



Decision Notice 085/2023

2021 Exams diet and alternative certification model

Authority: Scottish Ministers

Case Ref: 202101330

Summary

The Applicant asked the Authority for correspondence and details of meetings between John Swinney and others on the topic of the 2021 exams diet and alternative certification model. The Authority disclosed some information to the Applicant, withholding other information on the basis that disclosure would substantially inhibit the free and frank exchange of views. The Authority also refused to respond to part of the request on cost grounds (this was later withdrawn). The Authority later claimed that the disclosure of some of the withheld information would prejudice the free and frank provision of advice and the effective conduct of public affairs and also argued that certain information was not held.

The Commissioner investigated and found that the Authority had partially breached FOISA in responding to the request. While the Commissioner found that the Authority had correctly withheld some information, he found it had wrongly withheld other information under exemptions claimed and had failed to respond within the legislative timescales. He required the Authority to disclose certain information to the Applicant.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1) (Effect of exemptions); 10(1) (Time for compliance); 17(1) (Notice that information is not held); 21(1) (Review by Scottish public authority); 30(b) and (c) (Prejudice to effective conduct of public affairs); 47(1) and (2) (Application for decision by Commissioner)

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. On 17 May 2021, the Applicant made a request for information to the Authority. He asked for:
 - a) *Any emails, text messages, OneNote memos, or other correspondence between John Swinney, his ministerial office and/or special advisers and [the Scottish Qualifications Authority (the SQA)] on the topic of the 2021 exams diet and alternative certification model between November 1, 2020 to the date of this request.*
 - b) *Any emails, text messages, OneNote memos, or other correspondence between John Swinney, his ministerial office and/or special advisers to the National Qualifications Group on the topic of the 2021 exams diet and alternative certification model between November 1, 2020 to the date of this request.*
 - c) *The details of any meetings, phone calls or virtual video conferences held between Mr Swinney and any of his ministerial office and/or special advisers and any member of the National Qualifications Group since November 1, 2020 to the date of this request. This should include but not be limited to, details of those who attended, the location and date of the meetings, the agenda, any minutes, and any notes circulated from the meeting, and any follow-up emails or memos.*
2. The Authority responded on 15 September 2021. The Authority disclosed some information to the Applicant, subject to the application of exemptions in sections 30(b)(ii) and 38(1)(b) (Personal information) of FOISA. The Authority informed the Applicant that it was relying on section 12 (Excessive cost of compliance) of FOISA for information which would fulfil part c) of the request, as it argued that the cost of complying with that part of the request would exceed £600. It noted that the Applicant might wish to reduce the scope of the request to bring costs below £600, for example, by specifying particular subject matter or narrowing the timeframe of the request.
3. On 16 September 2021, the Applicant wrote to the Authority, requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because:
 - There had been an unreasonable wait for a response to his request.
 - He disagreed with the application of section 30(b)(ii), because the policy was no longer under discussion among Ministers and was past policy rather than current policy, due to the return of exams for the 2022 diet. (He did not question the application of section 38(1)(b) of FOISA.)
 - He believed that section 12 did not apply, given that the timescale and scope were narrow. In any case, the Authority had not provided any justification for its application in terms of the estimated cost of the request and a breakdown of costs.
4. The Authority notified the Applicant of the outcome of its review on 18 October 2021. In doing so, the Authority confirmed its original decision, subject to modifications.
5. The Authority apologised for the time taken to respond to the Applicant's request. The Authority informed the Applicant that it had reconsidered its application of the exemption in section 30(b)(ii) and found that additional information could be released to him. This was enclosed with the Authority's response. The Authority did, however, continue to rely on the

exemption in section 30(b)(ii) for withholding other information, and continued to apply section 12 to part c) of the request.

