

# Decision Notice



Decision 066/2009 Thomas Crooks and the Board of Management of  
Stevenson College Edinburgh

Employment-related questions

Reference No: 200801460, 200900268  
Decision Date: 15 June 2009

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Mr Thomas Crooks requested from the Board of Management of Stevenson College Edinburgh (the College) copies of correspondence relative to a named employee's use of discretionary time. The College responded by withholding the information on the grounds that it was personal information and therefore exempt in terms of section 38(1)(b) of FOISA. Following a review, Mr Crooks remained dissatisfied and applied to the Commissioner for a decision. Mr Crooks made further requests for information on the use of the College's Grievance and Dispute Policy and Procedures and names of colleagues who had made allegations against him. The College provided Mr Crooks with some information but stated that no other information was held. Following reviews, Mr Crooks remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which the College withdrew reliance on section 38(1)(b) of FOISA, indicating rather that the information was not held, the Commissioner found that the College did not hold the information requested by Mr Crooks.

However, the Commissioner found that the College had breached Part 1 of FOISA by failing to provide a notice to Mr Crooks setting out his rights of review and appeal, in line with the requirements of sections 19 and 21 of FOISA. He did not require the College to take any action in the circumstances (which included a subsequent assessment of the College's FOI practice).

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 15(1) (Duty to provide advice and assistance); 16(1) and (6) (Refusal of request); 17(1) and (2) (Notice that information is not held); 19 (Content of certain notices), and 21(5) and (10) (Review by Scottish public authority)

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



## Background

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1. Mr Crooks was previously employed by the College and entered into correspondence with it, in the course of which he made a number of information requests under section 1(1) of FOISA and received certain information in response to them. He made various further requests for information as follows.

### First Request

2. On 29 November 2007, Mr Crooks wrote to the College listing 16 requests for information. The requests included a reference to a policy of the College whereby staff members had to record within a log book their use of 'discretionary time' when not lecturing. In particular, at request number 12, Mr Crooks requested information on a named member of staff as follows:

*... I am requesting a copy of her entry in the log book for Tuesday, 20 November 2007. I am also requesting copies of any emails, memos, notes, notes of telephone conversations or any other form of communication in any way connected with her use of discretionary time for Tuesday 20 November 2007.*

3. The College responded on 24 December 2007 and in relation to request 12 refused to provide the information requested, stating that it was personal information and therefore exempt in terms of section 38 of FOISA. Mr Crooks was not informed of his right to request a review or to make a subsequent application to the Commissioner.
4. On 16 January 2008, Mr Crooks wrote to the College requesting a review of its decision. In particular, Mr Crooks argued that the information he was seeking was not personal information and therefore questioned the use of section 38 of FOISA.
5. On 22 January 2008 the College notified Mr Crooks of the outcome of its review, stating that where possible it had complied with FOISA and upholding the original decision to withhold the information. Again, Mr Crooks was not informed of his right to apply to the Commissioner for a decision.

### Second Request

6. On 9 April 2008, Mr Crooks wrote to the College asking a number of questions, of which 5 were requests for recorded information.
7. On 14 April 2008, Mr Crooks again wrote to the College, specifically asking for a further review of the decision to withhold the information he had requested at request 12 of his letter dated 29 November 2007.



8. On 30 April 2008, the College responded to Mr Crooks' letters of 9 and 14 April 2008. In relation to the 5 requests for information of 9 April 2008, the College indicated that no further information was held. In relation to the letter of 14 April 2008, the College stood by the decision not to release the information requested in Mr Crooks' first request. Again, Mr Crooks was not advised of his rights to request a review or make a subsequent application to the Commissioner.

### **Third Request**

9. On 23 April 2008, Mr Crooks wrote to the College asking a number of questions, of which 3 were requests for recorded information.

