

# Decision Notice

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## **Decision 110/2016: Mr Joseph Walker and the Commissioner for Children and Young People in Scotland**

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**Kingspark School, Dundee**

Reference No: 201501211  
Decision Date: 10 May 2016



Scottish Information  
Commissioner

## Summary

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On 1 March 2015, Mr Walker asked the Commissioner for Children and Young People in Scotland (CYPCS) for information about action taken by CYPCS in relation to Kingspark School, Dundee. CYPCS disclosed some information and withheld the remainder under a number of exemptions in FOISA.

During the investigation, CYPCS disclosed further information to Mr Walker.

The Commissioner found that CYPCS partially failed to respond to Mr Walker's request for information in accordance with FOISA. The Commissioner ordered CYPCS to disclose additional information to Mr Walker and found that the information which CYPCS disclosed during the investigation should have been disclosed at an earlier date.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions); 30(b)(ii) (Prejudice to effective conduct of public affairs); 36(2) (Confidentiality)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. Appendices 1 and 2 (Schedule of Documents) form part of this decision.

## Background

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### Request and review

1. Kingspark School in Dundee opened in 2009, for children with additional support needs<sup>1</sup>. A number of families with children at the school raised concerns about the treatment of children at the school<sup>2</sup>. Dundee City Council appointed an independent education consultant to investigate matters relating to specific children attending the school, following which he issued a report on 8 May 2014. On 16 May 2014, the Police Scotland reopened investigations into the incidents.
2. On 1 March 2015, Mr Walker made an information request to CYPCS. He asked for a range of information about Kingspark School, including:
  - (i) The action taken by CYPCS regarding incident(s) at Kingspark School with regard to the school, the local authority and the police.
  - (ii) Discussions with staff regarding Kingspark School, such as emails and minutes of meetings.
3. CYPCS responded on 25 March 2015. CYPCS disclosed some information and withheld the remainder under several exemptions in FOISA.

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<sup>1</sup> <http://kingspark.ea.dundee.sch.uk/>

<sup>2</sup> <http://news.stv.tv/tayside/1328746-education-scotland-release-second-report-on-kingspark-school-in-dundee/>

4. On 8 April 2015, Mr Walker wrote to CYPCS requesting a review of its decision. He did not accept that the exemptions applied, and explained why.
5. CYPCS notified Mr Walker of the outcome of its review on 7 May 2015. CYPCS responded to the matters raised by Mr Walker. It disclosed more information, but continued to withhold some information.
6. On 24 June 2015, Mr Walker applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Walker was dissatisfied with the outcome of CYPCS's review. He considered it was in the public interest to know why CYPCS decided not to undertake an enquiry into Kingspark. Mr Walker also expressed concern about CYPCS's record keeping practices.

### **Scope of CYPCS investigations**

7. The functions of the CYPCS are set out in the Commissioner for Children and Young People (Scotland) Act 2003 (the Act<sup>3</sup>). CYPCS's general function is to promote and safeguard the rights of children and young people in Scotland.
8. The Act did not create the role of an ombudsman or set up a complaints handling body, and it does not provide a framework for the handling and disposal of complaints. Section 7(1) of the Act gives CYPCS the power to:

“carry out an investigation into whether, by what means and to what extent, a service provider has regard to the rights, interests and views of children and young people in making decisions or taking actions that affect those children and young people”.
9. CYPCS's powers to carry out investigations are limited in a number of ways. Under section 7(3) of the Act, CYPCS may not carry out an investigation if it would relate to: a reserved matter; only to a particular child or young person; or the making of decisions or taking of action in particular legal proceedings before a court or tribunal or to a matter which is the subject of legal proceedings before a court or tribunal
10. Before carrying out an investigation, CYPCS must be satisfied (section 7(2) of the Act) on reasonable grounds, having considered the available evidence and any information received about the matter, that:
  - (i) the matter to be investigated raises an issue of particular significance to children and young people generally or to particular groups of children and young people, and
  - (ii) the investigation would not duplicate work that is properly the function of another person.

### **Investigation**

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11. The application was accepted as valid. The Commissioner confirmed that Mr Walker made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
12. On 17 July 2015, CYPCS was notified in writing that Mr Walker had made a valid application. CYPCS was asked to send the Commissioner the information withheld from Mr Walker. CYPCS provided the information and the case was allocated to an investigating officer.