6. On 25 October 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review for the following reasons:
 - (i) He considered the excessive delay by the Ministers in responding was a delaying technique to allow for the topic under the request to no longer be as current as it was by the time it responded, which was not only after the main exam diet but after the exam results themselves.
 - (ii) He stood by his argument that the exemption in section 30(b)(ii) had been applied erroneously and, in any case, he considered the public interest favoured disclosure.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 29 November 2021, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority 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 Authority was invited to comment on this application and to answer specific questions. These related to why it considered disclosure of certain of the information would inhibit substantially the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)). The Authority was also asked to provide a breakdown of the cost it would incur in fulfilling part c) of the Applicant's request. Comment was also sought from the Authority on the Applicant's dissatisfaction with the time taken to respond to his request.
10. Further submissions were sought and received from the Authority during the investigation.
11. During the investigation (on 1 July 2022), the Authority provided an updated response to the Applicant, in which it disclosed some further information it had previously exempted under section 30(b)(ii) of FOISA. In addition to continuing to rely on the exemption in section 30(b)(ii) for other information, the Authority also explained that it was also now relying on the exemptions in sections 30(b)(i) and 30(c) for some of the remaining withheld information. With regard to part c) of the Applicant's request, the Authority informed him that it was no longer seeking to argue that the cost of fulfilling this part would exceed £600. It intended to issue a revised review covering part c) of the request in due course.
12. The Authority provided a revised response to part c) of the Applicant's request on 1 June 2023. In doing so, it disclosed some information to the Applicant, notified him in line with section 17 of FOISA that certain information was not held, and relied on the exemptions in sections 30(b)(i), 30(b)(ii) and 38(1)(b) for withholding other information from him.
13. The Applicant confirmed that he had received this updated response from the Authority and whilst he was dissatisfied with the Authority's application of section 17, together with the

exemptions in sections 30(b)(i) and (ii), he did not wish to challenge the Authority's use of the exemption in section 38(1)(b).

14. Because the Applicant has indicated that he is not challenging the Authority's use of section 38(1)(b) of FOISA, the Commissioner will not consider the information withheld by the Authority from documents 1, (partial information in document 1a), 2, 3 and 4 in relation to part c) of the request.

Commissioner's analysis and findings

15. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Context

16. In 2020, school exams in Scotland were cancelled completely, for the first time ever, due to the Covid-19 pandemic. The SQA drew up results using a system which took teacher estimates for each pupil, then moderated them based on results from previous years. However, this caused an outcry after thousands of results were downgraded with claims that the moderation system unfairly penalised children at schools which historically had not performed well.
17. The Authority subsequently agreed to accept the original teacher estimated grades and commissioned an independent review (National Qualifications 2020: rapid review) (the Priestley Review).
18. This independent review recommended a new approach to National 5 exams and the development of a new approach to assessments, which was accepted by the Authority.
19. As a consequence of the Covid-19 pandemic and the consequent restrictions placed upon individuals, National 5 exams were cancelled for pupils in Scotland in 2021. These were instead replaced with teacher assessments and coursework.

Section 30(b)(ii) – substantial inhibition to free and frank exchange of views

20. The Authority is withholding some information in documents 8 and 9 (in relation to part a) of the request) and certain information in documents 1a and 1b (in relation to part c) of the request) under section 30(b)(ii) of FOISA. Section 30(b)(ii) provides that information is exempt if its disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
21. The chief consideration when applying the exemption in section 30(b)(ii) is not whether the information constitutes opinions or views, but whether the disclosure of that information would, or would be likely to, inhibit substantially the exchange of views. The inhibition in question must be, or must be likely to be, substantial and therefore of real and demonstrable significance.

The Applicant's submissions about the exemption

22. In his submissions in relation to both section 30(b) exemptions, the Applicant commented that he struggled to believe that disclosure of the withheld information would, or, would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation. In his view, this was partly due to the

fact that the Authority appeared to take a heavy-handed approach to applying the “chilling effect” doctrine, particularly for this policy.

23. With regard to the information withheld in response to part c) of his request, the Applicant questioned the application of the section 30(b) exemptions, given the amount of time that had passed since the submission of his original request.

The Authority’s submissions about the exemption

24. The Authority explained that the information in documents 8 and 9 comprised email exchanges between itself and the SQA, discussing and agreeing the content and tone for a message (from the National Qualifications 2021 Group) to learners about the 2021 Alternative Certification Model.
25. The Authority submitted that the production of a media statement is an iterative process, where early ideas may be tested, refined, revised and reworked. The final product may differ substantially from the starting point as a result.
26. It is the Authority’s view that the exemption in section 30(b)(ii) recognises the need for officials to have a private space within which to develop, discuss, test and revise lines and handling plans, before arriving at a final settled position.
27. The Authority asserts that the final position, by its nature, is designed to be communicated publicly. However, the process by which it is arrived at is not. This process, the Authority submitted, involves the free and frank exchange of views, to arrive at a final agreed position. Were the means by which such a position was arrived at disclosed, the Authority argued that all involved in that process would be substantially inhibited from giving their views freely. As a consequence, the Authority’s ability to robustly test proposed positions, before using them publicly, would be compromised substantially if every preliminary thought that had been recorded had to be disclosed.
28. Disclosing the full content of the drafting exchanges, the Authority argued, was also likely to undermine the SQA’s trust in the Authority, and substantially inhibit communications on this type of issue in future. The Authority considered the SQA would be reluctant to provide their views fully and frankly, either in writing or at meetings, if they believed these views were likely to be made public. This would, in turn, substantially harm the SQA’s and the Authority’s ability to carry out its work in relation to the awarding of national qualifications.
29. The views of the SQA around disclosure of this information were also shared with the Commissioner.
30. With regard to the information withheld in documents 1a and 1b, the Authority asserted that disclosure of the full content of the exchanges recorded in these documents would be likely to undermine the trust between a named individual and itself (which would, in turn, substantially inhibit communications on this type of issue in future).
31. It is necessary, the Authority submitted, that it is able to engage in discussion on the future development of a whole range of matters in relation to the education system and the awarding of qualifications in Scotland, and to engage in discussions to ensure that any issues are supported as robustly as possible and that sufficient research has been undertaken, sought, communicated and developed to ensure that awarding processes remain credible and valid.
32. In the Authority’s view, release of advice and views recorded in documents 1a and 1b, could, substantially inhibit the willingness to express an opinion and the openness of the views