### **Fourth Request**

10. On 12 May 2008, Mr Crooks again wrote to the College asking a total of 42 questions, 41 of which were requests for recorded information, all relating to use of the College's Grievance and Dispute Policy and Procedures and the outcomes of such use. This letter also requested that the College review its response to his second request of 9 April 2008.
11. On 20 May 2008, the College responded to Mr Crooks' requests of 23 April and 12 May 2008. This letter also responded to his request for review dated 12 May 2008 (regarding his second request). The College informed Mr Crooks that some of his correspondence did not describe information held by the College, in effect claiming that the information in question was not held. Mr Crooks was also informed that in any event his approach to the matter was considered by the College to be vexatious and that the matter was now closed.
12. Once again, no attempt was made to advise Mr Crooks of his rights to seek a review and subsequently to apply to the Commissioner.
13. On 23 May 2008, Mr Crooks wrote to the College requesting that a review be carried out in relation to the decisions to reject his requests for information and to regard them as vexatious. At this time he also requested a copy of the College's publication scheme and a list of the members of the College's board of management.
14. On 3 June 2008, the College provided Mr Crooks with a copy of the publication scheme and a list of the members of the board of management as requested and informed him that a review would be carried out regarding his previously requests for information.
15. On 20 June 2008, the College informed Mr Crooks that it had carried out a review but that no additional information could be provided because all relevant information had been disclosed. The College also informed Mr Crooks that it considered his repeated requests for similar information to be vexatious and therefore it was not obliged to comply (section 14 of FOISA). For the first time, Mr Crooks was informed of his right to apply to the Commissioner for a decision.



16. On 3 October 2008, Mr Crooks wrote to the Commissioner's Office, stating that he was dissatisfied with the outcome of the College's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Crooks in particular requested that the Commissioner consider the College's decision that his requests had been vexatious and questioned the refusal to provide the information requested at request 12 of 29 November 2007.
17. The application was validated by establishing that Mr Crooks had made requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its responses to those requests. Given that only on 20 June 2008 had Mr Crooks been advised of his right to apply to the Commissioner for a decision, the Commissioner agreed to exercise his discretion in terms of section 47(5) of FOISA to receive an application (in respect of Mr Crooks' first request) which it might otherwise have been argued had been made outwith the period of six months specified in section 37(4) of FOISA. The case was then allocated to an investigating officer.

#### **Fifth Request**

18. On examining the information supplied by Mr Crooks it was noted that on 20 October 2008 he had written to the College requesting the following;  
  
*... the names of my colleagues whose accusations against me inspired [three named individuals] to arrange the strategy of harassment meeting dated March 13 2007.*
19. Mr Crooks was informed that this request of 20 October 2008 could not be investigated by the Commissioner since he had not asked the College to review any response it might have made or the fact that no response had been received.
20. Mr Crooks later confirmed that the College had in fact responded on 28 October 2008, informing him that it had previously supplied all the information it held, and since it was aware of his application to the Commissioner of 3 October 2008 it would be inappropriate to comment further.
21. On 22 January 2009, Mr Crooks wrote to the College requesting a review of its response to his request dated 20 October 2009.
22. On 28 January 2009, the College responded to Mr Crooks' request for review and provided him with a copy of notes of a meeting of 13 March 2007, which it stated he had been supplied with previously. The College stated that it held no further relevant information.

#### **Second application to the Commissioner**

23. On 9 February 2009, Mr Crooks wrote to the Commissioner's Office, stating that he was dissatisfied with the outcome of the College's review regarding his fifth request for information and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.



24. The application was validated by establishing that Mr Crooks had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

## Investigation

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25. On 14 January 2009, the College was notified in writing that the application of 3 October 2008 had been received from Mr Crooks, given an opportunity to provide comments on that application (as required by section 49(3)(a) of FOISA) and asked to respond to specific questions. In particular, the College was asked to provide the Commissioner with any information withheld from the applicant and to justify its reliance on any provisions of FOISA it considered applicable to the information requested. The College was also asked to explain why Mr Crooks had not been informed of his rights to request a review and subsequently to apply to the Commissioner for a decision, as required by section 19 of FOISA, and also why it had not informed him of the right of application to the Commissioner following the reviews it had carried out, as required by section 21(10) of FOISA.
26. The College responded on 28 January 2009, indicating that it held no information in addition to that released to Mr Crooks already. Consequently, it was no longer relying on the exemption in section 38(1)(b) of FOISA in relation to Mr Crooks' first request. It provided an explanation of the application of discretionary time to this case.
27. The College did not, however, address the questions regarding the processes it should have followed under FOISA in dealing with Mr Crooks' requests, in particular informing Mr Crooks of his rights under sections 19 and 21(10) of FOISA as outlined above. The College was subsequently asked to respond specifically to these points, in addition to further explanations being sought on other aspects of its response.
28. The College responded on 11 February 2009 and again on 5 March 2009, accepting that it had failed to follow the procedures for dealing with requests for information under section 1(1) of FOISA and providing further explanation as to the searches carried out to justify responses that the information requested was not held.
29. On 27 April 2009, the College was notified in writing that the application of 9 February 2009 had been received from Mr Crooks, given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked to respond to specific questions. In particular, the College was asked to provide the Commissioner with any information withheld from the applicant and to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
30. The College responded on 1 May 2009, providing submissions as to the searches carried out in relation to Mr Crook's requests for information and confirming that it held no information in addition to that released to Mr Crooks already.





