

Decision Notice



Decision 096/2008 Mr B and the Scottish Further Education Unit

The production of support materials for Higher and Intermediate Philosophy courses

Reference No: 200700062

Decision Date: 12 August 2008

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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Summary

Mr B asked the Scottish Further Education Unit (SFEU) to supply information about the costs of producing and reviewing support materials for Higher and Intermediate Two Philosophy courses. The request included the name and qualifications of the writers and reviewers of each unit of support material, and payments made to those individuals.

SFEU refused Mr B's request, advising that disclosure of the information would prejudice commercial interests and would contravene the Data Protection Act 1998 (DPA). This decision was upheld after review. Mr B remained dissatisfied and applied to the Commissioner for a decision.

During the Commissioner's investigation, SFEU submitted that disclosure of the information requested could constitute an actionable breach of confidence and that the information was therefore, additionally, exempt from disclosure under section 36(2) of FOISA.

The Commissioner found that SFEU had failed to deal with Mr B's request for information in accordance with Part 1 of FOISA. He did not find that any of the exemptions applied by SFEU should be upheld. He found that disclosure would not be likely to have a substantially prejudicial effect on the commercial interests of any party involved, and that disclosure would not provide grounds for an actionable breach of confidence. While he accepted that some of the information withheld was personal data, he found that disclosure of that information would not contravene the data protection principles of the DPA. He required SFEU to release the information Mr B requested.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2(1) (Effect of exemptions); 3(1)(b) (Scottish public authorities); 6(1) (Publicly-owned companies); 17(1) (Notice that information is not held); 20(5) and (6) (Requirement for review of refusal etc.); 33(1)(b) (Commercial interests and the economy); 36(2) (Confidentiality) and 38(1)(b), (2)(a)(i) and (b) (Personal information)

Data Protection Act 1998 (DPA) sections 1(1) (Basic interpretative provisions) (definition of personal data) and 2 (Sensitive personal data); Schedules 1 (The data protection principles: the first principle) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data: condition 6)

Interpretation Act 1978 section 6(c) (Gender and number)

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

1. On 6 July 2006, Mr B wrote to SFEU requesting the following information:-
 - a) The cost of producing support materials for the new arrangements of Higher and Intermediate Two Philosophy, these costs being broken down for each individual unit.
 - b) The name, qualifications and payments made to each individual who produced each unit of support material.
 - c) The name, qualifications and payments made to each individual who vetted each unit of support material.
 - d) Details of any other costs incurred in the production of the above materials.
 - e) Details, and the outcomes, of any investigations undertaken to ascertain whether any of these individuals were involved with the production of similar items such as NABs [National Assessment Bank surveys], the exam syllabus or specimen exam papers for the above courses.
2. On 26 July 2006, SFEU refused Mr B's request for the following reasons.
 - In relation to point a), the release of this information would be prejudicial to the commercial interests of the persons involved in producing those packs.
 - In relation to points b) and c) above, the names, qualifications and fees received by the writers and reviewers were withheld in order to comply with the requirements of the DPA.
 - In relation to point d) above, SFEU explained that because printing for all support materials was combined, it was not possible to provide costs for individual units.
 - In relation to point e) above, it was SFEU's practice to ensure continuity between those writing unit specifications and those writing support materials, and this would have been taken into account when contracting writers for the support materials. (SFEU did not, however, confirm whether it held any information in relation to this part of Mr B's request.)
3. On 11 December 2006, Mr B wrote to SFEU requesting a review of its decision.
4. On 18 December, SFEU advised Mr B that its position remained unchanged from that previously notified on 26 July 2006.
5. On 5 January 2007, Mr B wrote to the Commissioner, stating that he was dissatisfied with SFEU's decision and applying for a decision in terms of section 47(1) of FOISA.



