

# Decision Notice

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## Decision 126/2018: Mr N and the Scottish Ministers

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### Governance review of Glasgow Clyde College

Reference No: 201800563

Decision Date: 15 August 2018



Scottish Information  
Commissioner

## Summary

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The Ministers were asked about the Scottish Further and Higher Education Funding Council's statutory governance review of Glasgow Clyde College. The Ministers supplied some information, but withheld other information.

The Commissioner found that information which was legal advice was exempt from disclosure. The Commissioner found that other information had been wrongly withheld, but had been disclosed by the Ministers during the Commissioner's investigation. The Commissioner accepted that the Ministers had identified all the information that fell within the request.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Notice that information is not held); 36(1) (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 11 September 2017, Mr N made a request for information to the Scottish Ministers (the Ministers). He asked for dates of contacts and copies of any letters, emails, notes of meetings and phone calls between the officers of the Scottish Government and the Scottish Further and Higher Education Funding Council (the SFC) between 19 February and 31 October 2015 in respect of:
  - the suspension of the Principal at Glasgow Clyde College;
  - the SFC's statutory governance review under section 7(7)C of the Further and Higher Education (Scotland) Act 2005; and
  - the appointment of the new board at Glasgow Clyde College as announced by Cabinet Secretary in Parliament on 8 October 2015.

Mr N added that if any of the meetings or phone calls were "informal", the Ministers should state whether or not these were recorded in the diaries of the Scottish Government officers.

2. The Ministers responded on 17 October 2017. They apologised for the delay in responding and disclosed some information. They withheld other information under sections 33(1)(b), 36(1) and 38(1)(b) of FOISA (respectively, the exemptions for commercial interests, confidentiality, and personal information). The Ministers also gave notice under section 17(1) that they did not hold some information.
3. On 30 November 2017, Mr N wrote twice to the Ministers requesting a review of their decision. He believed that the information supplied to him was incomplete. He asked the Ministers to focus their review "on the missing correspondence or notes of meetings between the Scottish Government and the Scottish Funding Council in regard to the Scottish Government's advice to the SFC (noted in the SFC's minutes of September 2015) that the

Government could not rely on the SFC and DLA Piper statutory review into governance at Glasgow Clyde College in 2015". Mr N also asked the Ministers to specify the information withheld under each exemption.

4. The Ministers notified Mr N of the outcome of their review on 13 March 2018. The Ministers noted that his requirement for review related to part (b) of his request. They confirmed their initial decision with modification: they continued to withhold information under sections 36(1) and 38(1)(b) of FOISA, but stated that their response should have said that they did not hold some of the information he had requested, rather than none of the information. The Ministers supplied Mr N with a letter from the Cabinet Secretary to the SFC dated 5 October 2015, which confirmed that the "SFC report" (i.e. the report prepared for the SFC by DLA Piper) was not relied upon by the Ministers prior to the making and laying of the order before Parliament for the removal of the Glasgow Clyde College Board.
5. On 26 March 2018, Mr N applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr N was dissatisfied with the outcome of the Ministers' review because he wished to know why the SFC's statutory report was deemed "not reliable" by the Scottish Government. Mr N accepted that personal data could be redacted from the information provided to him, but questioned why the exemption in section 36(1) of FOISA applied to information that was over two years old and for which no legal proceedings were current. Mr N also queried why the Ministers had provided no records of phone calls, emails, advice other than the Cabinet Secretary's letter of 5 October 2015.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr N made a request for information to a Scottish public authority and asked the authority to review its response to that request.
7. On 9 May 2018, the Ministers were notified in writing that Mr N had made a valid application. The Ministers were asked to send the Commissioner the information withheld from Mr N. The Ministers 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 Ministers were invited to comment on this application and answer specific questions including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.
9. On 3 July 2018, the Ministers provided Mr N with some information that had been withheld in terms of section 36(1) of FOISA. The Ministers confirmed that they no longer wished to rely on this exemption. They continued to withhold a small amount of personal data under section 38(1)(b) of FOISA from one of the documents. They explained that most of the information had been published in response to an information request received later in 2017. They apologised that this information was incorrectly withheld under section 36(1) of FOISA. In failing to disclose this information at an earlier stage, the Commissioner finds that the Ministers failed to comply with Part 1 of FOISA.

## Commissioner's analysis and findings

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10. 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 Mr N and the Ministers. He is satisfied that no matter of relevance has been overlooked.
11. Mr N believed the information he had received in relation to part (b) of his request was incomplete. The Commissioner has therefore investigated whether the Ministers identified all relevant information and provided Mr N with all the information to which he was entitled under FOISA when responding to part (b) of Mr N's request.