31. The College's submissions will be considered more fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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32. In coming to a decision on this matter, the Commissioner has considered all the submissions made to him by both Mr Crooks and the College and is satisfied that no matter of relevance has been overlooked.
33. Mr Crooks provided the Commissioner with copies of numerous letters exchanged with the College in which he asked various questions as to why certain actions were taken. The Commissioner can only comment, however, on correspondence which included requests for recorded information as summarised above.
34. Mr Crooks' requests for information and subsequent correspondence raised a number of technical issues surrounding the way in which the College handled the requests in terms of FOISA. The Commissioner will first of all consider whether the College provided Mr Crooks with all relevant information it held, before considering the technical issues.

### Section 17 – Notice that information is not held

35. As outlined above, in relation to all of Mr Crooks' requests for information the College intimated that it held no further information falling within the scope of the requests.
36. In order to determine whether the College was correct to respond to Mr Crook's request by stating that the information requested was not held, the Commissioner must establish whether the College held the information requested at the time of Mr Crook's request.
37. In relation to the first request of 29 November 2007, the College stated that lecturing staff were contracted to teach for 30 hours per week with a balance of 5 hours spent carrying out other duties (at a location of the lecturer's choosing). This balance is known as discretionary time. The department within which Mr Crooks was employed operated an 'out of office diary' and lecturing staff had to make entries within this diary recording the time and location of discretionary time worked outwith the College.
38. The College further stated that Mr Crooks requested a copy of the diary entry as it related to a named staff member's use of discretionary time. It submitted that the named staff member was not a member of the lecturing staff and as such did not have discretionary time allocated. As such, there was no discretionary time to record.
39. The College acknowledged, however, that when the named staff member was out of the office, then an entry to this effect would normally have been placed within this diary. It stressed that this was not discretionary time but merely a record to show that the staff member in question was working elsewhere.



40. The College confirmed that the diary in question had since been disposed of but could not confirm when the disposal took place. It confirmed that such diaries were not listed in any retention policy, nor was the destruction recorded, although it understood that this was routinely done at the end of the relevant academic session. With hindsight, the College accepted that a copy of the diary entry in question could have been provided to Mr Crooks: it acknowledged that adequate searches had not been carried out to locate it until early in 2009.
41. On a reasonable interpretation of Mr Crooks' first request, the Commissioner accepts that the request was for information in connection with the named staff member's use of discretionary time and not whether the individual was within the College or otherwise. At the root of the request was clearly a dispute about the use of discretionary time. In all the circumstances of this case, having considered the submissions made to him and the details of the steps taken by the College to confirm that no information was held, the Commissioner is satisfied that the College held no information (and in fact could not have been expected to hold any information) in relation to the named individual's use of discretionary time. The Commissioner would have considered it appropriate, however, in line with the College's duty to provide reasonable advice and assistance under section 15(1) of FOISA, for the College to have explained the position in respect of discretionary time to Mr Crooks when it responded to his request.
42. In relation to Mr Crooks' second, third and fourth requests, which for the avoidance of doubt have been taken to fall within the scope of Mr Crooks' application, the Commissioner is satisfied in the circumstances from the submissions made by the College that (by the conclusion of the investigation, at least) adequate searches were carried out to confirm that the information requested by Mr Crooks was not held by the College.
43. In his application to the Commissioner Mr Crooks also specifically complained that within the letters of 20 May and 20 June 2008, he was informed by the College that his requests were deemed to be vexatious in terms of section 14 of FOISA and that the College considered the matter to be closed.
44. Section 14 of FOISA provides that a Scottish public authority need not comply with a request for information in terms of section 1(1) of FOISA if the request is vexatious (section 14(1)) or repeated (section 14(2)).
45. In the course of the investigation, the College informed the Commissioner that it was attempting to inform Mr Crooks that should he make any future requests for the same information they would be dealt with in terms of section 14 of FOISA. While this could perhaps have been made clearer, the Commissioner accepts it as a reasonable explanation in the circumstances, given that the College had in fact (notwithstanding certain technical failures) responded to each of Mr Crooks' requests for information and carried out a subsequent review when required to do so. In the circumstances, the Commissioner does not consider it necessary to examine the College's application of section 14 further.