shared. Such inhibition would impact on Ministers ability to take fully informed policy decisions in future.

33. The Authority also relied on the submissions detailed in paragraphs 24 and 26 above in respect of the withheld information in documents 1a and 1b.

The Commissioner's view about the exemption

34. The Commissioner has taken account of all of the relevant submissions, together with the content of the withheld information.
35. Having examined the information withheld in documents 8 and 9, the Commissioner acknowledges that this shows the iterative process where changes were suggested and made to the proposed media statement, intended for release into the public domain in its final form.
36. The Commissioner is aware that the final settled position of both the Authority and the SQA was made publicly available in a press release, disclosed on the SQA's website on 14 May 2021.
37. Where (as in this case) discussions take place, and views and thoughts are exchanged, with the intention that the final settled position, once agreed, will be disclosed publicly, then the Commissioner may accept that disclosure of such exchanges would, or would be likely to prejudice substantially free and frank exchange of views for the purposes of deliberation. In this case, having considered the Authority's submissions and the withheld information, he accepts the inhibiting effect claimed by the Authority. Disclosure would be likely to impact significantly on trust between the Authority and the SQA and, in turn, lead to all parties being less likely to participate fully in similar discussions in future.
38. For these reasons, the Commissioner agrees that the Authority was entitled to rely on the exemption in section 30(b)(ii) for withholding certain of the information in documents 8 and 9 from the Applicant.
39. Having considered the information withheld in documents 1a and 1b, the Commissioner recognises that this reveals the response from the Chief Executive of the Scottish Qualifications Authority in respect of the content of the Priestley Review Report. Whilst information disclosed by the Authority shares the Deputy First Minister's response to the Chief Executive's letter, it does not specifically address all of the matters raised in the withheld information.
40. The Commissioner accepts, on the basis of the submissions received from the Authority, that were this particular information to be disclosed in response to this request, it is highly likely that comments might be expressed less frankly and be less full in future. This would therefore be likely to impact on the ability of all parties to make fully informed policy decisions in future.
41. For these reasons, the Commissioner accepts that the Authority was entitled to rely on the exemption in section 30(b)(ii) for withholding certain of the information in documents 1a and 1b from the Applicant.
42. Given that the Commissioner accepts that the Authority was entitled to rely on the exemption in section 30(b)(ii) for withholding this information, he is required to consider the public interest in section 2(1)(b) for that information.

The public interest test - section 30(b)(ii)

43. The exemption in section 30(b)(ii) is subject to the public interest test in section 2(1)(b) of FOISA. Where this exemption is correctly applied, the Commissioner must consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
44. 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. The public interest does not mean “of interest to the public” but “in the interest of the public”, i.e. disclosure must serve the interests of the public.

The Authority's submissions about the public interest

45. The Authority recognised the public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. It also acknowledged the public interest in relation to the delivery of National Qualifications in exceptional circumstances and the subsequent appeal provisions where grades were awarded through alternative certification.
46. The Authority considered this public interest had been met, at least in part, by publication of the final statement. The Authority provided a link to where the published statement could be accessed.
47. Against the public interest in disclosure of the information withheld under section 30(b)(ii), the Authority considered there to be a greater public interest in allowing a private space within which it could obtain full and frank advice and views from key stakeholders, such as the SQA, as part of the process of developing and refining communications, so that stakeholders received clear, consistent messaging to support the safe awarding of qualifications. This private thinking space was essential to enable all options to be properly considered, based on the best available expert advice, so that good decisions could be taken. If information of this sort were to be disclosed, the Authority believed it would substantially affect the willingness of all concerned to take part in such discussions, with the result that the final statement would have been less fully tested and less robust. The Authority considered this would not be in the public interest.
48. The Authority was also of the view that it would not be in the public interest to damage its relationship with the SQA, and undermine its trust in the Authority, through disclosure of information they had indicated would substantially inhibit the provision of advice in future.
49. Therefore, on balance, taking account of all the circumstances of the case, the Authority concluded that the public interest in disclosing the information was outweighed by the public interest in applying the exemption.

