

# Decision Notice

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**Decision 241/2014: Mr Iain Maciver and Comhairle nan Eilean Siar**

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**Significant case review**

Reference No: 201401486

Decision Date: 20 November 2014



Scottish Information  
Commissioner

## Summary

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On 21 May 2014, Mr Iain Maciver asked Comhairle nan Eilean Siar (the Comhairle) for the significant case review following the murder of a named person.

The Comhairle withheld the requested information. Following a review, Mr Maciver remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner found that the Comhairle had correctly applied the exemption in section 30(c) (Prejudice to the effective conduct of public affairs) to some of the withheld information, but that the rest had been wrongly withheld under section 30(c) and section 36(2) (Confidentiality) of FOISA, and should be provided to Mr Maciver.

## Relevant statutory provisions

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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); 36(2) (Confidentiality).

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

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1. On 21 May 2014, Mr Iain Maciver made a request for information to the Comhairle. He asked it to provide the significant case review (the Review) compiled by the Comhairle following the murder of a named person.
2. The Comhairle responded on 17 June 2014. In its response, the Comhairle notified Mr Maciver that it was withholding the Review under the exemptions contained in section 30(b) and 36(2) of FOISA. The Comhairle considered the public interest arguments for and against disclosure and it concluded that the public interest favoured maintaining the exemptions.
3. On 18 June 2014, Mr Maciver wrote to the Comhairle requesting a review of its decision on the basis that the public interest favoured disclosure of the information. Mr Maciver also noted that he was content for any personal names to be redacted from the Review.
4. The Comhairle notified Mr Maciver of the outcome of its review on 30 June 2014. The Comhairle upheld its previous decision to withhold the Review under the exemptions contained in section 30(b) and 36(2) of FOISA and responded to the comments made by Mr Maciver in his request for review.
5. On 11 July 2014, Mr Maciver wrote to the Commissioner. Mr Maciver applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Maciver stated he was dissatisfied with the outcome of the Comhairle's review because he considered that there was an overriding public interest in the Review being made public.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr Maciver 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.
7. On 23 July 2014, the Comhairle was notified in writing that Mr Maciver had made a valid application. The Comhairle was asked to send the Commissioner the information withheld from him. The Comhairle provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Comhairle was invited to comment on this application and answer specific questions, including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.

## Commissioner's analysis and findings

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9. 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 Maciver and the Comhairle. She is satisfied that no matter of relevance has been overlooked.
10. During the investigation, the Comhairle withdrew its reliance on the exemptions contained in section 30(b) of FOISA and instead it sought to rely upon the exemption contained in section 30(c) of FOISA, along with that contained in section 36(2) of FOISA.

### Withheld information

11. The information being withheld in this case is an internal Significant Case Review (Review) that was commissioned by the Comhairle after a named individual, who had previously been a "Looked-after Child", was murdered.

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

12. 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 use of 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 citing 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. This exemption is subject to the public interest test in section 2(1)(b) of FOISA
13. As the Commissioner's guidance on section 30 of FOISA makes clear, the prejudice in question 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, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).
14. In its submissions to the Commissioner, the Comhairle argued that disclosure of the Review at this time would, or would be likely to, prejudice substantially the effective conduct of public

affairs. In particular, the Comhairle argued that disclosure would hamper the effective implementation of the outstanding recommendations contained in the Review. The Comhairle explained that there is a high level of interest in the case and that disclosure could result in outside bodies and individuals “bombarding” it with comments and opinions about the case and the recommendations, which would seriously impede and disrupt efforts to implement the recommendations.