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

12. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received, subject to certain qualifications which are not applicable in this case. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give an applicant notice in writing to that effect.
13. In their review response, the Ministers stated that they had provided all the information that was covered by Mr N's request. Mr N commented:

“It seems very unfair that the Board of Clyde College are castigated by the Scottish Government (minister and officials) for not keeping timely minutes, and the government says it has no further records of what is, I believe, a significant decision to tell the SFC that their report could not be relied upon.”
14. The Ministers were asked to explain why they were confident that they had identified all information that fell within part (b) of the request.
15. The Ministers submitted that through an extensive search of their corporate records they were confident they had identified all information which would fall within the scope of the request. They had completed a search of the file “Glasgow Regional Board: Part 1 2015-2020” which was likely to hold relevant information. In addition, they had carried out keyword searches across their wider electronic document management system to identify any information, using various combinations of the terms “Glasgow Clyde” “college” “sfc” “Scottish funding council” “Glasgow Clyde College” “board” “Suspension” and “Principal”. The personal diaries of two officials had been searched for records of any relevant meetings.
16. The Ministers were asked why they were sure that they did not hold more correspondence relating to the view that the SFC report could not be relied upon. The attention of the Ministers was drawn to the Cabinet Secretary's letter of 5 October 2015 to the SFC, which contained the statement: “Given the concerns raised by the Board about the report, the Ministers have placed no reliance upon it.”
17. The Ministers noted that Mr N believed that there must have been some communication to the SFC explaining why the Ministers would not rely on the report, but they were confident that the searches they had undertaken had sourced all the information held on their corporate record, none of which explained why the report was not considered reliable.
18. The Ministers reiterated that they had released all the information they held, in response to Mr N's request, with the exception of one document (document 3) and some personal data.

19. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information (or, in this case, more information) is not held.
20. Having considered all the relevant submissions, the Commissioner accepts that the Ministers took adequate and proportionate steps to establish the information they held which fell within the scope of Mr N's request. Their searches are reasonable and proportionate and likely to identify relevant information. Specifically, the Ministers have searched the file most likely to contain relevant information. The key words used for searching the documents management system are also reasonable in the circumstances.
21. The Ministers also searched diaries which may have contained recorded information falling within Mr N's request (e.g. dates of contacts, notes of meetings and phone calls).
22. The Commissioner takes the view that information falling within the request would be reasonably easy to identify, in that it would have been created relatively recently and would relate to a specific and controversial subject: decisions and actions in respect of Glasgow Clyde College Board. Finally, the Commissioner notes that the Ministers successfully located some information, indicating that their search methodology was capable of locating information covered by Mr N's request.
23. The Commissioner is satisfied, on the balance of probabilities, that the Ministers identified all the information falling within part (b) of Mr N's request.
24. As stated in many previous decisions, the Commissioner's remit extends only to the consideration of whether a Scottish public authority actually holds the requested information and whether it has complied with Part 1 of FOISA (or with the Environmental Information (Scotland) Regulations 2004) in responding to a request. The Commissioner's role is not to determine whether a public authority should retain, record or hold more information about a subject.

### **Section 36(1) of FOISA - Confidentiality**

25. Section 36(1) of FOISA provides that information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given.
26. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled:
  - the information must relate to communications with a professional legal adviser, such as a solicitor or an advocate;
  - the legal adviser must be acting in their professional capacity; and
  - the communications must occur in the context of the legal adviser's professional relationship with their client.
27. The Ministers relied on this exemption to withhold some information which fell within part (b) of Mr N's request (document 3). This was advice received by the SFC from its professional

legal adviser for the principal or dominant purpose of giving legal advice, and was, according to the Ministers, therefore subject to legal advice privilege.

28. The Ministers submitted that, although the SFC had shared this advice with the Ministers, the legal advice remained privileged as disclosure was made on condition that it would remain confidential. Disclosure of the material would breach legal professional privilege. The Ministers argued that all necessary conditions for legal advice privilege to apply were satisfied. They confirmed that the information remained confidential at the time Mr N's request was received.
29. Having considered the content of the withheld information and the circumstances under which it was obtained by the Ministers, the Commissioner is satisfied that the information meets the conditions for legal advice privilege to apply. The advice was from a professional legal adviser acting in a professional capacity and the communication was in the context of a legal adviser's professional relationship with their client (the SFC).
30. Before information can attract legal advice privilege, the document must have been – and must continue to be – confidential between a legal adviser and their client. It is a precondition to a claim for privilege that the information in question is confidential, and therefore loss of confidentiality can accordingly equate to loss of privilege. The Commissioner accepts that legal privilege has not been lost in respect of the information in document 3, and the information remains confidential. Any sharing of the legal advice by SFC was done with express reference to its confidential and privileged nature and with the intention of maintaining confidentiality.
31. The Commissioner therefore accepts that the information falls within the terms of section 36(1) of FOISA. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA.