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<sup>3</sup> <http://www.legislation.gov.uk/asp/2003/17/notes/contents>

13. The investigating officer asked Mr Walker why he considered the public interest favoured disclosure of the withheld information, and whether he required a decision on the personal data that had been withheld from him. Mr Walker provided his comments and confirmed that he was content for personal data to be excluded from the Commissioner's investigation.
14. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. CYPCS was invited to comment on Mr Walker's application and to answer specific questions. These questions focused on CYPCS's record management practices, the searches conducted to identify information covered by the request and the exemptions relied upon to withhold the requested information. CYPCS responded on 23 September 2015.
15. In discussion with CYPCS, it was observed that not all of the documents identified within the schedule of documents had been provided to Mr Walker. CYPCS told the Commissioner that it did not consider that these documents would provide information that would be relevant to Mr Walker's request. CYPCS was informed that all information covered by a request must be provided unless exemptions or other relevant provisions in FOISA apply. CYPCS accepted this and disclosed further information to Mr Walker on 9 October 2015.
16. On 14 December 2015, the investigating officer contacted Mr Walker and CYPCS and requested further submissions on the public interest test and records management. Both parties responded, on 10 and 11 January 2016 respectively.
17. In its submission, CYPCS identified information within the documents previously provided to the Commissioner that it no longer considered exempt from disclosure under FOISA and was willing to disclose to Mr Walker. This information will be excluded from further consideration in this decision, but is listed in the Schedule of Documents in Appendix 2. The information has not yet been provided to Mr Walker: the Commissioner therefore requires CYPCS to disclose it to Mr Walker.

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

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18. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Walker and CYPCS. She is satisfied that no matter of relevance has been overlooked.

### **The scope of Mr Walker's information request**

19. CYPCS identified 32 documents containing information which falls within the scope of Mr Walker's request. These are listed in Appendix 2.
20. Mr Walker confirmed that he was content to exclude the personal data of third parties from the Commissioner's investigation and decision. The Commissioner will therefore not consider this information further. The only information being withheld in documents 6, 8, 9, 13, 14, 17, 20, 23, 28, 29 and 32 is personal data of a third party, so the documents will not be considered further in this decision.

### **Section 1(1) of FOISA – General entitlement**

21. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it.

22. The Commissioner finds that CYPCS failed to comply with section 1(1) of FOISA in relation to information which it held but which was not provided or considered in its response to Mr Walker's request or request for review. The information was provided during the Commissioner's investigation.
23. CYPCS disclosed some information on 9 October 2015. It explained to the Commissioner that it had not considered the information would provide Mr Walker with any useful insight, in relation to the actions taken by CYPCS. After the investigating officer pointed out that this approach does not comply with section 1(1) of FOISA, CYPCS provided the information to Mr Walker without further delay.
24. On 11 January 2016, CYPCS identified information which it no longer considered to be exempt from disclosure under FOISA. This information will be excluded from further consideration in this decision, but is listed in the Schedule of Documents in Appendix 2. The information has not yet been provided to Mr Walker: the Commissioner therefore requires CYPCS to disclose it to Mr Walker. The Commissioner finds that because the information was not provided when it responded to the request, CYPCS failed to comply with section 1(1) of FOISA in relation to this information.

### **Section 36(2) - Confidentiality**

25. CYPCS withheld some information under section 36(2) of FOISA. This provides that information is exempt if it was obtained by a Scottish public authority from another person and its disclosure by the authority so obtaining it to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person.
26. Section 36(2) therefore contains a two-stage test, both parts of which must be met before the exemption can be relied upon.

#### *Obtained from another person*

27. To meet the first stage of the test, information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.
28. CYPCS explained that the information withheld as exempt under section 36(2) consists of information received from the parents of children attending Kingspark School.
29. CYPCS noted that, although some of the withheld documents are internal emails, they summarise or refer to information provided to CYPCS by external parties. The Commissioner is satisfied that, where the information was provided by a parent and summarised or referred to by CYPCS in internal documents, it meets the requirements of the first part of the section 36(2) test.
30. In the circumstances, the Commissioner is satisfied that the majority of the information withheld under section 36(2) was obtained from another person. The exceptions are information withheld from paragraph 3 of document 2, and the last 19 words from the fourth paragraph of document 24. In both cases, the information was not obtained from a third party.

#### *Actionable breach of confidence*

31. To meet the second stage of the test, disclosure of the information by the public authority must constitute a breach of confidence actionable either by the person who gave the information to the public authority or by any other person. The Commissioner takes the view

that “actionable” means that the basic requirements for a successful action must appear to be fulfilled.

32. There are three requirements which must be met before a claim for breach of confidence can be established to satisfy the second stage of the test. These are:
- (i) the information must have the necessary quality of confidence;
  - (ii) the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
  - (iii) unauthorised disclosure must be to the detriment of the person who communicated the information.

#### Necessary quality of confidence

33. CYPCS commented that the information consists of records of communications with parents of children at Kingspark School about sensitive issues.
34. Mr Walker considered that, as some information about Kingspark School had already been made public, some of the correspondence could be disclosed without any breach of confidence (e.g. suggestions from parents of any action that could be taken).
35. CYPCS stated that the information which has been withheld is not a matter of public knowledge. It accepted that there have been media reports about the investigation into Kingspark School, but stated that these reports have not disclosed the information which is now withheld. CYPCS submitted that the withheld information cannot be ascertained or inferred from the media reports.
36. Having considered the withheld information and the arguments put forward by CYPCS, the Commissioner is satisfied that the information has the necessary quality of confidence; it is not common knowledge and could not readily be obtained by Mr Walker through any other means.