15. The Comhairle noted that the applicant is a member of the press who has often commented that the Comhairle failed in its duties to the deceased. The Comhairle argued that if the Review were to be disclosed now, the applicant is likely to make much of it, and that this could detract from the implementation of the recommendations.
16. The Comhairle argued that the timing of the request was significant, as the recommendations from the Review were (and are) still being carried out and an appeal against the convictions (of the men found guilty of the deceased’s murder) had been lodged. (The Commissioner notes that the appeal against the murder convictions has since been dismissed.)
17. The Comhairle submitted that it also has to consider how vulnerable members of the community might be adversely affected by disclosure of the Review. The Comhairle argued that the need to protect vulnerable individuals is its primary duty in all the circumstances of the case. The Comhairle submitted that its Social and Community Services Department (the Department) provides its services to families and individuals in confidence. The Comhairle argued that it was vital that service users had complete trust in the Department, and that they felt able to share information (in many cases, highly sensitive information) with social workers without fearing that such information would be made public. The Comhairle argued that if individuals believed that information they had shared confidentially with the Department were to be revealed to the wider public, there was a real risk they would become reluctant to engage with the Department at all.
18. The Comhairle indicated that if families and individuals refused to share information with the Department for fear their personal situation would be made public, the Department would be unable to determine the level of support each service user needed and this would adversely affect its ability to deliver its services, which in turn would, or would be likely to, prejudice the effective conduct of public affairs. The Comhairle submitted that it cannot execute its primary duty of protecting vulnerable individuals in society if those individuals do not trust the Department well enough to share vital (and often personally sensitive) information with it. The Comhairle considers that disclosure of the Review would be a breach of that trust.
19. In his submissions to the Commissioner, Mr Maciver did not make any arguments as to the suitability of this exemption, but he did indicate that if the exemption was found to apply, then in his view, the public interest would favour disclosure.
20. Having considered the content of the Review, the Commissioner notes that, for the most part, it focuses on the deceased; on his life, and his interactions with various agencies. While no personal names are included in the Review it is clear that a lot of the information comprises the sensitive personal data of living individuals who, given the content of the Review, along with the geography and population of the region, would be identifiable by its disclosure. The Commissioner also notes that the type of information contained in the Review is not information that a member of the public would normally expect to be disclosed about them. Largely, it is information that has been shared with medical, social and care professionals on the understanding that it would be kept confidential.

21. The Commissioner accepts that a key factor in the success of social work interventions is that confidentiality is expected and maintained. Some of the information in the Review is about vulnerable individuals and their involvement with the Comhairle's social work services. The Commissioner accepts that disclosure of information about the situations described in the Review would be likely to deter people in similar situations in future from engaging fully with the Comhairle's social work services. She therefore accepts that disclosure of those parts of the Review which describes the events under scrutiny would be likely to cause substantial prejudice to the effective conduct of public affairs, and are therefore exempt from disclosure under section 30(c) of FOISA. However, in relation to the parts of the Review which contain the recommendations for action, the Commissioner does not find that there is such a clear argument for withholding the information under section 30(c) of FOISA.
22. The Commissioner notes that the recommendations are essentially separate from the body of the Review as they do not relate directly to the deceased or his life. The Commissioner has considered the submissions made by the Comhairle, but she is not convinced that disclosure of the recommendations would have the effects it has claimed. In particular, the Commissioner has not been provided with any evidence to demonstrate that disclosure of the recommendations would negatively impact on the Comhairle's ability to implement them. Without such evidence, the Commissioner does not accept that "bad press" or an increase in enquiries about the case are factors that would significantly impede or prevent the Comhairle from enacting the recommendations listed in the Review.
23. In the circumstances, the Commissioner does not uphold the exemption contained in section 30(c) of FOISA in relation to the recommendations contained on pages 14 and 15 of the Review. As she has found that the exemption does not apply to this information, the Commissioner is not required to apply the public interest test to this information.
24. However, the Commissioner is satisfied that the exemption provided for in section 30(c) of FOISA applies to the main part of the Review (i.e. all of its content apart from the recommendations).
25. As mentioned above, the exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all the circumstances of the case, the public interest in disclosing the main part of the Review is outweighed by that in maintaining the exemption.

#### *Public interest test*

26. 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. It has also been held that the public interest does not mean "of interest to the public" but "in the interests of the public", i.e. disclosure must serve the interests of the public.

#### *Submissions by Mr Maciver*

27. Mr Maciver acknowledged that the content of the Review might identify living individuals, but he argued that he was only interested in its substance and findings. He noted that he was happy for any such information to be redacted and that no parties need to be identified.
28. Mr Maciver claimed that his own research had led him to believe that the Comhairle is failing to properly monitor vulnerable young people. Mr Maciver queried whether any of the recommendations contained in the Review have been implemented, noting that several years have passed since the Review was begun. Mr Maciver argued that if the Review was not made public, there would be no pressure on the Comhairle to learn from any past

mistakes and the public would have no assurances that the same failures would not be repeated.