6. The application was validated by establishing that Mr B had made a request for information to a Scottish public authority and had applied for a decision from the Commissioner only after asking the authority to review its response to that request.
7. Mr B's request for review was made some time after the period specified in section 20(5) of FOISA. However, given that SFEU responded to Mr B's review request, it is assumed that SFEU exercised its discretion under section 20(6) of FOISA, and that both Mr B's request for review and SFEU's review response are valid in terms of an application under section 47 of FOISA.
8. During the investigation Mr B confirmed that he did not require the Commissioner to consider SFEU's response to the final point in his request (point (e) in paragraph 1 above). This decision notice will therefore consider only the response to the first four points listed above in paragraph 1.

Investigation

9. On 29 January 2007, SFEU was notified in writing that an application had been received from Mr B. SFEU was invited to provide comments on the application (as required by section 49(3)(a) of FOISA) and was asked to provide the Commissioner with further information required for the purposes of the investigation. On 20 February 2007 SFEU provided the information requested with some additional comments and background information. The case was then allocated to an investigating officer.
10. The investigating officer subsequently (13 March 2007) contacted SFEU seeking responses to further questions. SFEU was asked which exemptions in FOISA it wished to claim, why it believed those exemptions applied and (where SFEU had relied upon a non-absolute exemption) why the public interest lay in withholding the information.
11. SFEU responded on 30 March 2007, with a submission which is considered in detail later in this decision notice, but is summarised as follows:
 - In relation to the costs of producing the support material (points (a) and (d) of Mr B's request, above), SFEU explained that while payments to the writers and reviewers were recorded, it was unable to calculate other costs specifically associated with the Philosophy units because costs such as staffing and printing were not accounted for against the development of individual units.
 - In relation to the payments made to individual writers and reviewers (points (b) and (c) of Mr B's request), SFEU cited "the commercial interest exemption", later confirmed to be section 33(1)(b) of FOISA. SFEU believed that disclosure of the information requested would adversely affect its own commercial interests, those of the writers and reviewers, and the commercial interests of the Scottish Government.



- In relation to the names, qualifications and payments made to the individual writers and reviewers (points (b) and (c) of Mr B's request), SFEU believed that it would contravene the DPA to provide this information without permission from the individuals concerned, and accordingly, the information was exempt from disclosure under section 38(1)(b) of FOISA (with reference to section 38(2)(a)(i)).
 - SFEU identified no public interest in disclosure which would outweigh the public interest in preventing substantial prejudice to the commercial interests of the parties involved.
12. Further information and clarification was sought from SFEU on a range of matters during the investigation. In further correspondence, SFEU also submitted that information about the payments to individuals was exempt from disclosure under section 36(2) of FOISA, because disclosure could constitute an actionable breach of confidence.
13. Mr B was also invited to provide further comments on the case, and in particular in relation to the question of whether there was a legitimate interest in the disclosure of personal information relating to the individuals concerned.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner has considered all of the information and the submissions that have been presented to him and is satisfied that no matter of relevance has been overlooked.

Is SFEU a Scottish public authority?

15. During the investigation of Mr B's application, SFEU queried whether it was, in fact, a Scottish public authority covered by FOISA.
16. Section 3(1)(b) of FOISA provides that a publicly owned company as defined by section 6 of FOISA is a Scottish public authority for the purposes of FOISA. Section 6 of FOISA specifies that a "publicly-owned company" is one which is wholly owned by the Scottish Ministers, or by any other Scottish public authority listed in schedule 1 of FOISA. SFEU acknowledged that it is owned by Scotland's further education colleges, but queried whether section 6 should apply to companies which are owned by more than one Scottish public authority.
17. The Commissioner has received clear legal advice that, given the terms of section 6(c) of the Interpretation Act 1978, which states that (unless the contrary indication appears) words in the singular include the plural, the singular noun "authority" in section 6 of FOISA may also be read in the plural. In other words, a company wholly owned by more than one public authority will be a publicly owned company under section 6 of FOISA. The Commissioner is therefore satisfied that SFEU is a Scottish public authority for the purposes of FOISA.