#### Obligation to maintain confidentiality

37. CYPCS explained that it is intended to be a safe point of contact for children and young people (and their parents, carers and representatives) in need of support. Processes within its office are designed to ensure that vulnerable people feel confident that information shared will be treated confidentially.
38. CYPCS has taken measures to ensure that individuals feel safe in approaching their office; for example, its website allows users to choose to “browse in secret”, so that its website will not appear on the user’s browsing history and no cookies will be left on their computer.
39. CYPCS made reference to *Decision 241/2014 Mr Iain Maciver and Comhairle nan Eilean Siar*.<sup>4</sup> It noted that, in this decision, the Commissioner found that the sensitivity of the information and the relationship between the communicating parties was sufficient to create an implied obligation of confidentiality. CYPCS considered that the same situation applied in this case. It submitted that the withheld information is very sensitive and that there is an implied obligation of confidentiality between CYPCS, other public authorities and the parents of children at Kingspark School.

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<sup>4</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2014/201401486.aspx>

40. CYPCS explained that the withheld information was received from parents, regarding the treatment of their children by members of staff at Kingspark School. CYPCS asserted that, in this situation, there is a clear confidential relationship between the parents and the CYPCS.
41. The Commissioner accepts that the relationship between the concerned parents and CYPCS creates an implied obligation of confidentiality. Having considered the withheld information and the circumstances in which the information was provided to CYPCS, the Commissioner is satisfied that the information withheld under section 36(2) of FOISA was received in circumstances which imposed upon CYPCS an obligation to maintain confidentiality.

#### Unauthorised disclosure which would cause detriment

42. The third requirement is that unauthorised disclosure of the information must be to the detriment of the person who communicated it. The damage need not be substantial and indeed could follow from the mere fact of unauthorised use or disclosure in breach of confidence.
43. CYPCS considered that disclosing the withheld information would cause detriment to the parents and their children. CYPCS noted from the Commissioner's briefing on section 36<sup>5</sup>, that the distress need not be financial but may be emotional. CYPCS considered this guidance to be particularly relevant to this case. It argued that the parents would suffer emotional detriment and distress if their personal concerns regarding their children were publicised. The Commissioner agrees and accepts that disclosure would cause detriment.
44. The Commissioner is therefore satisfied that all the tests for an actionable breach of confidence are met in this case.

#### Public interest defence

45. The exemption in section 36(2) of FOISA is an absolute exemption in terms of section 2(2) of FOISA and so is not subject to the public interest test in section 2(1)(b). However, the law of confidence recognises that, in certain circumstances, the strong public interest in maintaining confidences may be outweighed by the public interest in disclosure of the information. In deciding whether to enforce an obligation of confidentiality, the courts are required to balance these competing interests, but there is no presumption in favour of disclosure. This is generally known as the public interest defence.
46. The courts have identified a relevant public interest defence in cases where withholding information would cover up serious wrongdoing, and where it would lead to the public being misled on, or would unjustifiably inhibit public scrutiny of, a matter of genuine public concern.
47. CYPCS submitted that there is a strong public interest in ensuring that the withheld information remains confidential. The ability of CYPCS to function effectively relies on engendering confidence in the general public that communication with CYPCS is treated confidentially and remains so. CYPCS argued that disclosure of information shared with CYPCS about the parents' concerns and their personal circumstances would seriously damage its public reputation as a safe haven where children and young people can share concerns in confidence. This would be to the overall detriment of the public service that CYPCS provides.

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<sup>5</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section36/Section36.aspx>

48. The Commissioner acknowledges the inherent public interest in the events at Kingspark School. However, having considered CYPSC's submissions, the Commissioner is satisfied that there is no reasonable argument in this case for the disclosure of the confidential information on public interest grounds. Consequently, she is satisfied that CYPSC was entitled to withhold this information under section 36(2) of FOISA.
49. The Commissioner therefore accepts that section 36(2) of FOISA applies to all of the information withheld under this exemption, **except for the information withheld in paragraph 3 of document 2 and the final 19 words of paragraph 4 in document 24.**

### **Section 30(b)(ii) – Prejudice to effective conduct of public affairs**

50. CYPSC relied upon the exemption contained in section 30(b)(ii) of FOISA to withhold information in the remaining documents (4, 5, 7, 10, 11, 12, 15, 16, 18, 19, 21, 22, 25, 26, 30 and 31).
51. In order for CYPSC to rely on this exemption, it must show that disclosure of the information would (or would be likely to) inhibit substantially the free and frank exchange of views for the purposes of deliberation.
52. The Commissioner expects authorities to be able to demonstrate a real risk or likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is a remote possibility. The harm in question should take the form of substantial inhibition from expressing views in as free and frank a manner as would be the case if disclosure could not be expected to follow. The word "substantial" is important here: the degree to which a person will be, or is likely to be, inhibited in expressing themselves has to be of some real and demonstrable significance,
53. The exemption is subject to the public interest test in section 2(1)(b) of FOISA.

