

Decision Notice 119/2021

Prelim and SQA Exam Results for N5 English and N5 Business Management

Applicant: The Applicant

Public authority: Midlothian Council

Case Ref: 202001389



Scottish Information
Commissioner

Summary

The Council was asked for the prelim result and result achieved at SQA examination for every pupil who took N5 English and N5 Business Management over a specified time period.

The Council provided some of this information to the Applicant, noting that it could not provide the data at individual pupil level.

The Commissioner was not satisfied that the Council was entitled to inform the Applicant that it did not hold the data at individual pupil level. He found that the Council failed to inform the Applicant which provision in FOISA it was relying on for not providing her with certain information. The Commissioner also found that the Council failed to provide adequate advice and assistance to the Applicant, and did not respond to her request and requirement for review within the statutory timescales.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 10(1) (Time for compliance); 15 (Duty to provide advice and assistance); 17(1) and (2) (Notice that information is not held); 19 (Content of certain notices); 21(1), (4), (5) and (10) (Review by Scottish public authority)

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 20 August 2020, the Applicant made a request for information to Lasswade High School, a school provided and managed by Midlothian Council (the Council). The information requested was:
 - a) For the years 2017, 2018 and 2019, the prelim result and the result achieved at Scottish Qualifications Authority (SQA) examination for every pupil who took N5 English and N5 Business Management qualifications.

The Applicant set out the format in which she expected to receive the information and made it clear that she was not looking for the names of any pupil, just a breakdown for each pupil by year and subject.
 - b) For 2020, the prelim result and estimated grade for N5 English and N5 Business Management pupils, along with associated rankings required by the SQA.
2. The Council responded on 24 September 2020. It explained that information on prelim grades was not kept by the school in a format that could be interrogated at individual pupil level. It did, however, provide aggregate information for 2017, 2018 and 2019 in relation to estimates and awards for all pupils sitting the two National 5 subjects. The Council was only able to provide aggregate information for the estimates for all pupils sitting the two subjects in 2020.
3. On 24 September 2020, the Applicant wrote to the Council, requesting a review of its decision on the basis that it had not provided anonymised information broken down by pupil, as requested. The Applicant commented that contact she had with the school suggested it

held the requested information at individual pupil level and that 2019 information was used to inform estimates that led to the 2020 N5 awards.

4. The Applicant also expressed the following dissatisfaction with the Council's response:
 - It had not provided any information on rankings for 2020 awards as requested.
 - The information provided made no sense to the Applicant and the Council provided no explanation as to its meaning.
 - It provided no advice or assistance, even although it claimed it was unable to provide the requested information.
 - No explanation was provided by the Council as to the delay in responding to the request.
5. The Council notified the Applicant of the outcome of its review on 11 November 2020. The Council re-iterated its earlier response that Lasswade High School did not keep the information on prelim grades, nor was it held centrally in a format that could be interrogated at individual pupil level. The Council explained that it would take extensive research to gather and collate the information. Therefore, it informed the Applicant that, in line with section 9 (Fees) of FOISA, it might be seeking to make a charge for the provision of this information. The Council also noted that if the cost of undertaking this exercise exceeded £600, it would likely refuse the request on the grounds of excessive cost. The Council invited the Applicant to let it know if she wished it to undertake this exercise and, potentially, issue a fees notice or refuse to comply due to excessive cost.
6. Regarding the prelim result and estimated grade for both N5 subjects for 2020, along with associated rankings required by the SQA, the Council explained that the only extant information it held was the awards for N5 English results for 2020. The Council disclosed this information to the Applicant.
7. On 22 November 2020, following further correspondence with the Council, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of the Council's review for the following reasons:
 - She did not accept that the information was not held in a format the Council could easily locate and collate.
 - The Council's refusal to provide the requested information on cost grounds.
 - The Council's failure to provide advice and assistance.
 - The Applicant's need to chase the Council for a response to her request and requirement for review.
8. Following the submission of her application, the Council issued a revised review response to the Applicant on 8 December 2020.
9. In this response, the Council apologised for the delay in providing its initial response, but explained that this was caused by the time taken to bring all of the information together. The Council disclosed some information falling within scope of her request and confirmed that it was no longer seeking to argue that a cost would apply to provision of the information. The Council also provided the Applicant with a copy of its "Guide to abbreviations".

10. The Applicant contacted the Commissioner again on 8 December 2020, enclosing the Council's revised review outcome and explaining that she remained dissatisfied with the Council's response. In a further email dated 13 January 2021, the Applicant set out her particular reasons of dissatisfaction as being:
- The Council's contention that information relating to preliminary results at an individual pupil level was not held in a format that the Council could easily locate and collate.
 - The Council's failure to provide a response to her request in full, or any clear justification/exemption to explain why the information was not being provided in full.
 - The Council's failure to provide any advice or assistance with regard to her request and to enable her to understand the information that had been disclosed in response.
 - The Council's failure to acknowledge her request for review and to provide an explanation as to why its responses to her request and requirement for review were late.