Information not held

18. In relation to points a) and d) of Mr B's request (see paragraph 1 above), SFEU advised that it could not provide information which would show costs relating specifically to the Philosophy support materials. SFEU explained why its accounting procedures made it impossible to split out SFEU staff time costs for the development of these units within the National Qualifications (NQ) project as a whole, or to identify printing costs for the material.
19. SFEU considered whether it should, instead, provide Mr B with details of the costs for the whole NQ project. However, it concluded that disclosure of this information would prejudice its own commercial interests, as well as those of the Scottish Government. As this was not information which Mr B specifically requested, the Commissioner has not found it necessary to consider SFEU's conclusion on this point in his decision notice.
20. On the basis of the explanations supplied by SFEU, the Commissioner accepts that SFEU does not hold the information detailed in points a) and d) of Mr B's request.
21. However, rather than advising Mr B that the specific information he had asked for was not held, SFEU told him (in its letter of 26 July 2006) that information about the cost of producing the support materials for Higher and Intermediate Philosophy was covered by "the commercial interest exemption". This position was not revised after SFEU reviewed its response to his request. The Commissioner therefore finds that SFEU wrongly cited section 33(1)(b) of FOISA and did not comply with section 17(1), which requires a Scottish public authority to give the applicant notice in writing if it does not hold the information requested.
22. The remaining parts of this decision will consider whether the SFEU acted in accordance with Part 1 of FOISA when withholding the information sought in parts (b) and (c) of Mr B's request, i.e.:
 - b) The name, qualifications and payments made to each individual who produced each unit of support material.
 - c) The name, qualifications and payments made to each individual who vetted each unit of support material.

Information withheld under section 36(2) of FOISA (Confidentiality)

23. As noted above, SFEU advised the Commissioner that details of the payments made to individual writers and reviewers were exempt from disclosure under section 36(2) of FOISA. This exemption applies where information has been obtained by a public authority from a third party, and where disclosure of the information would constitute a breach of confidence actionable by the third party or any other person.



24. In order to rely on section 36(2), an authority must demonstrate that certain conditions apply. Firstly, the information must have been obtained from another party. In this case SFEU has advised that guideline consultancy rates exist, but it was left to the project manager to negotiate rates with each writer/reviewer on an individual basis.
25. In *Decision 088/2007 Mr Alan Keith, Chairman of the Association of Dumfries and Galloway Accommodation Providers and VisitScotland*, the Commissioner found that terms of a contract that had been negotiated between a Scottish public authority and a third party did not constitute information which had been provided to the Scottish public authority. Full details of the Commissioner's reasoning are found in the decision notice for that case, and similar arguments apply in the case currently under consideration.
26. SFEU's submissions did not suggest that the negotiation process followed in this case involved the figure agreed with each individual being supplied to the SFEU by that person. The Commissioner consequently does not accept that the negotiated fee paid to each writer or reviewer was information which SFEU obtained from those individuals. In these circumstances, the first test for the application of this exemption has not been met, and it is not necessary for the Commissioner to go on to consider whether disclosure would entail a breach of confidence actionable by a third party.
27. The Commissioner therefore finds that the exemption in section 36(2) of FOISA does not apply to information about the payments to individual writers or reviewers.

Information withheld under section 33(1)(b) of FOISA (Commercial interests)

28. Section 33(1)(b) of FOISA states that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person, including a Scottish public authority. The public authority applying this exemption must be able to indicate the nature of the commercial interests involved and explain how these interests would, or would be likely, to be substantially prejudiced.
29. In this case, SFEU believed that disclosure of the information requested would substantially prejudice the commercial interests of the writers and reviewers, as well as its own commercial interests and those of the Scottish Government.