#### *CYPSC's submissions*

54. The documents withheld under section 30(b)(ii) are a record of communications between the Children's Commissioner and his staff, providing views on the issues surrounding Kingspark School, and documenting conversations with the Children's Commissioner. (When CYPSC's submissions refer to Tam Baillie, the Commissioner, as opposed his office more generally, this decision refers to "the Children's Commissioner".)
55. CYPSC acknowledged that such information could only be withheld if it would, or would be likely to, substantially inhibit the free and frank provision of advice and exchange of views. In reaching its decision, it had taken into account the following factors:
  - (i) Nature and subject matter: the relevant information is highly sensitive in nature, as it discusses involvement of CYPSC in complaints surrounding Kingspark School, including some sensitive details of complaints received directly by CYPSC.
  - (ii) Manner of expression: while the information withheld is not expressed in an unprofessional manner, it is expressed in a frank and open manner which, in some cases, clearly challenges the position taken by the Children's Commissioner.
  - (iii) Timing of disclosure: the CYPSC involvement in the issues surrounding Kingspark School was not at an end.
56. CYPSC was concerned that, if this information were to be disclosed, members of staff would be less likely to question and challenge the Children's Commissioner for fear of personal



views being inappropriately disclosed to the public. CYPCS considered this would be heightened by the fact that the sensitive issues in which the CYPCS are involved are often the subject of press attention. There is a risk that the personal opinions of members of staff may be taken out of context and commented on publicly by the press, if released into the public domain.

57. CYPCS noted that highly sensitive information is discussed between staff and the Children's Commissioner on a regular basis. To enable staff to support the Children's Commissioner in fulfilling his functions, it is essential that they should not feel inhibited from discussing sensitive issues with him. Such discussions are encouraged as an important mechanism to ensuring the accountability of decisions taken by CYPCS. Anything which could inhibit staff from sharing their views on how the Children's Commissioner should approach particular matters will have a detrimental impact on CYPCS's ability to reach informed, balanced and accountable decisions.
58. In support of its submissions, CYPCS made reference to *Decision 085/2015 Paul Hutcheon and the Chief Constable of the Police Service of Scotland*<sup>6</sup> in which the Commissioner decided that the frank and candid views of one employee, which were prepared for the purposes of discussions on a controversial matter, should be withheld under section 30(b). CYPCS considered that the same circumstances applied in relation to the information it was withholding.
59. CYPCS also made reference to *Decision 089/2015 Leslie Mitchell and Risk Management Authority*<sup>7</sup> in which the Commissioner accepted that in the circumstances of the case, information about internal deliberations was exempt from disclosure given the risk of substantial inhibition to future deliberations. CYPCS commented that it also needed a forum within which to have a free and frank discussion of sensitive information in order to fulfil its statutory duty.
60. In conclusion, CYPCS maintained that disclosure of the information identified as exempt under this exemption would substantially inhibit the free and frank provision of advice, and exchanges of views for deliberation.

#### *Mr Walker's submissions*

61. In his request for review (8 April 2015), Mr Walker questioned the application of the exemption in section 30(b)(ii). He considered it was difficult to see how the exemption could apply if the Children's Commissioner had made a decision and had instructed a member of staff in relation to that decision.
62. Mr Walker commented that the CYPCS does not appear to have any policies or procedures in effect which would justify the decision not to undertake an inquiry. Therefore, more information should be disclosed than would otherwise be the case, in order to understand his reasoning. Mr Walker noted that the CYPCS was not a regulator, but believed he should follow the principles of good regulation, particularly with regard to transparency.

#### *The Commissioner's view*

63. In assessing whether the exemption in section 30(b)(ii) of FOISA is engaged, the chief consideration is whether the disclosure of the information would, or would be likely to, inhibit substantially the future exchange of views.

