

# Decision Notice

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## **Decision 090/2019: Mrs Jane Carmichael and The Registrar of Independent Schools in Scotland**

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### **Copy of complaint**

Reference No: 201900297

Decision Date: 5 June 2019



Scottish Information  
Commissioner

## Summary

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The Registrar was asked for a copy of a complaint made to her by Perth and Kinross Council concerning the (now closed) New School, Butterstone. The Registrar withheld the information under sections 30(b)(ii), 30(c) and 38(1)(b) of FOISA.

During the Commissioner's investigation Mrs Carmichael said that she did not require personal data to be disclosed. The Registrar subsequently disclosed the remaining information to Mrs Carmichael.

The Commissioner investigated and found that the Registrar had wrongly withheld information under sections 30(b)(ii) and 30(c) of FOISA. As the Registrar disclosed all of this information during the investigation, he did not require her to take any action.

## 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(b)(ii) and (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

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1. On 26 June 2018, Mrs Carmichael made a request for information to The Registrar of Independent Schools in Scotland (the Registrar). She asked for information concerning a complaint made to the Registrar by Perth and Kinross Council regarding the New School, Buttersone, which she understood to have lodged in 2017 or 2018.
2. The Registrar responded on 23 July 2018, and withheld the information under sections 30(b)(ii) (Prejudice to effective conduct of public affairs) and 38(1)(b) of FOISA (Personal information).
3. On 9 August 2018, Mrs Carmichael wrote to the Registrar, requesting a review of the decision. She appreciated that identities had to be protected, but also believed there was a need for public transparency in relation to complaints.
4. The Registrar notified Mrs Carmichael of the outcome of her review on 6 September 2018. The Registrar upheld the application of sections 30(b)(ii) and 38(1)(b) of FOISA and also applied section 30(c). The Registrar referred Mrs Carmichael to reports by the Care Inspectorate and the HM Inspectors, following their inspections of the school in May 2018.
5. On 18 February 2019, Mrs Carmichael wrote to the Commissioner. She applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mrs Carmichael stated she was dissatisfied with the outcome of the Registrar's review because she believed information about serious welfare concerns should be in the public domain.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mrs Carmichael 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.
7. On 5 April 2019, the Registrar was notified in writing that Mrs Carmichael had made a valid application. The Registrar was asked to send the Commissioner the information withheld from Mrs Carmichael. The Registrar provided the information and the case was allocated to an investigating officer.
8. At the outset of the Commissioner's investigation, after discussions between the investigating officer and the Registrar, further information was disclosed to Mrs Carmichael. Mrs Carmichael had stated that she did not require the personal data contained in the complaint, but she did require information that would outline the nature of the failings at the school which had prompted the complaint. After deliberations, the Registrar confirmed that the information being withheld under sections 30(b)(ii) and 30(c) could be disclosed to Mrs Carmichael. The information was then provided to Mrs Carmichael: Mrs Carmichael confirmed that this was the information she was looking for, but also that she still sought a decision in relation to the Registrar's earlier decision to withhold it.
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 provide any reasoning as to why the now disclosed information had been withheld at the time of the request and review requirement, and what had changed in the interim period.
10. The Registrar elected not to offer any comments.

## Commissioner's analysis and findings

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11. 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 Mrs Carmichael and the Registrar. He is satisfied that no matter of relevance has been overlooked.

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

12. At both initial response and review stages, the Registrar withheld the information under two parts of section 30 of FOISA. Section 30(b)(ii) provides that information is exempt if its disclosure under FOISA would, or would be likely to, prejudice substantially the free and frank exchange of views for the purposes of deliberation. Section 30(c) provides that the information is exempt if disclosure would otherwise prejudice substantially the effective conduct of public affairs.
13. As stated above, during the investigation, the Registrar withdrew her reliance on section 30(b)(ii) and 30(c) of FOISA to withhold the information in this case. In the absence of submissions from the Registrar as to why the information was initially considered exempt from disclosure, the Commissioner must find that disclosure of the information would not have had the substantially prejudicial impact required for section 30(b)(ii) or 30(c) of FOISA to be engaged. Consequently, in this case, the Commissioner is not satisfied that the information subsequently disclosed was properly withheld under the noted exemptions. Having reached this conclusion, he is not required to consider the public interest test in section 2(1)(b) of FOISA.

14. The Commissioner concludes, therefore, that the Registrar was not entitled to rely upon section 30(b)(ii) or 30(c) of FOISA to withhold the information in question, and by so doing, breached Part 1 of FOISA.

## **Decision**

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The Commissioner finds that the Registrar of Independent Schools in Scotland (the Registrar) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mrs Carmichael.

The Commissioner finds that the Registrar wrongly withheld information under section 30(b)(ii) and 30(c) of FOISA.

Given that, during the investigation, the Registrar disclosed to Mrs Carmichael all of the information found to have been wrongly withheld, the Commissioner does not require the Registrar to take any action in response to this failure, in response to Mrs Carmichael's application.

## **Appeal**

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Should either Mrs Carmichael 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**

**5 June 2019**

## 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 –

...

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

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