29. Mr Maciver referred the Commissioner to a 2009 report issued by the Scottish Children's Commissioner entitled "*Sweet Sixteen*" which contained four recommendations (numbered 20, 21, 22 and 23) for the Comhairle. Mr Maciver noted that the 2009 report focused on failings in "through care" and highlighted the issue of looked-after children being discharged from care at their 16<sup>th</sup> birthday. Mr Maciver alleged that the Comhairle failed to implement the recommendations made in the "*Sweet Sixteen*" report and, on this evidence, he alleged it was highly unlikely that the Comhairle would implement the recommendations made in the Review unless the Review itself was made public.
30. Mr Maciver argued that the "*Sweet Sixteen*" report, which found failings in how the Comhairle dealt with looked-after children, was not reported in the local media and was essentially "hushed up". Mr Maciver submitted that only positive stories about the Department are published locally and he alleged that the Department is relying upon secrecy to conceal its failures. Mr Maciver submitted that the public interest should not really be in question and he argued that by disclosing the Review, the Commissioner has an opportunity to help fix a "severely-malfunctioning" children's service department. Mr Maciver argued that all of this combined to make an over-riding public interest argument for disclosure.

#### *Submissions by the Comhairle*

31. The Comhairle acknowledged that there is a general public interest in the disclosure of information. However, the Comhairle argued that there was a competing public interest in protecting vulnerable members of the community, both now and in the future. The Comhairle argued that, while the content of the Review might be of interest to the public, it is not in the public interest for a person's family life to be made public. The Comhairle has rejected Mr Maciver's request that the Review should be disclosed with the personal data redactions he suggested. The Comhairle has argued that even if names were redacted from the Review, individuals would still be identifiable from the content and circumstances outlined in the document.
32. The Comhairle contended that not only had it had taken account of the recommendations contained in the 2009 report conducted by the Scottish Children's Commissioner, but that it had agreed with those recommendations and taken steps to implement them. The Comhairle argued that it had fully implemented the first two recommendations, that it is following current regulations and guidance with regard to the third recommendation and that the establishment of a public service partnership approach had overtaken the fourth and final recommendation.
33. The Comhairle argued that while the public will quite rightly want to be satisfied that it has implemented the recommendations contained in the Review, it does not necessarily follow that disclosure of the Review would be in the public interest. The Comhairle stressed that it expects that the Review will be disclosed at some point in the future, but it did not consider it to be in the public interest to disclose at the present time.
34. The Comhairle strongly disagreed with Mr Maciver's suggestion that non-disclosure of the Review would mean that the Comhairle would take no action in response to any failings or recommendations that were highlighted in the Review; it referred to the professional standards of its staff and its partners who undertake child and adult protection work. The Comhairle stressed that just because a document or its contents are not to be made public, does not mean they will not be acted upon.

### *The Commissioner's conclusions*

35. The Commissioner acknowledges that there is a general public interest in transparency in the conduct of public affairs. The Commissioner also recognises that there is a substantial public interest in ensuring that the Department is fulfilling its functions effectively, especially as it is responsible for assisting some of the most vulnerable members in society. Disclosure of the main part of the Review would enable the public to understand how the Comhairle and its partners supported the deceased during his life, and it would also enable them to understand how the care network operated in practice.
36. On the other hand, the Commissioner considers that the main part of the Review also contains a significant amount of sensitive personal data relating to the deceased and other individuals, disclosure of which could cause distress to the individuals concerned. The Commissioner considers that disclosure of the Review could deter vulnerable individuals from approaching or fully confiding in the Comhairle's social work department, and that if this happened, it would not only be to the detriment of those individuals, it would also be to the detriment of the wider public. The Commissioner notes Mr Maciver's suggestion that the Report could be disclosed with names redacted. However, in the circumstances, the redaction of names will not be sufficient to prevent individuals from being identified or to prevent distress to the individuals concerned.
37. The Commissioner is strongly of the view that it is in the public interest for vulnerable members of the community to be confident that they can access and engage with care services confidentially. Furthermore, the Commissioner considers that if individuals who require additional support are afraid to obtain that support for fear their circumstances would become public knowledge, this could result in wider problems in the community, which would be contrary to the public interest. Overall, the Commissioner finds that in this case, the public interest lies in withholding the main part of the Review.
38. As the Commissioner has concluded that the main part of the Review is exempt from disclosure under section 30(c) of FOISA, she will not consider it further in this decision.
39. The Comhairle also relied upon the exemption in section 36(2) of FOISA to withhold the recommendations contained in the Review. The Commissioner will now go on to consider whether this information should be withheld.

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

40. The exemption in section 36(2) (which is set out in full in the Appendix) contains two tests, both which must be met before it can be relied upon. The first is that the 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.

*Was the information obtained by a Scottish public authority from another person?*

41. The Comhairle explained that it is a member of the Western Isles Child Protection Committee (the Committee), and that it was the Committee who commissioned the Review. The Comhairle explained that the Committee was separate from the Comhairle and included members from other organisations such as Police Scotland and NHS Western Isles. The Comhairle noted that the Committee's purpose was to bring interested agencies together to identify and commission child protection activity.