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<sup>6</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2015/201402569.aspx>

<sup>7</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2015/201500004.aspx>

64. Each request must be considered on a case-by-case basis, taking into account the effects anticipated from the disclosure of the particular information involved. The content of the withheld information will require to be considered, taking into account factors such as its nature, subject matter, manner of expression and whether the timing of disclosure would have any bearing. Disclosing advice or views whilst a decision was being considered, and for which further views were still being sought, for example, is likely to be more substantially inhibiting than once advice has been taken.
65. The Commissioner notes that CYPCS provided Mr Walker with a summary of the actions it had taken with respect to the incidents reported by the parents and their contact with other individuals and organisations. However, there are significant differences between the summary provided to Mr Walker and the withheld information. The summary provides an overview of CYPCS's actions, whilst the withheld information records internal discussions and deliberations.
66. Having considered all of the withheld information and the submissions from both parties, the Commissioner accepts that, in the circumstances of this case, CYPCS required a private space to discuss sensitive matters freely and frankly, without the concern that such comments would be made public. Given the sensitive nature of the issue, she accepts disclosure of the withheld information would be likely to stifle the frankness and candour of comments made by staff on similarly sensitive issues in future and would inhibit them from discussing sensitive issues.
67. In conclusion, the Commissioner is satisfied that the exemption applies to all information withheld under section 30(b)(ii) (Documents 4, 5, 7, 10, 11, 12, 15, 16, 18, 19, 21, 22, 25, 30 and 31).

#### *Public interest test*

68. The exemption in section 30(b)(ii) is subject to the public interest test required by section 2(1)(b) of FOISA. Where this exemption applies, the Commissioner must 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.
69. The "public interest" is not defined in FOISA, but has been described as "something which is of serious concern and benefit to the public", not merely something of individual interest. The public interest does not mean "of interest to the public" but "in the interest of the public", i.e. disclosure must serve the interests of the public.

#### CYPCS's public interest submissions

70. CYPCS told the Commissioner that the main reason it had not conducted an investigation was due to the restrictions on its investigatory powers under the Act<sup>8</sup>. Section 7(2)(b) of the Act does not allow CYPCS to conduct an investigation which would "duplicate work that is properly the function of another person". In the event that an investigation was conducted, disclosure of the information would, CYPCS argued, pre-empt the investigation and that would not be in the public interest.
71. CYPCS explained that, during the period covered by the withheld information, there was an ongoing investigation by Dundee City Council. Angus Council, the Care Inspectorate and Education Scotland (amongst others) were involved, and an investigation by Police Scotland was also ongoing at the date of the request.

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<sup>8</sup> <http://www.legislation.gov.uk/asp/2003/17/notes/contents>

72. CYPCS stated that the majority of the information withheld from Mr Walker under the exemption in section 30(b)(ii) of FOISA is records of conversations between staff considering whether CYPCS could investigate Kingspark School without “duplicating the work of another body”. This includes views on investigations by other public authorities and whether CYPCS has a remit to investigate.
73. CYPCS recognised that there is a public interest in the transparency of its decision-making procedures, especially due to the media coverage of the issues surrounding Kingspark School. CYPCS acknowledged that making the withheld information public would improve accountability and lead to greater awareness of the Children’s Commissioner, his office and what he does.
74. However, CYPCS considered that there was a stronger public interest in allowing it to fulfil its functions. In order to do so effectively, it argued that it must be able to discuss and debate sensitive matters candidly and openly before coming to a decision. CYPCS made reference to *Decision 018/2015 Gary Smith and East Ayrshire Council*<sup>9</sup>, which acknowledges that it would not be in the public interest to limit the ability of local authorities to have robust and frank deliberations and discussion, particularly where the information to be discussed was of a confidential nature.
75. CYPCS made reference to the Commissioner’s briefing on section 30<sup>10</sup>, which states that there is clearly a strong public interest in protecting the effective conduct of public affairs. CYPCS considered that disclosure of the withheld information would inhibit CYPCS from discussing sensitive issues in an open and candid manner. Staff would be discouraged from raising issues for fear of disclosure. CYPCS submitted that such discussions are essential so that it can make decisions which have been thoroughly considered, and improve its accountability to the public. CYPCS concluded that anything that could reduce its ability to operate properly would not be in the public interest.
76. CYPCS concluded that in assessing the public interest in maintaining this exemption, the same considerations applied as in *Decision 085/2015*. In that decision, the Commissioner concluded that the public interest in maintaining the exemption outweighed the strong public interest in disclosure because:
- (i) it was in the public interest to allow individuals private space to discuss and exchange views on a controversial matter, without fearing that those views will be made public;
  - (ii) the view expressed was the view of one individual within the public authority; and
  - (iii) the comments did not appear to have led to any action by the public authority.
77. In conclusion, CYPCS stated that it had not taken a restrictive approach to disclosure. Where possible, it had disclosed copies of original emails and, where this was not possible, it had described to Mr Walker in detail the actions and decisions it had taken in respect of Kingspark School. It considered that the information already disclosed, or otherwise already available in the public domain, satisfies the public interest in information explaining its decision-making process and reasoning. CYPCS concluded that the remaining withheld information would not shed significant further light on its approach in relation to Kingspark School.