#### *The public interest test*

32. The Ministers recognised that there would be some public interest in disclosure of the withheld information as part of open, transparent and accountable government and to inform public debate. They also acknowledged that there is a public interest in relation to the dismissal of the Glasgow Clyde Board. They believed, however, that there was “a very strong public interest in maintaining legal professional privilege and in ensuring the confidentiality of communications between legal advisers and their clients or other legal advisers, including where this legal advice has been shared in confidence”.
33. Specifically, the Ministers commented that it was important in all cases that lawyers can provide free and frank legal advice which considers and discusses all issues and options without fear that that advice may be disclosed and, as a result, potentially taken out of context. It was also important to ensure that public authorities can share legal advice in confidence and for a limited purpose, without losing confidentiality or waiving privilege, to allow authorities to work on issues such as the Glasgow Clyde Board and specifically the SFC's statutory governance review under the Further and Higher Education (Scotland) Act 2005. The Ministers submitted that, in areas such as this, which are the subject of political debate, an expectation that legal advice could be released would inevitably lead to legal advice becoming much more circumspect and therefore less effective.
34. The Ministers argued that the public interest in disclosure was insufficient to outweigh the very strong public interest in maintaining the confidentiality of legal advice.

35. In his submissions on the public interest test, Mr N emphasised his belief that there is a public interest in disclosure of information relating to the dismissal of the Glasgow Clyde College Board. He also suggested that, in terms of the balance of public interest, less weight should be given to the confidentiality of the legal advice, describing it as over two years old and not relating to any current legal proceedings. Mr N noted that the SFC has only once used its statutory powers to initiate an inquiry (and follow up report) – and that was in 2015, for Glasgow Clyde College. He believed it was a matter of public interest to know if these powers were rightly or wrongly used by SFC and, therefore, the Ministers should reveal the legal reasons in full.
36. Mr N also noted that a Task Group was set up by the Cabinet Secretary in October 2015 to look at issues relating to Glasgow Clyde College, and other colleges. The report of that Task Group, in early 2016, made no reference to the SFC report not being relied upon. In September 2015, the minutes of the SFC Audit Committee record that they were told by the Scottish Government that the report would not be relied upon, and that officials at the SFC were asked to produce a full report of the reasons. Mr N stated that the report was never produced, and that he had been told by the SFC that the report was no longer needed because it was superseded by the Education Secretary's Task Group. He stated that the Task Group had never addressed the issue of the reliability of the SFC report and the SFC's use of its statutory powers. Mr N therefore believed that it would be in the public interest to put information into the public domain which would address these issues.
37. The Commissioner acknowledges that there will be occasions where the significant public interest in favour of withholding legally privileged communications may be outweighed by the public interest in disclosing the information. For example, disclosure may be appropriate where:
- the privileged material discloses wrongdoing by/within an authority
  - the material discloses a misrepresentation to the public of advice received
  - the material discloses an apparently irresponsible and wilful disregard of advice
  - a large number of people are affected by the advice
  - the passage of time is so great that disclosure cannot cause harm.
38. After careful consideration, the Commissioner is satisfied that none of the considerations set out above (or any others of comparable weight) apply here, in relation to the information withheld under section 36(1).
39. The courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client, on administration of justice grounds. In a freedom of information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC 164 (QB). Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
40. The Commissioner acknowledges that there is a public interest in the disclosure of the information. Mr N is correct to point to the general public interest in scrutinising the SFC's use of powers under the 2005 Act and the public interest in transparency around the

decision-making process of public authorities such as the SFC or the Ministers, especially when legal advice is involved.

41. On balance, however, the Commissioner accepts that greater weight should be attached to the arguments which favour withholding the information in the public interest. As stated above, the courts have recognised that legal privilege is a fundamental right that underpins the administration of justice. In all the circumstances of this case, therefore, the Commissioner concludes that the public interest in disclosing the information is outweighed by that in maintaining the exemption in section 36(1). Consequently, he finds that the Ministers were entitled to withhold the legal advice in document 3 under that exemption.

## Decision

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The Commissioner finds that the Scottish Ministers partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr N.

The Commissioner finds that the Ministers identified all the information they hold that fell within the scope of part (b) of Mr N's request.

The Commissioner also finds that the Ministers were correct to withhold legal advice under section 36(1). The Ministers were wrong to withhold other information under section 36(1), but, as they have acknowledged this and disclosed the information, the Commissioner does not require the Ministers to take any action in respect of this failure.

## Appeal

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Should either Mr N or the Ministers 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**

**15 August 2018**



### Freedom of Information (Scotland) Act 2002

#### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

- (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.

...

#### 17 Notice that information is not held

- (1) Where-

- (a) a Scottish public authority receives a request which would require it either-

- (i) to comply with section 1(1); or  
(ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

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

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

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

...

#### 36 Confidentiality

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

...

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