The Applicant's submissions about the public interest

50. In relation to all exemptions claimed by the Authority, the Applicant argued that advice around this particular policy had a higher degree of public interest than other areas where this exemption might legitimately apply.
51. The exam diet of 2021 was highly contentious, he submitted, in terms of the policy development and tests set internally by the Authority around whether exams would be sat in person or held as they were. There were thousands of students impacted by the decisions made by the Authority at this time and the Applicant believed it to be demonstrably in the

public interest for this information to be disclosed. In the Applicant's view, such disclosure would aid transparency and accountability.

52. Without disclosure, the Applicant was concerned that pupils who sat their exams in 2021 would be left without the ability to fully hold their elected representatives to account for decisions made during the pandemic.

The Commissioner's conclusions on the public interest test

53. The Commissioner considered all of the arguments presented to him in relation to the public interest in withholding or disclosing certain of the information in documents 8 and 9 and 1a and 1b.
54. The Commissioner recognises the significant public interest that exists in the decision making of the Authority and the SQA around how the exam diet in 2021 was to be delivered and the impact of this on both students and teaching staff. This includes discussions and decisions made by the SQA and the Authority around the nature of improvements that should be made in future. Which would include consideration of the Priestley review and report.
55. As mentioned above, the information for which the Authority has relied on section 30(b)(ii) of FOISA in respect of documents 8 and 9 concerns the exchange of thoughts and views around the content of a media statement (the final version of which was published).
56. In this case, the Commissioner agrees with the Authority that a public interest does exist in enabling the Authority and other relevant stakeholders to be able to discuss matters freely and frankly, without concern that exploratory discussions are disclosed into the public domain. The Commissioner accepts that it is in the public interest that relevant stakeholders are not inhibited from giving their free and frank views in future.
57. Furthermore, the Commissioner also agrees that the provision of the final agreed position in the published statement does, at least to some extent, fulfil the public interest that exists in this particular information.
58. With regard to the information withheld in documents 1a and 1b, the Commissioner agrees that there is a public interest in obtaining full and frank advice and views from key stakeholders (such as the SQA). He also accepts that this public interest extends to ensuring that all options are properly considered, based on the best available advice, to enable good decisions to be taken. With that in mind the Commissioner agrees (as he did in respect of the information withheld in documents 8 and 9) that it is in the public interest that relevant stakeholders are not inhibited from giving free and frank views in future.
59. Given that the Authority disclosed, in full, its response to each of the recommendations made in the Priestley Review, the Commissioner considers that this goes some way to addressing the public interest that exists in the information in documents 1a and 1b.
60. On balance, therefore, the Commissioner finds that the public interest in disclosing the withheld information in documents 8 and 9 and 1a and 1b is outweighed by that in maintaining the exemption in section 30(b)(ii) of FOISA. Consequently, he is satisfied the Authority was entitled to maintain the exemption.

Section 30(b)(i) – substantial inhibition to free and frank provision of advice

61. The Authority is withholding information in two paragraphs in document 10.1 (in response to Part a)), as well as information contained in one paragraph of document 1a and some information in document 3a (in response to Part c)) from the Applicant under section 30(b)(i)

of FOISA. Section 30(b)(i) provides that the information is exempt if its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice. The exemption is subject to the public interest test in section 2(1)(b) of FOISA.

62. In applying the exemption in section 30(b)(i), the chief consideration is not whether the information constitutes advice, but whether disclosure of that information would, or would be likely to, inhibit substantially the provision of advice. The inhibition in question must be substantial and therefore of real and demonstrable significance.

The Applicant's submissions about the exemption

63. The Applicant offered the same submissions in relation to the application of both section 30(b) exemptions (see above).