The commercial interests of the writers and reviewers

30. SFEU submitted that section 33(1)(b) of FOISA applied to information about the fees paid to the writers and reviewers.
31. The initial reason given by SFEU was that the writers and reviewers may provide services for a number of agencies at varying rates of pay for their services. SFEU believed that disclosing information about the fees it paid each consultant could impact upon the individuals' ability to contract in future.



32. During the investigation SFEU provided more detailed arguments. It explained that the rates of pay for its consultants' contracts are regularly varied in order to take account of the relevant knowledge and experience of each individual involved in the project activity, and that a higher rate of payment will often be required in order to secure a particular individual's services. SFEU argued that if other agencies or consultants were to find out what each writer or reviewer had been paid, this:
- a) may lead to some individuals feeling aggrieved, through learning that they are being paid less than others;
 - b) may weaken the consultants' future bargaining position when contracting for work, if they have been contracted at a low rate of pay on one project and are attempting a higher rate of pay on another.
33. SFEU stated that in this instance a daily rate was negotiated with each writer and reviewer for work on the support materials.
34. The Commissioner has considered the information withheld in this case, and the SFEU's comments as to the process by which it agreed fees with specialist writers and reviewers in this case. The Commissioner accepts that the writers and reviewers, in providing their specialist services to SFEU for a fee, have commercial interests.
35. However, the Commissioner is not persuaded that the commercial interests of these individuals would, or would be likely to be, substantially prejudiced by the disclosure of the fees paid for work on each unit of support material. In particular, the Commissioner has noted that disclosure of the total fee paid to each person for work on each support unit would not reveal the daily rate agreed with any individual. It is therefore unclear how disclosure of the total sum paid, on a specific project, would weaken their bargaining position in negotiations with other agencies, for other work. The fees therefore cannot be said to reveal anything about an individual consultant's profit margin, costs, overheads or other factors which ordinarily would be considered commercially sensitive.
36. The Commissioner has noted the SFEU's points about the individuals' concerned feeling aggrieved about the fee paid to themselves or others, should these be disclosed. However, he does not consider that such feelings would amount to substantial prejudice to their commercial interests.
37. The Commissioner has found that disclosure of the fee paid for the work undertaken by the writers and reviewers would not, and would not be likely to, prejudice substantially their commercial interests. It remains to be considered in this decision notice whether the information is exempt from disclosure under section 38(1)(b).

The commercial interests of SFEU and of the Scottish Government

38. SFEU also argued that disclosure of the payments made to the writers and reviewers would substantially prejudice its own and other agencies' position when negotiating rates of payment for similar work in future projects.



39. SFEU did not explain why this would be a consequence of disclosure, and it is not clear to the Commissioner that such an outcome should be expected, unless SFEU was in direct competition with other agencies for the services of the writers and reviewers. It must be assumed that there are a limited number of agencies tendering for such specialist services, and the opportunities for the individuals concerned to play one agency off against another would likewise be limited. The Commissioner has advised public authorities that in his view, the exemption in section 33(1)(b) applies where the damage caused by disclosing information would be significant; would be likely and not hypothetical; and would occur in the near future and not some distant time. In this case, SFEU has not persuaded the Commissioner that such would be the consequences if the information about payments was disclosed.
40. In any case, the Commissioner does not accept that SFEU has any commercial interests in relation to the project in question. It is important to note that the Commissioner considers that there is a distinction to be drawn between 'commercial interests' and 'financial interests'. An organisation's financial interests will relate to the management of its financial resources and assets, while its commercial interests will specifically relate to any commercial trading activity it undertakes, e.g. the ongoing sale and purchase of goods and services, commonly for the purpose of revenue generation. Such activity will normally take place within a competitive environment. While the purchase of resources or services may entail activity which engages with commercial operators, it will not necessarily follow that the authority has commercial interests in relation to that activity.
41. In this case, the development of support materials was enabled by grant funding to SFEU from the then Scottish Executive Education Department (SEED). As a result of the recommendations contained in the National Qualifications Steering Group's report, *Review of Initial Implementation of New National Qualifications (2001)*¹ SEED commissioned a review of assessment arrangements for National Qualifications (NQ) courses. As part of this work, SEED provided grant funding to SFEU to develop support materials for a range of NQ courses. The grant was awarded under the terms of the Educational Development, Research and Services (Scotland) Grant Regulations 1999.²
42. Although it is true that any surplus from the grant funding would provide income to SFEU, the Commissioner does not accept that generating income was the objective of the project in which SFEU was involved. Financial considerations may well have been factored in to any bid for funding, and taken into account when negotiating payments made to the writers and reviewers, but in the Commissioner's view, these financial considerations do not amount to commercial interests.
43. SFEU put forward certain other arguments relating to its own commercial interests and those of the Scottish Executive (now the Scottish Government), but these related to arguments against disclosure of the overall cost of the whole NQ project. As the overall cost was not information which formed part of Mr B's request, the Commissioner has not found it necessary to consider these arguments in this decision notice.