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<sup>9</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2015/201402009.aspx>

<sup>10</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section30/Section30.aspx>

### Mr Walker's public interest submissions

78. In his application, Mr Walker stated that he understood that enquiries to CYPCS were confidential, but believed that more information should be disclosed. He believed it was in the public interest to know what CYPCS did in relation to the enquiries, what advice it gave, and why it did not use its powers to investigate. He considered that it was in the public interest to show with whom CYPCS had discussed matters, and whose advice it took.
79. Mr Walker also argued that it would be in the public interest to know why CYPCS thought that Dundee City Council was best placed to carry out an inquiry, despite having an interest in the matter. He did not consider that the ongoing police investigation would be affected by disclosure of the withheld information.

### The Commissioner's view on public interest

80. The Commissioner is acutely aware of the sensitivity and seriousness of the issues being discussed in the withheld information.
81. The allegations relating to Kingspark School related to serious concerns about child welfare and there is a strong public interest in the disclosure of information which would improve or enable public understanding of the actions or reasoning of CYPCS.
82. The Commissioner has no remit to judge whether CYPCS should have decided to investigate parents' concerns about Kingspark School but she finds Mr Walker's concerns understandable.
83. Mr Walker was concerned that, at the date he made his request, CYPCS had given no indication whether it would conduct an independent investigation into Kingspark School, or when he would make a decision on whether to do so. The matters raised by the parents were serious complaints, relating to child welfare, and there was clearly a public expectation that CYPCS would investigate. The lack of any clear, public decision on whether to investigate was concerning to people who expected CYPCS to take action, and raised legitimate questions about its role.
84. The Commissioner notes that CYPCS provided Mr Walker with a detailed summary of its actions. This included a description of the correspondence it had with several bodies, showing that it raised concerns about the matters being investigated and the time taken to do so. The Commissioner considers that this information, together with the information disclosed under FOISA, provides some insight into how CYPCS saw its role, and the actions it took, in relation to the Kingspark parents' complaints. This goes some way towards satisfying the public interest in disclosure of information covered by Mr Walker's request.
85. CYPCS's submissions to the Commissioner provided further insight as to the reasons why it had not instigated an investigation (at the date of Mr Walker's request), but none of these reasons had been made clear to the public at the time, and were not made clear in the response Mr Walker received to his request or request for review.
86. The Commissioner accepts that there is a strong public interest in disclosure of information that gives insight into how and what CSPCS investigates. She also accepts that private discussions about such sensitive issues are necessary for the effective operation of CYPCS, and that disclosure of any of the information considered exempt could substantially inhibit CYPCS or members of the public (including children and young people) from discussing or recording concerns on similar subjects in the future.

87. On balance, the Commissioner has concluded that:
- (i) the public interest in disclosing information which provides insight into how and what CYPCS investigates outweighs the public interest in maintaining the exemption in section 30(b)(ii) of FOISA and this information should be disclosed.
  - (ii) the public interest in disclosing information which **does not** provide insight into how and what CYSPPS investigates does not outweigh the public interest in maintaining the exemption in section 30(b)(ii) of FOISA and this information was correctly withheld.
88. The Commissioner therefore finds that the public interest favours disclosure of information within documents 5, 7, 11, 22, 25 and 30 which was previously withheld under section 30(b)(ii) of FOISA
89. The Commissioner also finds that the remaining information was correctly withheld under section 30(b)(ii) and does not need to be disclosed to Mr Walker.

### **Summary of information to be disclosed**

90. The Commissioner has concluded that information in documents 1, 2, 3, 5, 7, 11, 16, 18, 22, 24, 25, 26, 27 and 30 should be disclosed to Mr Walker. This includes the information that CYPCS no longer considers to be exempt. To aid compliance with this decision, the Commissioner will provide a marked up copy of these documents to CYPCS showing which information is to be disclosed.

### **Records management**

91. In his application, Mr Walker expressed dissatisfaction about CYPCS's record management practices, believing that they were not in line with the Scottish Ministers' Section 61 Code of Practice on Records Management (Section 61 Code).
92. Mr Walker noted that, in its response to his request for review, CYPCS informed him:
- "As a matter of course, [CYPCS] does not keep a record of decisions or actions taken on a regular basis. We are a relatively small public authority and it is often more efficient for the [CYPCS] to instruct and discuss decisions or actions with staff verbally as we do have limited capacity to record all actions and decisions in writing".
93. Mr Walker referred the Commissioner to a comment in a previous version of the Section 61 Code. The current version of the Section 61 Code no longer includes the same text, but does include a similar comment:
- "Freedom of information legislation is only as good as the quality of the records and other information to which it provides access. Access rights are of limited value if information cannot be found when requested or, when found, cannot be relied upon as authoritative."<sup>11</sup>
94. Mr Walker noted that the response from CYPCS implies that it does not document many decisions. Mr Walker considered that, in cases like that of Kingspark School, which had potential criminal investigations associated with it, it would be even more necessary to create reliable records.
95. The Commissioner asked CYPCS to comment on this part of Mr Walker's application, and on whether its records management policies were in line with the Section 61 Code.