The Authority's submissions about the exemption

64. The Authority explained that document 10.1 is an SQA paper on the appeals model for National Qualifications in 2021 which was shared with the Deputy First Minister and includes the provision of advice following views from the Equality and Human Rights Commission (EHRC).
65. The Authority submitted that the withheld information was provided to it by the SQA, and it considered it essential for officials to be able to communicate, often in confidence, with external stakeholders such as the SQA on a range of issues, including those of an operational nature.
66. The Authority argued that disclosure of the full content of these communications, without the SQA's consent, was likely to undermine its trust in the Authority and substantially inhibit communications on this type of issue in future. Specifically, it considered the SQA would be reluctant to provide its views fully and frankly, either in writing or at meetings, if it believed its views were likely to be made public.
67. The Authority identified its concern that the relationship between itself and a key stakeholder would be substantially damaged if the information requested were disclosed, and that this would substantially harm the SQA and the Authority's ability to carry out its work in relation to the awarding of National Qualifications and the subsequent appeals provision.
68. The Authority submitted that disclosure of the withheld information in documents 1a and 3a would, or would be likely to, inhibit substantially the free and frank provision of advice, particularly where that advice was given by individuals from the SQA and other UK Administrations.
69. The Authority explained that this exemption recognises the need for stakeholders to fully engage with it and, in doing so, provide candid advice. In the Authority's view, disclosing free and frank advice received from the SQA would jeopardise that collaborative approach to policy making and delivery. In particular, the Authority argued that disclosure of the advice would mean that partners were less willing to be fully open and honest in their advice and opinions, particularly where release of these views could impact on operational deliverability of the qualifications on an ongoing basis.
70. The Authority also asserted that the UK Government would be unlikely to share their approach to exams in the future, for the same reasons, should the information be publicised.
71. It is the Authority's position that the views expressed in the withheld information impact decision making for exams, with Ministers relying on the open and honest sharing of advice

from the SQA when considering options and arriving at decisions. Release of the advice and views in these areas of operational sensitivity could lead to an inhibition of sharing such free and frank advice.

The Commissioner's view about the exemption

72. The Commissioner has considered all of the Authority's submissions and those from the Applicant, along with the withheld information in documents 10.1, 1a and 3a.
73. The Commissioner accepts that, if the withheld information in document 10.1, together with most of the withheld information in documents 1a and 3a were to have been disclosed when it was evident that a final position had not been reached, then it would have been likely to inhibit these discussions or stifle similar discussions between relevant stakeholders and the Authority in future.
74. However, the Commissioner does not accept that the same would be the case in respect of certain of the information withheld in document 3a. This is because it is evident from reading other information on the same page, that the Authority has disclosed what the approach or intended approach of rUK administrations would be. As such, where the Authority has considered it appropriate to disclose that information in response to the Applicant's request, the Commissioner is unclear why, therefore, disclosure of the withheld information would cause the harm anticipated by the Authority.
75. The Commissioner therefore accepts, from the submissions he has received and the content of the information itself, that disclosure of most of the information withheld under section 30(b)(i) would, or would be likely to, result in the harm claimed by the Authority.
76. As the Commissioner is not satisfied that certain of the information withheld in document 3a is exempt from disclosure under regulation 30(b)(i), he is not required to go on to consider the application of the public interest test.
77. As the Commissioner is satisfied that the Authority was entitled to rely on the exemption in section 30(b)(i) of FOISA for most of the withheld information, he is required to go on to consider the application of the public interest test in relation to that exemption for that particular information.

The public interest test - section 30(b)(i)

78. The exemption in section 30(b)(i) is subject to the public interest test in section 2(1)(b) of FOISA. Where this exemption is correctly applied, the Commissioner must consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

The Authority's submissions about the public interest

79. The Authority recognised a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. It also acknowledged the public interest in relation to the delivery of the National Qualifications in exceptional circumstances and the subsequent appeal provisions where grades are awarded through alternative certification.
80. Against this, however, the Authority considered there to be a greater public interest in allowing a private space within which it could obtain full and frank advice from key stakeholders, such as the SQA, as part of the process of developing and refining the appeals process, so that they were able to implement a credible and valid awarding process. This

private thinking space was, the Authority argued, essential to enable all options to be properly considered, based on the best available expert advice, so that good policy decisions could be taken.

81. Premature disclosure would, the Authority submitted, be likely to undermine the full and frank discussion of issues both within the group and between the Authority and stakeholders, which would, in turn, undermine the quality of the policy and decision-making process. This would not, in the Authority's view, be in the public interest.
82. The Authority also considered it to be contrary to the public interest to damage its relationships with the SQA, and to undermine its trust in the Authority through disclosure of information it had indicated would substantially prejudice its ability to take this important area of work forward in future.
83. Having taken account of all the circumstances of the case, the Authority concluded that the public interest in disclosing the information was outweighed by that in maintaining the exemption in section 30(b)(i).