¹ <http://www.scotland.gov.uk/Resource/Doc/158369/0042902.pdf>

² http://www.oqps.gov.uk/legislation/ssi/ssi1999/ssi_19990065_en_1



44. The Commissioner finds that SFEU was wrong to withhold information about the payments made to writers and reviewers under section 33(1)(b) of FOISA on the basis that disclosure of the information would not, and would not be likely to, prejudice substantially the commercial interests of any party.
45. As the exemption does not apply, the Commissioner is not required to consider whether the public interest favours maintenance of the exemption or release of the information.

Information withheld under section 38(1)(b) of FOISA (Personal information)

46. SFEU has applied the exemption in section 38(1)(b) to the details of the names and qualifications of the writers and reviewers, along with details of the payments made to each individual for each course unit. SFEU argued that this information constituted personal data, disclosure of which would contravene the provisions of the DPA. SFEU considered whether the qualifications and payments could be disclosed if names were withheld, but believed that individuals might still prove identifiable, as the people concerned were established figures and academics in a particular field.
47. Section 38(1)(b), read in conjunction with either section 38(2)(a)(i) or (b), exempts personal data from disclosure if the release of the information would contravene any of the data protection principles set out in Schedule 1 of the DPA. The Commissioner therefore considered whether the information in question is personal data and, if so, whether disclosure of the information would breach the data protection principles.
48. The Commissioner is satisfied that the names and qualifications of the consultants writing or reviewing the Unit support packs, and the payments made to each individual, are personal data as defined in section 1 of the DPA. He finds that none of the information is sensitive personal data, as defined by section 2 of the DPA.
49. SFEU has not stated which data protection principle(s) it believes would be breached by release of this information, though it has referred to disclosure of this information being “fundamentally unfair”. Under the circumstances the Commissioner finds it appropriate to consider the information in terms of the first data protection principle, which requires that personal data is processed fairly and lawfully.
50. In order to determine whether the first data protection principle would be breached by disclosure in this case, the Commissioner must also consider whether any of the conditions in schedule 2 to the DPA could be met. The Commissioner finds that condition 6 of Schedule 2 (see Appendix) would appear to be the only condition which might permit the disclosure of the information in this case. This is discussed later in this decision notice.



Would disclosure be fair?