46. In relation to Mr Crooks' fifth request of 20 October 2008, the College explained that he had previously been provided with all the information it held falling within the scope of this request. It confirmed that a further copy of the one document held had been supplied to Mr Crooks on 28 January 2009 and explained to the Commissioner what actions had been taken to ascertain that no further recorded information was held.
47. Having considered all the submissions made by the College, the Commissioner is satisfied that the College carried out adequate searches (by the conclusion of the investigation, at least) to ascertain what information was held, and considering Mr Crooks had previously been provided with a copy of any information held the College was correct to respond to this (and his other requests) in terms of section 17(1) of FOISA.

#### **Technical breaches of FOISA – Section 19 and 21(10)**

48. Where information is held, section 16(1) of FOISA requires a Scottish public authority to provide notice that the information is held, what exemption applies and where appropriate why the exemption applies.
49. Section 16(6) of FOISA states that any Refusal Notice in terms of section 16(1) is subject to the provisions of section 19 of FOISA.
50. Where information is not held, section 17(1) of FOISA requires an authority to provide notice that this information is not held.
51. Section 17(2) of FOISA states that any Notice in terms of section 17(1) is subject to the provisions of section 19 of FOISA.
52. Section 19 of FOISA states that a Refusal Notice under sections 9(1) or 16(1), (4) or (5) (including a refusal notice given by virtue of section 17(1) (information not held) must contain particulars-
  - (a) of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and
  - (b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).
53. Section 21(10) of FOISA states that a Scottish public authority's response to the applicant (under section 21(5)) following a review carried out under section 21 must contain particulars about the rights of application to the Commissioner and of appeal to the Court of Session conferred by sections 47(1) and 56 respectively.
54. In this case, it is apparent that Mr Crooks made several requests for information to the College and that whilst the initial 'refusal notice' of 24 December 2007 intimated that information was exempt in terms of section 38 in that it was personal data, it did not comply with section 19 of FOISA since it did not inform Mr Crooks about his rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1) respectively.



55. Subsequent responses by the Council in terms of section 17(1) of FOISA stating that no further information was held, did not comply with section 19 of FOISA in that again Mr Crooks was not informed about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1) respectively.
56. In the College's responses to Mr Crooks' requests for review, Mr Crooks was not informed of his rights of application to the Commissioner and appeal to the Court of Session, as required by section 21(10) of FOISA.
57. In correspondence with the Commissioner, the College accepted that it did not follow the procedures set out in sections 19 and 21(10) of FOISA, indicating that the matter had since been raised with the staff concerned who were now aware of the need to identify specific requests under FOISA when they arose and to follow procedures in the early stages of dealing with such requests.
58. In conclusion the College failed to comply with the technical requirements of section 19 and 21(10) of FOISA as outlined above in responding to Mr Crooks' requests for information.
59. In the circumstances, given in particular that the College's practice in handling requests for information has since been examined more comprehensively by the Commissioner by way of a practice assessment under section 43(3) of FOISA, the Commissioner does not (in this particular case, in response to Mr Crooks' applications) require any action in respect of these and the other breaches of Part 1 of FOISA identified in this decision.

## DECISION

The Commissioner finds that the Board of Management of Stevenson College Edinburgh (the College) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) by responding to the information requests made by Mr Crooks, by responding in terms of section 17(1) of FOISA that it held no further information falling within the scope of his requests. He also finds, however, that the College breached Part 1 in failing to advise Mr Crooks adequately why it held no information falling within the scope of his first request, as he considers it was required to do in terms of section 15(1) of FOISA.

The Commissioner also finds that the College breached Part 1 of FOISA by failing to provide notice to Mr Crooks in line with the requirements of sections 19 and 21(10) of FOISA. In the circumstances, the Commissioner does not require the College to take any action in respect of the breaches identified in this decision in response to Mr Crooks' applications.

Decision 066/2009  
Mr Thomas Crooks  
and Stevenson College Edinburgh



## Appeal

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Should either Mr Crooks or the Board of Management of Stevenson College Edinburgh wish to appeal against this decision, there is an 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 notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**15 June 2009**



## Appendix

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### 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.

##### 15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

...

##### 16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-

- (a) discloses that it holds the information;
- (b) states that it so claims;
- (c) specifies the exemption in question; and
- (d) states (if not otherwise apparent) why the exemption applies.

...

- (6) Subsections (1), (4) and (5) are subject to section 19.

##### 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.
- (2) Subsection (1) is subject to section 19.

...

## 19 Content of certain notices

A notice under section 9(1) or 16(1), (4) or (5) (including a refusal notice given by virtue of section 18(1)) or 17(1) must contain particulars-

- (a) of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and
- (b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).

## 21 Review by Scottish public authority

...

- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

...

- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.