The Applicant's submissions about the public interest

84. The Applicant made the same submissions on the public interest in relation to both section 30 exemptions (see above).

The Commissioner's conclusions on the public interest test

85. The Commissioner has considered all of the arguments presented to him in relation to the public interest in withholding or disclosing certain of the information in document 10.1 (in response to part a) of the request) and documents 1a and 3a (in response to part c) of the request).
86. The Commissioner recognises the significant public interest that exists in the decision making of the Authority and the SQA around how the exam diet in 2021 was to be delivered, including the provisions in place for appeals, and the impact this had on both students and teaching staff.
87. He also acknowledges the Applicant's view that there is a public interest in disclosure, to enable students to fully hold elected representatives to account for decisions made during the pandemic. That said, the Commissioner does not consider that the information withheld in document 10.1 would, if disclosed, lead to greater transparency over the policy decisions taken by the Authority and stakeholders, or enable students to hold them to account for policy decisions over the 2021 exams diet. The Commissioner takes the same view in respect of the information withheld in documents 1a and 3a.
88. In any case, the Commissioner agrees with the Authority that a public interest does exist (in this case and with regard to this information) in enabling the Authority and other relevant stakeholders to be able to receive and discuss advice on policy matters (in this case, the development of the appeals process and response to the Priestley Review) freely and frankly, without concern that exploratory discussions are disclosed into the public domain. This is particularly the case where it is evident that a final view does not appear to have been reached on the specific policy matter under discussion. The Commissioner accepts that it is in the public interest that relevant stakeholders are not inhibited from giving their free and frank advice in future.

89. On balance, therefore, the Commissioner finds that the public interest in disclosing the withheld information in documents 10.1, 1a and 3a is outweighed by that in maintaining the exemption in section 30(b)(i) of FOISA. Consequently, he is satisfied the Authority was entitled to maintain the exemption

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

90. The Authority has relied on the exemption in section 30(c) of FOISA for information withheld in documents 3.2 and 4.1.
91. 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 sections 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.
92. The standard to be met in applying the tests contained in the section 30(c) exemption is high. In particular, 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).

The Authority’s submissions about the exemption

93. In its submissions, the Authority acknowledged that the redacted information in documents 3.2 and 4.1 related to the delivery of the qualifications in the school year 2020-2021, and accepts that this process was completed.
94. However, the Authority submitted that considerations raised in these discussions remained live and pertinent to ongoing and future delivery considerations. The Authority asserted that releasing this information would compromise any future implementation of similar arrangements, and therefore the SQA’s operational delivery of the process, under the existing or future qualifications. The Authority also considered that it would undermine the ability to award credible and valid qualifications for learners in future.
95. The Authority argued that stakeholders would be likely to be reluctant to take part or to contribute fully and candidly, if concerned that their views would be disclosed subsequently. This would, the Authority submitted, prejudice substantially the awarding process and undermine its effectiveness, because the approach to awarding would be based on incomplete or inaccurate information.
96. The Authority also reiterated its view that it is essential for officials to be able to communicate, often in confidence, with external stakeholders such as the SQA on a range of issues, including on issues of an operational nature. Consequently, the Authority argued that disclosing the full content of these communications, particularly without the SQA’s consent, was likely to undermine its trust in the Authority and substantially inhibit communications of this type about the specific issue concerned in future.

97. The SQA would, the Authority submitted, be reluctant to provide its views fully and frankly, either in writing or at meetings, if it believed its views were likely to be made public, particularly while these discussions related to sensitive or controversial issues such as alternative certification and awarding processes.
98. The Authority considered it necessary to be able to engage in discussion on the future development of a whole range of matters in relation to the education system and the awarding of qualifications in Scotland. It also considered it necessary to engage in discussions to ensure that any issues were supported as robustly as possible, and that sufficient research had been undertaken, sought, communicated and developed to ensure that it was engaging in work in the best interest of the students of Scotland.
99. The Authority again noted its concern that the relationship between itself and the SQA would be substantially damaged if the requested information were to be disclosed. This would substantially harm the SQA and the Authority's ability to carry out its work in relation to the awarding of National Qualifications, which it viewed as constituting substantial prejudice to the effective conduct of public affairs in line with section 30(c) of FOISA.