42. Once commissioned, a review team was established which included representatives from each member agency of the Committee as well as a representative from the charity "Action for Children" and a Detective Inspector from outwith the local area. The representative from "Action for Children" was appointed as the Independent Chair of the Review. The Comhairle argued that it obtained the Review from another person, namely the charity "Action for Children". The Comhairle acknowledged that the review team included a representative of the Comhairle, but it noted that the review team had an independent chair and the Review itself was intended to be independent.
43. Having considered the Comhairle's submissions on this point, the Commissioner has difficulty accepting that the information in the Review was obtained from another person, in the sense argued by the Comhairle. The Commissioner notes that while the Chair of the review team was from a separate legal entity (namely "Action for Children"), the review team led by the Chair included a member of the Comhairle. The Commissioner notes that even if she did accept that the Comhairle obtained the information in the Review from another person, most of the information came from people involved in the case, including the Comhairle's own staff.
44. The Commissioner is therefore not satisfied that the recommendations were, in fact, obtained from a third party. However, given the arguments put forward by the Comhairle, the Commissioner will go on to consider whether the second part of the test applies to the recommendations.

*Would disclosure of the information constitute an actionable breach of confidence?*

45. The second part of the test is that disclosure of the information by the public authority must constitute a breach of confidence, actionable by either 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.
46. Generally, there are considered to be three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element of this test. These are:
  - (i) the information must have the necessary quality of confidence about it;
  - (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*

47. For information to have "the necessary quality of confidence", it must be information which is not a matter of public knowledge. The information must have the basic attribute of inaccessibility. The Commissioner is satisfied that this is the case here, as it is clear that this information has only been seen by the author and intended recipients and has not been made available in the public domain.



### *Obligation to maintain confidentiality*

48. An obligation to maintain confidentiality can be either "express" or "implied". An implied obligation of confidentiality can arise as a result of the relationship between the parties or the particular circumstances in which information was obtained.
49. The Council has claimed an implied obligation of confidentiality. The Comhairle has argued that the sensitive nature of the information contained in the Review and the relationship between the parties involved in its creation were such as to imply an obligation. The Comhairle noted that as a member of the Committee it was bound by the obligation of confidentiality. In the circumstances, the Commissioner accepts that the information was obtained subject to an implied obligation of confidentiality.

### *Unauthorised disclosure which would cause detriment*

50. The third part of the test is that unauthorised disclosure of the information must be to the detriment of the person(s) who communicated it, or any other person. The damage need not be substantial, and indeed could follow from the mere fact of unauthorised use or disclosure in breach of confidence.
51. In its submissions, the Comhairle argued that disclosure of the information might be highly damaging to any of the individuals referred to in the report. The Comhairle also argued that detriment would be caused to the ability of the professionals involved in the Committee to effectively complete the implementation of the Review's recommendations.
52. The Commissioner has considered the Comhairle's arguments. She can only consider detriment insofar as it relates to disclosure of the recommendations. On this basis, the Commissioner finds that no detriment would occur to any person involved in providing the information in this Review if the recommendations were disclosed. She does not accept that disclosure would significantly impede the professionals involved in the Committee from effectively completing the implementation of the Review's recommendations, for the reasons discussed in relation to section 30(c) of FOISA. She does not accept that the recommendations contain information that would be highly damaging to any individual, if disclosed.
53. Accordingly, the Commissioner does not uphold the application of the exemption contained in section 36(2) of FOISA and finds that the Comhairle must disclose the recommendations listed on pages 14 and 15 of the Review.

## **Decision**

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The Commissioner finds that Comhairle nan Eilean Siar (the Comhairle) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Maciver.

The Comhairle correctly applied the exemption in section 30(c) of FOISA to part of the Review. However, it was wrong to withhold other information under section 30(c) and section 36(2) of FOISA.

The Commissioner therefore requires the Comhairle to disclose the recommendations listed on pages 14 and 15 of the Review to Mr Maciver by 5 January 2015.

## **Appeal**

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Should either Mr Maciver or Comhairle nan Eilean Siar 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 Comhairle nan Eilean Siar fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that Comhairle nan Eilean Siar failed to comply. The Court has the right to inquire into the matter and may deal with Comhairle nan Eilean Siar as if it had committed a contempt of court.

**Margaret Keyse**  
**Head of Enforcement**

**20 November 2014**

### 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.

#### 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.

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