Investigation

11. The application was accepted as valid. The Commissioner confirmed that the Applicant 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.
12. On 23 November 2020, the Council was notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.
13. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and to answer specific questions. These related to the searches carried out by the Council to determine what recorded information it held falling within the scope of the request, together with the steps taken by the Council to provide advice and assistance to the Applicant and why the Council's responses to the Applicant were made outwith the statutory timescales.
14. During the investigation, the Council provided explanations, to the Applicant, of the terminology used in the information disclosed to her.
15. Following this disclosure, further submissions were sought and received from the Council regarding whether other specific information, falling within scope of the request, was held. The Council disclosed further information to the Applicant in relation to anonymised individual rankings for results achieved for N5 English in 2020 and anonymised percentage prelim results for each candidate sitting N5 Business Management in the same year. The Applicant confirmed that she had received this information. However, within that information the Council also identified which ranking and prelim percentage related to her son, by marking her son's name against the appropriate figures. The Applicant did not ask for the personal data of her son to be disclosed as part of this request, but rather made it clear in her request that she wanted the information to be anonymised.

Commissioner's analysis and findings

16. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

Section 1 – General entitlement

17. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received, subject to certain qualifications which are not applicable in this case.
18. In this case, the Applicant disputed the Council's contention that information relating to preliminary results at an individual pupil level was not held in a format the Council could easily locate and collate. The Applicant referred to correspondence she had from the Council, which appeared to suggest that the school held prelim grades and exam grades for pupils over a 3-year period, and this data was analysed to identify trends. The Applicant questioned how it was possible for the school to conduct this analysis without holding the data.
19. The question as to whether recorded information is held is a factual one.
20. The Council explained that there was no statutory requirement for the school to analyse prelim results against the final exam result and the local authority did not ask for this data as part of their quality assurance arrangements. Therefore, this information was not routinely available either in school or at a corporate level. The Council commented that, prior to responding to the Applicant's request for review, personnel in Lasswade High School were asked to search for the information within relevant departments. The Council submitted that the school confirmed some of the requested information was held, in an unstructured format, within relevant departments. It noted that this information had been recorded for trend analysis purposes only and the format of the data was inconsistent across the departments and years. Consequently, the Council was unable to meet the Applicant's exact format requirements when disclosing the data to her.
21. The Council provided comments from the school explaining the reason for the inconsistency. The school noted specifically that Business did not have a record of the prelim scores for pupils for 2017. It went on to say that it did not ask teams to retain that information as it was not a routine part of their analysis of performance data. It also commented that there was no standard time for which teams were asked to retain data for, but it typically worked on a three to five year time frame to establish trends for the purpose of self-evaluation and self-improvement. The school also commented that Business give the prelim result as a percentage and these were not explicitly linked to bands. The Council explained that the prelim, and other evidence, was looked at to determine bands and rankings for 2020 SQA purposes.
22. With regard to the information held by the English department, the school explained it had the full three years of information, but only half of the candidates' prelim scores had been entered into a central system used by the English team in years 2017 and 2018. This was the reason why the number of entries in the spreadsheet provided to the Applicant for these two years was much less than for 2019.
23. The Council provided the Commissioner with an explanation of the nature and scope of searches it carried out at each stage of processing and responding to the Applicant's request, to determine what information it held falling within scope of the request. The Council also provided details of the personnel involved in these searches and why they were the most appropriate individuals to carry out this work.

24. As noted above, following the submission of her application to the Commissioner, and during the course of the investigation, further information falling within scope of the Applicant's request was provided to her, broken down to individual pupil level.
25. Having considered all of the submissions from the Council, the Commissioner recognises that the Council may not have a statutory duty to hold prelim data to be able to analyse it against final SQA exam grades. However, it is evident that it does (and did, at the time the request was received) hold information covered by the Applicant's request which could be analysed and interrogated at individual pupil level for all but one of the years (in relation to N5 Business Management) and all of the years (in the case of N5 English) of the timescale covered by the Applicant's request.
26. Because the Council provided information, broken down to individual pupil level, falling within scope of the Applicant's request, in its revised response to her request for review, the Commissioner is not satisfied that the Council carried out adequate searches prior to responding to the Applicant's request or her requirement for review.
27. The Commissioner therefore finds that the Council failed to comply with section 1(1) of FOISA when it responded to the Applicant's request and requirement for review as it did not identify, locate and disclose to her all of the recorded information it held falling within scope of her request at individual pupil level.
28. However, as all of the recorded information held by the Council which was relevant to her request was disclosed to the Applicant by the conclusion of the investigation, the Commissioner does not require the Council to take any action in relation to this breach.