The Applicant's submissions about the exemption

100. The Applicant submitted that it appeared to him that this exemption had been used incorrectly. He considered there to be no apparent risk to the effective conduct of public affairs within the information in documents 3.2 and 4.1.
101. In the Applicant's view, there was no clear evidence of these documents being critical to how public affairs operate. He also viewed the suggestion here that there was a real and demonstrable impact to the conduct of public affairs as groundless.

The Commissioner's view about the exemption

102. Having fully considered all relevant submissions, together with the content of the withheld information in documents 3.2 and 4.1, the Commissioner does not agree that disclosure of this information, at the time the Applicant submitted his request and requirement for review, would have otherwise prejudiced substantially, or been likely to prejudice substantially, the effective conduct of public affairs.
103. The Commissioner recognises that the withheld information in document 3.2 (which forms part of a paper from December 2020 setting out details of the Quality Assurance of the National 5 Alternative Certification Model for session 2020-2021) relates to discussions around the delivery and implementation of the Alternative Certification Model. The same is true of the information withheld in document 4.1 (which forms part of a letter to the Deputy First Minister on the same subject).
104. These discussions reflected the circumstances at that time in respect of the 2021 exam diet.
105. The Commissioner cannot agree with the Authority's assertion that disclosure of this particular information would make the SQA less forthcoming and frank in future, given that it is, after all, within the SQA's remit to engage fully with the Authority when discussing matters such as these. Furthermore, it is relevant to bear in mind that in 2022 school exams returned to normal in Scotland. The Alternative Certification Model was not needed.
106. Covid-19 has not gone away and, should there be an increase in cases again, and restrictions re-imposed, arrangements of the nature set out in documents 3.2 and 4.1 might have to be made again. However, the Commissioner is unable to agree with the Authority that release of the withheld information would compromise any future implementation of

similar arrangements. The Commissioner is of the view that, should similar arrangements be required, it is likely, as a consequence of consideration by relevant stakeholders and the Authority of the content of the withheld information, that circumstances would be different. The Commissioner considers the same to be true around concerns raised by the Authority in relation to its ability to award credible and valid qualifications in future.

107. It is for these reasons that the Commissioner is not satisfied that the harm envisaged by the Authority would – or would be likely to – occur if the withheld information in documents 3.2 and 4.1 were disclosed in response to this request.
108. The Commissioner does not, therefore, accept that the exemption in section 30(c) of FOISA should be upheld in respect of this particular information.
109. Given that the Commissioner does not accept the application of the exemption for this particular information, he is not required to consider the public interest test in section 2(1)(b) for the information.
110. As the Authority is not relying on any other exemption to withhold this information, he requires the Authority to disclose it to the Applicant.

Section 17 – Information not held

111. Section 17(1) of FOISA requires that, where an authority receives a request for information that it does not hold, it must give the applicant notice in writing that it does not hold the information.
112. In part c) of his request, the Applicant asked for
“the details of any meetings, phone calls or virtual video conferences held between Mr Swinney and any of his ministerial office and/or special advisers and any member of the National Qualifications Group since November 1, 2020 to the date of this request. This should include but not be limited to, details of those who attended, the location and date of the meetings, the agenda, any minutes, and any notes circulated from the meeting, and any follow up emails or memos.”
113. In the Authority’s revised response of 1 June 2023, it provided the Applicant with a link to a page on its website where it is possible to view details of ministerial engagements. These can be searched by month and year, with information in the relevant spreadsheet(s) being broken down by the name of the relevant Scottish Government Minister.
114. The Authority informed the Applicant that a review of that information showed that within the period of the FOI request, the Deputy First Minister met with the CEO of the SQA on specific dates. The Authority explained that no other meetings with members of the National Qualifications Group were recorded in these logs or identified separately.
115. The Authority provided the Applicant with the information it held relating to the specific meetings identified, but also informed him that it did not hold any information for meetings which occurred on 1 December 2020 and 25 January 2021.
116. The Authority explained that officials met regularly with the SQA on a range of matters relating to the delivery of its functions, and a briefing was not always produced. It also added that, at the time of these meetings, minutes were not routinely taken.