51. In considering this question, the Commissioner has taken into account the (UK) Information Commissioner's Freedom of Information Awareness Guidance number 1³. In assessing fairness, the Information Commissioner advises that consideration should be given as to whether disclosure would cause unnecessary or unjustified distress or damage to the person whom the information is about, whether the third party would expect that his/her information might be disclosed to others and/or whether the third party would expect that his/her information would be kept private. In addition, this guidance also states that:
- "Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned."
52. SFEU has argued that the release of the information in question would be fundamentally unfair to the consultants. It has not given explicit reasons for this view, but has elsewhere referred to the implicit confidentiality associated with the payments.
53. SFEU has confirmed that it has not sought permission from the writers and reviewers to disclose their personal data. No information has been supplied that would confirm whether or not they would have any expectation that data relating to their work for SFEU would be disclosed. It might be argued that the individuals concerned would not expect the information requested by Mr B to be publicly supplied.
54. However, it might also be noted that since FOISA came into force in January 2005, it has been widely reported that information held by public authorities about how they make decisions, perform their functions and spend public funds might be the subject of an information request. In this context, it might equally be assumed that any person or organisation contracting with a public authority does so with awareness of the existence of FOISA (even if its implications are not fully appreciated), and with an expectation that some information might be requested or disclosed under its terms. Certainly, it would be a matter of good practice generally for public authorities to alert outside contractors to FOISA's existence and the possibility of requests for information about work undertaken.
55. In relation to the names and qualifications of the writers and reviewers the Commissioner finds that it would not be unfair to disclose the information. SFEU stated that the writers and reviewers had been selected because of their acknowledged academic standing and knowledge of the subject matter, and upon recommendation from the SQA. Academic reputation is not generally a private matter. In this case individuals were recruited to a publicly-funded project on the basis of their academic achievements and reputation.

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http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance%20_1_%20personal_informat ion_v2.pdf



56. The Commissioner has noted that disclosure of the names and qualifications would confirm that these individuals undertook this work in a professional capacity; it would not reveal any detail of their private, home or family lives. As such, the Commissioner does not accept that this disclosure would cause undue damage or distress to these individuals. The Commissioner also took into account that the expertise and experience of the writers and reviewers, as reflected by their qualifications, is an indication of the quality of work for which SFEU was paying.
57. After taking into account all of the above, the Commissioner has concluded that it would be fair for the consultant's names to be released, along with any information held by SFEU about their qualifications.
58. In relation to the payments made to each consultant, the Commissioner again finds that it would be fair to disclose the information, even if the individuals concerned would not have expected this to happen.
59. Although it might be argued that the payments made to the writers and reviewers represented their "personal finances" (as referred to in the guidance quoted above), the Commissioner takes the view that the payments in question were a one-off fee for a specified piece of work, and reveal only limited information about the personal finances of the individuals contracted. He considers that the responsibilities associated with the contracts in question give rise to expectations of transparency and accountability in relation to the use of public funds.

Would disclosure be lawful?

60. The first data protection principle requires disclosure of personal information to be lawful as well as fair. As mentioned previously in this decision notice, SFEU has advised that disclosure of the terms on which the writers and reviewers were employed could amount to an actionable breach of confidence.
61. Although the Commissioner did not accept that the exemption in section 36(2) applied to the information, given that he did not accept that the information in question was obtained by the SFEU from a third party, he will, however, consider whether disclosure would in fact constitute an actionable breach of confidence..



62. The Commissioner takes the view that ‘actionable’ means that the basic requirements for a successful action must appear to be fulfilled. There are three main requirements, all of which must be met before a claim for breach of confidentiality can be established, as listed below.
- a) The information must have the necessary quality of confidence about it. It must not be generally accessible to the public already.
 - b) The information must have been received by the public authority in circumstances from which an obligation on the authority to maintain confidentiality could be inferred. The obligation may be explicit (for example, expressed in a contract or other agreement), or implied from the circumstances or the nature of the agreement between the parties.
 - c) There must be a disclosure or use of the information which is not authorised by the person who communicated the information but which would cause detriment to that person.
63. The Commissioner accepts for the purposes of test (a) that the information concerning payments is not already generally accessible.
64. The Commissioner notes that SFEU has described its negotiations as “unique to the individual and implicitly confidential”, but no further evidence has been supplied to show that either of the parties considered this process to be such, beyond the assertion that disclosure would breach the DPA.
65. The Commissioner has already considered whether disclosure of the information about payments would cause substantial prejudice to the writers and reviewers’ commercial interests, particularly in relation to their negotiating position for other contracts. There, he concluded that there SFEU had not demonstrated that disclosure would be likely to prejudice substantially the consultants’ commercial interests. He has similarly concluded in relation to a potential breach of confidence action that there would not be any detriment (which might be less significant than the “substantial prejudice” required for the application of the exemption in section 33(1)(b)) to those commercial interests. He has considered whether any other detriment would be experienced by the writers and reviewers, but has not identified any adverse consequences for those individuals’ interests should the information be disclosed.
66. The Commissioner does not accept that disclosure of the information about payments made to individual writers and reviewers would give grounds for an actionable breach of confidence, and so be unlawful.