Section 15 – Duty to provide advice and assistance

29. Section 15 of FOISA requires a Scottish public authority, so far as it is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it. The Commissioner would expect an authority to provide sufficient advice and assistance to an applicant to ensure that the information is actually reasonably accessible to them. Failure to do so can lead to a breach of the duty under section 15(1).
30. Throughout her correspondence with the Council around its responses to her request and requirement for review, the Applicant consistently commented to the Council about the fact that she was unable to understand the information that had been disclosed to her and requested further explanation to assist her with this.
31. In its revised response to her requirement for review, the Council provided the Applicant with a copy of its "Guide to Abbreviations". This document contains all abbreviations used in its directorate (not only Education). The information contained in the "Guide to Abbreviations" is not specific to the information disclosed to the Applicant and does not provide an insight into the meaning of the abbreviations and technical terms used in the headings of the disclosed information. In its submissions, the Council accepted that it should have provided the Applicant with an explanation of the headings used.
32. The Council also accepted that an explanation of the information disclosed to her should have been provided to the Applicant.
33. The Commissioner notes that, in an email dated 25 February 2021, the Council provided the Applicant with explanations of the meanings of the titles used in each of the column headings contained in the tables where information was disclosed to her.

34. While the Applicant acknowledged that she received these explanations from the Council, she was of the view that the explanatory information given was for data that she could not use because of the way it had been presented to her. The Applicant was also dissatisfied with some of the explanations given as they related to data she had asked for but not received.
35. Having considered the explanatory information provided by the Council, in association with the information already disclosed to the Applicant, the Commissioner considers this explanatory information to be helpful in enabling a comparison to be drawn between the results recorded for the pupils sitting the exams over the different years covered by the request (where the information for those years is provided). Such a comparison can be drawn where results are examined year on year for the two subjects individually.
36. The Commissioner acknowledges that, given the different grading process introduced in 2020, it would be more difficult to draw a comparison of the 2020 data with the earlier information. He considers that further explanatory information given to him by the Council during its submissions around the interpretation of "Band", "Refined Band" and "Notional % range" would, if disclosed to the Applicant, enable her to better understand the information disclosed for 2020. The Commissioner therefore requires the Council to provide this explanation to the Applicant.
37. As mentioned previously, during the investigation, the Council provided the Applicant with the percentage prelim results for the pupils who sat the N5 Business Management examination in 2020. However, these results were provided in a stand-alone document and were not incorporated into the earlier information the Council had disclosed for the same pupils. As a consequence, it was difficult for the Applicant to clearly analyse these results. During the investigation, the Commissioner asked the Council to incorporate the percentage prelim results into the earlier information disclosed. This information was provided to the Applicant on 13 May 2021.
38. As noted above, because the school does not hold the prelim results in the same way for each subject and for each year covered by the request (in the case of N5 Business Management), it was not possible for the Council to provide the Applicant with the requested information presented in the same way, using the same column headings.
39. Overall, the Commissioner finds that, despite her continued requests that she be provided with advice and assistance to better understand the information disclosed to her, the Council did not comply with the duty under section 15(1) of FOISA when it responded to the Applicant's request and requirement for review. However, while he is satisfied that the explanations provided to the Applicant during the investigation, together with the Council's inclusion of the percentage prelim results with the previous information disclosed for N5 Business Management, assist the Applicant in better understanding the information disclosed, he finds that disclosure of the further explanatory information referred to in paragraph 36 would also be of assistance to the Applicant.

Handling issues

40. In her application to the Commissioner, the Applicant commented on the Council's failure to provide any justification or exemption as to why information was not being provided to her in full.
41. The Applicant also expressed dissatisfaction with the Council's failure to provide her with an explanation as to why the responses to her request and requirement for review were late.

Response to request

Section 17 of FOISA – Notice that information is not held

42. Section 17 of FOISA states that where an authority receives a request which would require it to comply with section 1(1) or determine whether the information is exempt from disclosure but it does not hold that information, the authority must give the applicant a notice in writing to the effect that it does not hold it.
43. Section 17(2) of FOISA also makes it clear that a notice in terms of subsection (1) is subject to section 19 of FOISA, which requires that an applicant is informed of their rights of application to the authority and to the Commissioner conferred by sections 20(1) and 47(1) respectively.
44. In this case, it is apparent that the Applicant made a valid request for information (to the Council) under section 1(1) of FOISA.
45. In responding to this request, where it argued that it did not hold the requested information in a format which allowed it to be interrogated at individual pupil level, the Council had a duty to provide the Applicant with a response in terms of section 17(1) of FOISA, since she had asked for the information to be broken down to individual pupil level. The Commissioner is not satisfied that the response given made it sufficiently clear that the information was not held by the Council, or that this was rectified adequately in the review outcome. By failing to do this, the Commissioner finds that the Council's response of 24 September 2020 did not comply with the requirements of section 17(1) of FOISA, as outlined above.
46. The Commissioner is, however, satisfied that the Council did inform the Applicant of her rights under sections 20(1) and 47(1), as required by section 19 of FOISA.