117. In response to the Commissioner's request for submissions, the Authority outlined the nature of the searches carried out in an effort to determine whether information relating to the meetings identified from the Ministers list of engagements was held.
118. These included searches of the Authority's eRDM system, along with key word searches of relevant folders, email inboxes of key staff, and a review of searches previously undertaken prior to the response to an earlier information request.
119. The Authority explained that members of staff from the National Qualifications Team and Qualification Policy Team were asked to undertake the searches as they were familiar with the subject material.
120. The Authority submitted, that due to the level of correspondence received, Private Offices do not routinely hold information in their mailboxes for any length of time. This is because officials are expected to save any material of corporate record to the eRDM filing system.
121. The Authority stated that the Ministers have no legal obligation to make a record or arrange a minute to be taken of every meeting they attend, and there is no specific duty on Ministers to make a record/arrange for a minute to be taken in relation to any meeting with the SQA. Furthermore, at the time of these meetings, minutes were not routinely taken. However, the Authority noted that the expectation was subsequently put in place that minutes be produced for all Ministerial meetings.
122. In later submissions, the Authority commented that the Civil Service Code states that civil servants must keep accurate official records and handle information as openly as possible within the legal framework. Guidance on taking minutes is published on the Saltire intranet and reviewed periodically. The Authority clarified that its staff were reminded in November 2022 about the importance of preparing a record of Ministerial meetings as part of wider work to enhance existing arrangements.

Commissioner's conclusions

123. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reasons offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations as to what information the authority should hold, ultimately the Commissioner's role is to determine what information is actually held by the public authority (or was, at the time the request was received).
124. Having considered all of the submissions, the Commissioner is satisfied that the searches undertaken by the Authority were adequate and would have been likely to identify any other relevant information falling within scope of part c) of the Applicant's request, if it were held.
125. The Commissioner is also satisfied that relevant personnel were involved in undertaking the searches.
126. In all the circumstances, therefore, the Commissioner is satisfied, on the balance of probabilities, that the Authority does not (and did not, at the time the request was received from the Applicant) hold any other recorded information which would fulfil part c) of the Applicant's request (specifically information relating to meetings which took place on 1 December 2020 and 25 January 2021). The Authority was therefore entitled to rely on

section 17 of FOISA, on the basis that it did not hold certain information which would fulfil part c) of the Applicant's request.

Timescale for compliance

127. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.
128. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review. Again, this is subject to qualifications which are not relevant in this case.
129. In his application to the Commissioner, the Applicant expressed dissatisfaction with the time taken by the Authority to respond to his request, in particular.
130. In submissions, the Authority explained that, due to the significant amount of interest in decisions taken around the assessment of National Qualifications in 2021 and 2022 and related issues, there had been an increase in demand on the team responsible for these issues. These pressures occurred over a period of time when there were reduced resources within the team, and this led to issues in terms of continuity and efficiency in processing FOI requests.
131. The Authority also explained that the information requested in this case was of a complex and sensitive nature, which required input from a number of teams and senior policy officials who had significant competing priorities for their time.
132. The Authority noted that officials were working to improve and learn lessons from this extremely busy period, to ensure that a more effective service would be provided in future.
133. It is a matter of fact that the Authority did not provide a response to the Applicant's request and requirement for review within 20 working days and, therefore, the Commissioner finds that it failed to comply with sections 10(1) and 21(1) of FOISA.
134. Because the Authority did provide a response to the Applicant's request and requirement for review, the Commissioner does not require it to take any action in relation to these breaches, in this particular case. However, he notes with concern the extreme delay in responding to the request initially (this took nearly four months) and also the fact that, even after this substantial delay, the Authority appears to have concluded during the investigation that its response to part c) of the request was not sufficiently robust to be capable of withstanding scrutiny (an issue which still remains to be remedied).

Decision

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

The Commissioner finds that, by relying on the exemptions in sections 30(b)(i) and 30(b)(ii) for withholding certain information from the Applicant, the Authority complied with Part 1. He is also satisfied that the Authority was entitled to notify the Applicant that it did not hold certain information which would fulfil part c) of the request.

However, the Authority breached Part 1 of FOISA (in particular, section 1(1)) by:

- applying the exemption in section 30(b)(i) to information in one paragraph in document 3a (covered by Part c) of request)
- applying the exemption in section 30(c) to information withheld in documents 3.2 and 4.1
- initially applying section 12(1) to part c) of the request and
- failing to comply with the time limits in sections 10(1) and 21(1) of FOISA.

The Commissioner requires the Authority to:

- disclose to the Applicant the information it withheld from documents 3.2 and 4.1
- disclose to the Applicant the information withheld on page 3 of document 3a (covered by part c) of request)

These steps must be taken by **12 October 2023**.

Appeal

Should either the Applicant or the Authority 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

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

28 August 2023

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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”

...

- (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 –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
 - (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
 - (b) in a case where section 1(3) applies, the receipt by it of the further information.

...

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.

...

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

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-
- (i) the free and frank provision of advice; or
 - (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.

...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
- (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;

- (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);
and
- (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

...