Can a condition in schedule 2 be met?

67. The first data protection principle requires one of the conditions in Schedule 2 of the DPA to be met (where information is not sensitive personal data). As noted previously, the Commissioner considered condition 6 of Schedule 2 in relation to the personal information withheld. This allows information to be processed (for example, by disclosure under FOISA) where:
- "The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."
68. The application of condition 6 involves a balance between competing interests broadly comparable, but not identical, to the balance that applies when considering the public interest test in section 2 of FOISA. Condition 6 requires a consideration of the balance between (i) the legitimate interests of those to whom the data would be disclosed, which, in this context, are Mr B and other members of the public (see section 38(2)(a) of FOISA) and prejudice to the rights, freedoms and legitimate interests of the data subjects, which, in this case, are the writers and reviewers of the support material. However, because the processing must be "necessary", only where (i) outweighs or is greater than (ii) should the personal data be disclosed.
69. The Commissioner accepts that Mr B has a legitimate interest in gaining access to information about the identities and qualifications of the writers and reviewers, with a view to clarifying questions he has raised about the expertise and viewpoint of the individuals involved, and the use of public money.
70. The Commissioner found that there exists a wider legitimate interest in the general public being able to ascertain that those contracted by public authorities to write detailed support material for public examinations are appropriately qualified to do so. Additionally he found there to be a legitimate interest in information which would allow the public to see whether the support material for the courses in question had been compiled and reviewed by individuals working within a particular school of thought, or whether the writers and reviewers represented a range of viewpoints.
71. The Commissioner also accepts that both Mr B and the general public have a legitimate interest in information about the fees paid to the writers and reviewers, in order understand the costs associated with the development of course materials, and to be satisfied that best value, openness and accountability prevail when spending public money; in this case money that had been provided as grant funding from the Scottish Government.
72. The Commissioner considered whether these interests might be met equally effectively by a means other than by disclosure of the information requested by Mr B. However, the Commissioner did not find that information which would meet these interests was available by other means, and concluded that disclosure of the information requested by Mr B was required for this purpose.



73. The Commissioner then considered the rights, freedoms and legitimate interests of the data subjects (i.e. the writers and reviewers) in relation to the information withheld.
74. The writers and reviewers have a legitimate interest in being able to conduct their business without undue disclosure of their personal information. (As noted previously, no information has been supplied to the Commissioner that would confirm whether or not they would have any expectation that data relating to their work for SFEU would be disclosed.)
75. The Commissioner is therefore required to balance these competing interests in order to establish whether disclosure of the personal data would be warranted.
76. Having balanced the legitimate interests of Mr B (and the wider public) and those of the data subjects, the Commissioner has found that processing by disclosure would not be unwarranted in this instance. He has concluded that the legitimate interest in disclosing the identity and qualifications of the writers and reviewers, and in disclosing the payments made to those individuals, outweighs any prejudice to the rights and freedoms or the legitimate interests of the data subjects.
77. In reaching this judgement, the Commissioner has concluded that any intrusion stemming from the disclosure of this information is likely to relate to the data subjects' professional lives, rather than their personal or home life: this is relevant in terms of the Information Commissioner's guidance previously referred to, which states:

