

Decision Notice 019/2020

Correspondence relating to the New School Butterstone

The Applicant

Public authority: Registrar of Independent Schools in Scotland

Case Ref: 201901151



Scottish Information
Commissioner

Summary

The Registrar was asked for correspondence relating to the New School Butterstone.

Some of the information was provided, but five paragraphs of an advice note to the Scottish Ministers were withheld.

The Commissioner investigated and found that the Registrar had correctly withheld these paragraphs on the grounds that disclosing them would prejudice substantially the effective conduct of public affairs.

Relevant statutory provisions

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

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. By way of background, the New School, Butterstone was an independent special school in Perthshire, which provided education and care to young people with additional support needs. The school closed in November 2018. The Scottish Ministers subsequently commissioned an independent review into the closure of the school. More information about the independent review can be found here: <https://www.gov.scot/groups/new-school-butterstone-closure-independent-review/>
2. On 28 March 2019, the Applicant made a request for information to the Registrar of Independent Schools in Scotland (the Registrar). He asked for correspondence relating to the New School, including emails, meeting minutes and telephone notes, between the Registrar and:
 - the Care Inspectorate
 - the Scottish Government Education Department
 - Perth and Kinross Councilbetween 1 February 2017 and 2 December 2018.
3. The Registrar responded on 29 April 2019. She disclosed information to the Applicant, some of which had been redacted on the basis that the exemptions in section 38 (Personal information), section 39 (Health, safety and the environment) and section 30 applied.
4. On 13 June 2019, the Applicant wrote to the Registrar requesting a review of her decision on the basis that he required disclosure of five specified paragraphs of an advice note from the Registrar to the Scottish Ministers. These paragraphs had been redacted under section 30(c) of FOISA on the grounds that disclosure would be likely to substantially prejudice the effective conduct of public affairs. Parts of the paragraphs had also been withheld under

section 38(1)(b) of FOISA, on the grounds that they were the personal data of third parties and, in this case, exempt from disclosure.

5. The Registrar notified the Applicant of the outcome of her review on 24 June 2019. The Registrar upheld the application of the exemptions at sections 30(c) and 38(1)(b) of FOISA. The Registrar also notified the Applicant that she was applying the exemptions in sections 30(b)(i) and (ii) to the information.
6. On 5 July 2019, the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Registrar's review because he felt that the information related to factual information and it would not compromise the workings of the Registrar or the Care Inspectorate. He also argued that it was in the public interest that the information be disclosed.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
8. On 21 August 2019, the Registrar was notified in writing that the Applicant had made a valid application. The Registrar was asked to send the Commissioner the information withheld from the Applicant. The Registrar provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Registrar was invited to comment on this application and to answer specific questions. These focused on the Registrar's application of the exemptions applied.
10. The Applicant was also asked for any submissions he wished to make, including his arguments on the public interest in the information being disclosed.
11. Submissions were received from both the Registrar and the Applicant.

Commissioner's analysis and findings

12. 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 him by both the Applicant and the Registrar. He is satisfied that no matter of relevance has been overlooked.

Section 30(c) - Prejudice to effective conduct of public affairs

13. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority applying it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure. The exemption (if found to be engaged) is also subject to the public interest test in section 2(1)(b) of FOISA.

14. As noted in previous decisions, there is a high threshold to be crossed in applying the tests contained in the section 30(c) exemption. The prejudice must be substantial, and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future and not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case-by-case basis, taking into account the actual content of the information and all other relevant circumstances (which may include the timing of the request).

Submissions from the Applicant

15. The Applicant submitted detailed arguments as to why the information should be disclosed. These are summarised below.
16. The Applicant argued that the information was critical in terms of the decision-making which led to the closure of a special school. He argued that the imposition of conditions on the school by the Scottish Ministers was wholly reliant on the information supplied to the Registrar by the Care Inspectorate, and then in turn to the Scottish Ministers.
17. He stated that the closure of the school had led to a loss of a £1.3 million turnover, a loss of 51 jobs and the displacement of 24 pupils. Also, the closure had caused considerable reputational damage to school staff affected by the closure.
18. He submitted that the outcome(s) of the child protection investigation(s) is/are in the public domain; that the parties concerned had a right to the information on natural justice grounds and that the information related to factual matters which would not compromise the workings of either the Registrar or the Care Inspectorate.