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<sup>11</sup> <http://www.gov.scot/Resource/0046/00465761.pdf> (paragraph 2)

96. CYPCS explained that it had prepared and submitted a records management plan to the Keeper of the Records of Scotland (the Keeper) on 28 April 2015. Following receipt of an interim report from the Keeper, its records management plan was revised and submitted on 19 August 2015. The plan was approved by the Keeper on 21 August 2015. The records management plan and the Keeper's assessment report are available on the CYPCS website<sup>12</sup>.
97. The records management plan submitted by CYPCS acknowledges that there are a number of improvements required. CYPCS recognises that its current records management practice is not consistent with element 3 of the Section 61 Code, which states: "Authorities should ensure they keep the records they will need for business, regulatory, legal and accountability purposes".
98. CYPCS submitted that actions are routinely recorded, but acknowledged that there is no systematic process for recording decisions as to whether to proceed (or not) with an individual enquiry, complaint or request for an investigation. In light of this inconsistency, CYPCS is in the process of developing and establishing guidelines to ensure that decisions, actions and their rationale on matters that are the subject of an enquiry or potential investigation are routinely recorded.

#### *Commissioner's conclusions*

99. The Commissioner was concerned to learn that CYPCS did not routinely record and retain information about decisions taken as part of its statutory duties or powers, which appeared to make it difficult for it to evidence and document its decision making, either for internal purposes or external scrutiny. This in turn led her to question the extent to which CYPCS was complying with the Section 61 Code (in particular section 3).
100. While, as stated in *Decision 073/2006 Mr Connolly and the University of Glasgow*<sup>13</sup>, the Commissioner does not have the power to require an authority to reorder its system of records management in a way that ensures that the information is held, she does have powers to issue practice recommendations specifying steps an authority must take to conform with the Section 61 Code. Before issuing such a practice recommendation, the Commissioner is required to consult with the Keeper.
101. The Commissioner notes (and welcomes) the steps CYPCS has taken, in consultation with the Keeper to improve record keeping, by reviewing its records management and preparing a records management plan. In the circumstances, therefore, she does not consider it necessary to require any further action of CYPCS.

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<sup>12</sup> <http://www.sccyp.org.uk/footer/foi/class-5>

<sup>13</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2006/200503079.aspx>

## Decision

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The Commissioner finds that Commissioner for Children and Young People in Scotland (CYPCS) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Walker.

The Commissioner finds:

- (i) In responding, CYPCS failed to disclose information covered by the request which was later provided to Mr Walker and therefore failed to comply with section 1(1) of FOISA.
- (ii) CYPCS correctly applied the exemptions in section 30(b)(ii) and 36(2) of FOISA to most information withheld under these provisions.
- (iii) CYPCS wrongly withheld other information under section 30(b)(ii) and 36(2) of FOISA.

The Commissioner requires CYPCS to disclose the information identified in paragraph 90, by **Friday, 24 June 2016**.

## Appeal

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Should either Mr Walker or CYPCS 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.

## Enforcement

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If CYPCS fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that CYPCS has failed to comply. The Court has the right to inquire into the matter and may deal with CYPCS as if it had committed a contempt of court.

**Rosemary Agnew**  
**Scottish Information Commissioner**

**10 May 2016**

## Appendix 1: Relevant statutory provisions

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### 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.

...

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

#### 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.

...

#### 30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-

...

- (ii) the free and frank exchange of views for the purposes of deliberation; ...

#### 36 Confidentiality

...

- (2) Information is exempt information if-

- (a) it was obtained by a Scottish public authority from another person (including another such authority); and
- (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.



## Appendix 2: Schedule of documents

Mr Walker agreed that the personal data within the following documents could be withheld. Section 38(1)(b) of FOISA has therefore been excluded from consideration in the following table. If the only information withheld in a document is personal data, then the document is marked as “exempt” and the Commissioner does not require CYPSC to disclose it.