Section 10(1) – Time for compliance

47. 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.
48. The Council explained that the delay in responding to the request was caused by workload pressure and the time taken to gather information in a clear and succinct manner.
49. It is a matter of fact that the Council did not provide a response to the Applicant's request for information within 20 working days, so the Commissioner finds that it failed to comply with section 10(1) of FOISA. Although this failure was addressed by the Council in a revised review outcome, following the Applicant's application to the Commissioner, it received no mention in the Council's immediate response to the requirement for review (which must be considered the review outcome for the purposes of FOISA).

Review outcome

Section 21 of FOISA – Review by Scottish public authority

50. Section 21(4) of FOISA states that the authority may do the following in respect of the initial request for information, in response to a requirement for review:
 - (a) confirm the decision complained of, with or without such modifications as it considers appropriate;
 - (b) substitute a different decision for the original decision; or
 - (c) reach a decision, where the complaint is that no decision has been reached.

51. Section 21(5) of FOISA then requires the authority to give the applicant notice in writing of what it has done under subsection (4), with a written statement of its reasons for so doing. In this case, as mentioned above, the Commissioner notes that the Council informed the Applicant that, in line with section 9 of FOISA, it might issue a Fees Notice to her as the process of providing prelim grade information at individual pupil level would take extensive research to gather and collate. The Council also informed the Applicant that, if the cost of collating the information was more than £600, it would likely refuse the request on the grounds of excessive cost.
52. 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.
53. The Commissioner notes that the Council's response to the Applicant's request for review dated 11 November 2020 did not contain particulars about her rights of application to the Commissioner and of appeal to the Court of Session, as required by section 21(10).

Section 21(1) – Review by Scottish public authority

54. 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.
55. The Council explained that the delay in providing a response to the review was due to pressure on resources and the amount of work needed to pull the information covered by the request together.
56. It is a matter of fact that the Council did not provide a response to the Applicant's requirement for review within 20 working days, so the Commissioner finds that it failed to comply with section 21(1) of FOISA.

Conclusion

57. In conclusion, the Commissioner finds that the Council failed to comply with the requirements of sections 10(1), 17(1), 21(1) and 21(10) of FOISA, as outlined above, in responding to the Applicant's request for information.
58. As the Council did provide a response to the Applicant's request and requirement for review, albeit late, the Commissioner does not require any action to be taken in relation to these breaches, in this case. However, the Commissioner would draw the Council's attention (and that of all Scottish public authorities) to Modules 1 and 5 of the Self-Assessment Toolkit ("Responding on time" and "Conduct of Reviews"¹). These resources provide guidance to assist authorities in improving compliance with FOI timescales and also to promote efficiencies in handling requests and reviews, by carrying out an effective review of its response to a request, including good review practice and learning for future requests.

¹ <https://www.itspublicknowledge.info/ScottishPublicAuthorities/Self-AssessmentToolkit/Self-AssessmentToolkitIntroduction.aspx>

Decision

The Commissioner finds that Midlothian Council (the Council) failed to comply 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 failing to carry out thorough and adequate searches to provide the Applicant with all information held at the time of her request, the Council did not comply with section 1(1) FOISA.

Because the Council did not provide appropriate explanations and definitions to enable the Applicant to understand the information disclosed to her, and did not provide certain of the information in a format which made it easy to analyse, the Commissioner finds that it failed to comply with its duty to provide advice and assistance under section 15(1) of FOISA.

Furthermore, the Commissioner finds that the Council failed to comply with sections 10(1), 17(1), 21(1) and 21(10) in its handling of, and responses to, the Applicant's request and requirement for review.

For the reasons given in the decision notice, the Commissioner does not require the Council to take any action in relation to these breaches in relation to the Applicant's application, apart from the failure to comply with its duty to provide advice and assistance. In relation to this breach, the Commissioner requires the Council to disclose the explanations referred to in paragraph 36, by **24 September 2021**.

Appeal

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

**Margaret Keyse
Head of Enforcement**

10 August 2021

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

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.
-

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.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

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

- (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.

...

- (4) The authority may, as respects the request for information to which the requirement relates-

- (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
- (b) substitute for any such decision a different decision; or
- (c) reach a decision, where the complaint is that no decision had been reached.

- (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.

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