Submissions from the Registrar

19. The Registrar was clearly concerned that disclosing the information in question would make it less likely that third parties would provide her with the information she needed to carry out her role.
20. She explained that she receives intelligence from third parties, such as updates from the Care Inspectorate. She has no locus to investigate incidents or interrogate school policy and procedures and therefore relies on professionals in other public bodies to do so. Depending on the facts presented to her, it may be necessary to share that intelligence with the Scottish Ministers where it relates to the performance of a school, such as was the case in this instance. (Information contained in the advice note from the Registrar to the Scottish Ministers was obtained by the Registrar from the Care Inspectorate.)
21. The Registrar submitted that, if she was obliged to disclose information such as that contained within the advice note, those third parties on which her office relied would no longer share sensitive and confidential information, including details of pending enquiries or investigations. Without that, her ability to usefully inform and advise the Scottish Ministers would be reduced to nil and would have “devastating” consequences for the Scottish Ministers’ ability to regulate the independent schools’ sector.

The Commissioner’s conclusions

22. The Commissioner is satisfied that the exemption under section 30(c) of FOISA is engaged in relation to the five paragraphs which are the subject of this decision. Having scrutinised the information, the Commissioner accepts that it is information of the type which would be crucial to the Registrar’s function to provide advice and updates to the Scottish Ministers.

23. He also accepts that disclosure of this type of information would be likely to have a negative impact on the relationship between the Registrar and third parties such as the Care Inspectorate, given that it would make it less likely that third parties would share sensitive information with the Registrar. It is clear that the nature of such an information sharing relationship depends on trust between the parties involved. If trust were lost, this would, in turn, prejudice substantially the ability of the Ministers to regulate the independent school sector.

The public interest

24. The Commissioner must now consider whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by that in maintaining the exemption.
25. The Applicant stated that it was in the public interest for the information to be disclosed in order to ascertain whether the Care Inspectorate, Registrar of Independent Schools and Scottish Ministers acted in accordance with the principles of administrative law, whether the information was accurate and true, and whether a deliberate deception may have occurred.
26. He argued that it was in the public interest that justice be done and be seen to be done. If malpractice had taken place, the public, those working in education and care services and service users, may be at risk unless remedial action was taken.
27. The Registrar accepted that there was a public interest in open governance and in public bodies being accountable to the public.
28. However, she considered that the public interest would be far better served by her being able to, in confidence where necessary, discuss and share information with the Scottish Ministers and other interested parties for the purposes of informing decisions or notifying bodies as appropriate and in the interests of ensuring schools provide a level of care and education expected.
29. The Commissioner agrees with the Applicant that there is a strong public interest in scrutinising the actions of the organisations involved in the matters leading up to the closure of the New School, and thereafter.
30. However, disclosing the five paragraphs in question here would not be the way to achieve this end. There are other avenues that can be explored by the Applicant to examine the accountability or otherwise of the parties involved in the monitoring of the New School in the lead up to its closure, and the decisions that were taken.
31. As noted in paragraph 1 above, an independent review of the closure of the school is underway. The Commissioner takes the view that an enquiry of this type would be the correct and logical way in which to get to the bottom of the issues that are of concern to the Applicant in this case.
32. An official independent inquiry, while dealing with the issues of concern to the Applicant, would not undermine the working relationships between the parties in the way that disclosure of the information contained in the five redacted paragraphs may do.
33. On balance, the Commissioner finds that the public interest arguments for maintaining the exemption outweigh those in favour of the disclosure of the information.
34. Therefore the Commissioner finds that the Registrar was entitled to withhold this information under section 30(c) of FOISA.

Other exemptions

35. The Commissioner notes that the Registrar also wished to withhold parts of this information under section 38(1)(b) of FOISA. However, given that the Commissioner has found that all of the information is exempt from disclosure under section 30(c), he is not required to go on to consider whether section 38(1)(b) also applies.

Decision

The Commissioner finds that the Registrar of Independent Schools in Scotland complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or the Registrar 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

29 January 2020

Appendix 1: 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.

...

- (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 –

...

- (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-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

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