had asked for in this request.

## **Decision**

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

## **Appeal**

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Should either Mr MacKinnon or Education Scotland 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**  
**27 October 2014**



## Appendix 1:

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### 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.

...

##### 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.

...

**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)**