Doc. No.	Exemptions relied on	Comments from CYPSC	Commissioner’s conclusion	Exempt Partial disclosure/ Withhold
1	36(2)	Information within paragraphs 1 and 7 can be disclosed.	Information to be disclosed in line with CYPSC’s comments. Section 36(2) upheld for the remainder of text.	Partial disclosure
2	36(2)	Information within paragraphs 1 and 3 can be disclosed.	Section 36(2) upheld with respect to the majority of text. Disclose redacted version of paragraph 1 in line with CYPSC’s comments and all of the text being withheld in paragraph 3.	Partial disclosure
3	36(2)	Information on page 1 - paragraphs 4 and 5 page 2 – all except first paragraph page 4 – text being withheld of this email can be disclosed.	Information to be disclosed in line with CYPSC’s comments. Section 36(2) upheld with respect to remaining withheld text.	Partial disclosure
4	30(b)(ii) 36(2)	Withhold in entirety	Section 30(b)(ii) upheld; public interest does not favour disclosure. Section 36(2) upheld.	Withhold
5	30(b)(ii) 36(2)		Section 30(b)(ii) upheld; public interest favours disclosure – withhold employee’s name. Section 36(2) upheld.	Partial disclosure
6	36(2)	<u>N/A</u>	Section 36(2) not considered as information is personal data.	Exempt
7	30(b)(ii)	Withhold in entirety	Section 30(b)(ii) upheld; public interest favours disclosure (except paragraph 10 of the second page of the email).	Partial disclosure
8	<u>N/A</u>	<u>N/A</u>	<u>N/A</u>	Exempt
9	<u>N/A</u>	<u>N/A</u>	<u>N/A</u>	Exempt
10	30(b)(ii) 36(2)	Withhold in entirety	Section 30(b)(ii) upheld; public interest does not favour disclosure. Section 36(2) not considered as information is personal data	Withhold

Doc. No.	Exemptions relied on	Comments from CYPCS	Commissioner's conclusion	Exempt Partial disclosure/ Withhold
11	30(b)(ii) 36(2)	Withhold in entirety	Section 30(b)(ii) upheld; public interest favours disclosure of the first three paragraphs of text withheld under this exemption; remainder to be withheld. Section 36(2) upheld.	Partial Disclosure
12	30(b)(ii)	Withhold in entirety	Section 30(b)(ii) upheld; public interest does not favour disclosure.	Withhold
13	<u>N/A</u>	<u>N/A</u>	<u>N/A</u>	Exempt
14	<u>N/A</u>	<u>N/A</u>	<u>N/A</u>	Exempt
15	30(b)(ii)	Withhold in entirety	Section 30(b)(ii) upheld; public interest does not favour disclosure	Withhold
16	30(b)(ii) 36(2)	Information within paragraphs 1, 2, 3 and 6 can be disclosed.	Information to be disclosed in line with CYPCS's comments. Section 30(b)(ii) upheld; public interest does not favour disclosure. Section 36(2) upheld.	Partial disclosure
17	<u>N/A</u>	<u>N/A</u>	<u>N/A</u>	Exempt
18	30(b)(ii) 36(2)	1 <sup>st</sup> sentence of 5 <sup>th</sup> paragraph can be disclosed.	Information to be disclosed in line with CYPCS's comments. Section 30(b)(ii) upheld; public interest does not favour disclosure. Section 36(2) upheld.	Partial disclosure
19	30(b)(ii)	Withhold in entirety	Section 30(b)(ii) upheld; public interest does not favour disclosure.	Withhold
20	<u>N/A</u>	<u>N/A</u>	<u>N/A</u>	Exempt
21	30(b)(ii)	Withhold in entirety	Section 30(b)(ii) upheld; public interest does not favour disclosure.	Withhold
22	30(b)(ii) 36(2)	Withhold in entirety	Section 30(b)(ii) upheld; public interest favours disclosure of the first paragraph of text withheld under this exemption, withhold remainder. Section 36(2) upheld.	Partial disclosure
23	<u>N/A</u>	<u>N/A</u>	<u>N/A</u>	Exempt
24	36(2)	Withhold in entirety	Section 36(2) upheld with respect to the majority of text, except for the last 19 words from the fourth paragraph which should be disclosed; remainder to be withheld.	Partial disclosure
25	30(b)(ii) 36(2)	Withhold in entirety	Section 30(b)(ii) upheld; public interest favours disclosure of some text (excluding any personal data). Section 36(2) not considered; section 38(1)(b) applies to remaining text.	Partial disclosure
26	30(b)(ii)	Information withheld under section 30(b)(ii) can be disclosed.	Information to be disclosed in line with CYPCS's comments.	Partial disclosure

Doc. No.	Exemptions relied on	Comments from CYPCS	Commissioner's conclusion	Exempt Partial disclosure/ Withhold
27	36(2)	Some information withheld under section 36(2) can be disclosed.	Information to be disclosed in line with CYPCS's comments.	Partial disclosure
28	<u>N/A</u>	<u>N/A</u>	<u>N/A</u>	Exempt
29	<u>N/A</u>	<u>N/A</u>	<u>N/A</u>	Exempt
30	30(b)(ii) 36(2)	Withhold in entirety	Section 30(b)(ii) upheld; public interest favours disclosure of some text (excluding any personal data). Section 36(2) not considered; section 38(1)(b) applies to remaining text.	Partial disclosure
31	30(b)(ii)	Withhold in entirety	Section 30(b)(ii) upheld; public interest does not favour disclosure.	Withhold
32	<u>N/A</u>	<u>N/A</u>	<u>N/A</u>	Exempt

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