"While it is right to take into account any damage or distress that may be caused to a third party by the disclosure of personal information, the focus should be on damage or distress to an individual acting in a personal or private capacity."
78. Although the fee paid to each individual relates to their personal finances, the Commissioner is unable to accept the SFEU's assertion that disclosing this is akin to disclosing the salary of its employees. This fee relates to a work undertaken on a single project and cannot be taken to reflect the overall income or the personal finances of each individual concerned.
79. The Commissioner has found, therefore, that all tests relating to condition 6 can be met. Having found disclosure to be both fair and lawful and to be permitted in line with condition 6(1) of Schedule 2 to the DPA, the Commissioner does not accept that disclosure of the information under consideration would breach the first data protection principle, and does not accept that the information requested by Mr B is exempt under section 38(1)(b).
80. Accordingly, the Commissioner has found that SFEU were wrong to withhold the names and qualifications of the writers and reviewers, and the payments made to those individuals, and requires SFEU to provide this information to Mr B.



DECISION

The Commissioner has found that the Scottish Further Education Unit (SFEU) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr B.

SFEU failed to notify Mr B that some of the information was not held, as required to do by section 17(1) of FOISA. Instead, SFEU wrongly cited the exemption in section 33(1)(b) in relation to information which it did not hold.

The Commissioner has found that SFEU was not justified in withholding information under the exemptions cited (sections 33(1)(b), 36(2) and 38(1)(b) of FOISA), and so it breached the requirements of section 1(1).

The Commissioner therefore requires SFEU to provide Mr B with the information requested in those parts of his request outlined in points (b) and (c) of paragraph 1 above; that is, the names, qualifications and payments made to the writers and reviewers of the support material in question. This information must be provided to Mr B by 26 September 2008.

Appeal

Should either Mr B or SFEU 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
12 August 2008



Appendix

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 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.

(...)

3 Scottish public authorities

- (1) In this Act, “Scottish public authority” means-

(...)

- (b) a publicly-owned company, as defined by section 6.

6 Publicly-owned companies

- (1) A company is a "publicly-owned company" for the purposes of section 3(1)(b) if it is wholly owned-

- (a) by the Scottish Ministers; or
(b) by any other Scottish public authority listed in schedule 1, other than an authority so listed only in relation to information of a specified description.

(...)



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.

(...)

20 Requirement for review of refusal etc.

(...)

- (5) Subject to subsection (6), a requirement for review must be made by not later than the fortieth working day after-
 - (a) the expiry of the time allowed by or by virtue of section 10 for complying with the request; or
 - (b) in a case where the authority purports under this Act-
 - (i) to comply with a request for information; or
 - (ii) to give the applicant a fees notice, a refusal notice or a notice under section 17(1) that information is not held,

but does so outwith that time, the receipt by the applicant of the information provided or, as the case may be, the notice.

- (6) A Scottish public authority may comply with a requirement for review made after the expiry of the time allowed by subsection (5) for making such a requirement if it considers it appropriate to do so.



33 Commercial interests and the economy

- (1) Information is exempt information if-
- (...)
- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

36 Confidentiality

- (...)
- (2) Information is exempt information if-
- (a) it was obtained by a Scottish public authority from another person (including another such authority); and
- (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

38 Personal information

- (1) Information is exempt information if it constitutes-
- (...)
- (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;
- (...)
- (2) The first condition is-
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
- (i) any of the data protection principles; or
- (...)



(b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

Data Protection Act 1998

1 Basic interpretative provisions

In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

2 Sensitive personal data

In this Act “sensitive personal data” means personal data consisting of information as to-

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,
- (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
- (e) his physical or mental health or condition,
- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.



Schedule 1 – The data protection principles

Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
 - (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

...

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

...

Interpretation Act 1978

6 Gender and number

In any Act, unless the contrary intention appears,

(...)

- (c) words in the singular include the plural and words in the plural include the singular.