

Decision Notice

Decision 144/2016: Mr James McEnaney and the Scottish Ministers

National standardised tests in schools

Reference No: 201502194

Decision Date: 4 July 2016



Scottish Information
Commissioner

Summary

On 3 September 2015, Mr McEnaney asked the Scottish Ministers (the Ministers) for information about national standardised tests in schools.

The Ministers disclosed some information and withheld the remainder under a number of exemptions in FOISA.

The Commissioner found that the Ministers partially failed to respond to Mr McEnaney's request for information in accordance with FOISA. The Commissioner accepted that the Ministers had conducted adequate and proportionate searches and that some of the information was correctly withheld. However, the Ministers wrongly withheld other information.

The Commissioner requires the Ministers to disclose the information which was wrongly withheld.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 29(1)(a) and (4) (definition of "government policy") (Formulation of Scottish Administration policy etc.); 30(b)(i) and (c) (Prejudice to effective conduct of public affairs)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 3 September 2015, Mr McEnaney made a request for information to the Ministers. He asked for the details of the advice provided to the Scottish Government which resulted in the announcement of national standardised tests in the Programme for Government¹. He asked for the advice itself and for the name of the individual or organisation responsible for the advice.
2. The Ministers responded on 1 October 2015. They provided Mr McEnaney with two web links and withheld some information under a number of exemptions in FOISA.
3. On 6 October 2015, Mr McEnaney emailed the Ministers requesting a review of their decision on the basis that he did not accept the information should be withheld. He considered that he should have been given the information from "stakeholders" (i.e. the individuals or groups who played a part in the decision), given the likely public interest in this information. He accepted that, in some circumstances, the Ministers' objections to disclosing the information might apply, but did not accept that a blanket refusal to provide information was appropriate or in the public interest. He suggested that it would be appropriate to disclose either a general outline of the advice provided, or a redacted version.
4. The Ministers notified Mr McEnaney of the outcome of their review on 29 October 2015. They disclosed an extract of some information and the names of two individuals who had given advice on national standardised testing. The Ministers withdrew their reliance on a

¹ <https://firstminister.gov.scot/programme-for-government-2015-16/>

number of exemptions, but continued to withhold information under section 29(1)(a) and section 30(b)(i) of FOISA (respectively, the exemptions relating to policy information and prejudice to the effective conduct of public affairs).

5. On 23 November 2015, Mr McEnaney applied to the Commissioner for a decision in terms of section 47(1) of FOISA. In addition to his dissatisfaction that information had been withheld, Mr McEnaney considered it likely that the Ministers held further information falling within scope of his request which could be disclosed to him.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr McEnaney made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.
7. On 7 December 2015, the Ministers were notified in writing that Mr McEnaney had made a valid application, and were asked to send the Commissioner the information withheld from Mr McEnaney. The Ministers provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and answer specific questions. These questions focused on the searches carried out to identify information covered by the request, the information falling outwith the scope of the request and the exemptions relied upon to withhold the requested information. The Ministers responded on 14 March 2016.
9. Mr McEnaney was invited to explain why, in his view, the withheld information should be disclosed, and did so.
10. On 21 April 2016, the investigating officer contacted the Ministers, and requested further submissions on whether further information fell within scope of Mr McEnaney's request and additional commentary on the exemptions which the Ministers had relied upon to withhold information. The Ministers responded on 6 May 2016.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr McEnaney and the Ministers. She is satisfied that no matter of relevance has been overlooked.

Section 1(1) – Information falling within scope of the request

12. Section 1(1) of FOISA creates a general entitlement to be given information held by a Scottish public authority which is requested by an applicant, subject to the application of any exemptions in Part 2 of FOISA and any other relevant provision in Part 1.
13. In his application, Mr McEnaney commented that he considered the scope of his request to be wider than the Ministers had considered. Mr McEnaney argued that information about the National Improvement Framework (NIF) which involved National Standardised Testing (NST) was well within the scope of his request. He noted that a range of 'stakeholder meetings' had taken place and asked for information about these meetings, specifically what meetings

took place and who attended them. He also asked for details of the conversations which had taken place at these meetings.

14. The Ministers explained that the NIF document announced on 1 September 2015 in the Programme for Government was a draft at the time of Mr McEnaney's request (3 September 2015). (The finalised NIF document was launched on 6 January 2016.) Following the announcement of the draft NIF, the Scottish Government engaged with over 5000 teachers, parents and young people to gather feedback and views on the proposals. These views helped to inform the development of the draft NIF, but the meetings were informal and no minutes were taken. The Ministers submitted that these discussions and meetings were not specifically about the national standardised assessments, but about the NIF more broadly, and so did not fall within the scope of Mr McEnaney's request, which asked specifically about advice relating to the "national standardised tests".
15. The Commissioner accepts that if the Ministers had held information about the discussions at the stakeholder meetings listed by the Ministers, this information would be likely to fall within the scope of Mr McEnaney's request. However, having considered all the relevant submissions, the Commissioner is satisfied that these meetings were not minuted. She notes that the Cabinet Secretary for Education and Lifelong Learning wrote to Mr McEnaney on 27 October 2015 in terms which confirmed that the stakeholder discussion of 16 June 2015 was informal in nature and no minutes were taken.
16. The Ministers identified four documents which contained information which they considered fell within scope of the request. Some of the information from these documents was disclosed to Mr McEnaney with the Ministers' review response. The Ministers took the view that other information in these documents was exempt from disclosure under FOISA, and that some information in them fell outside the scope of Mr McEnaney's request.
17. The Ministers were asked to explain in more detail why they believed that some of the information was not covered by Mr McEnaney's request. They submitted that Mr McEnaney specifically asked for details of the advice provided to Scottish Government which "resulted in the announcement of national standardised tests in the Programme for Government". The Ministers appear to have interpreted the request as excluding any information about advice which did not result in the announcement of national standardised tests. In the circumstances of this case, the Commissioner accepts this is a reasonable interpretation of the request and, accordingly, that the Ministers have identified all information in the four documents which falls within the scope of Mr McEnaney's request.
18. Having considered all the relevant submissions, the Commissioner is satisfied that the Ministers have taken adequate and proportionate steps to establish the information they held which fell within the scope of Mr McEnaney's request, and that no further information falls within scope of the request.

Section 29(1)(a) – Formulation of Scottish Administration policy etc.

19. Under section 29(1)(a) of FOISA, information held by the "Scottish Administration" (defined in section 126 of the Scotland Act 1998 as members of the Scottish Executive and junior Scottish Ministers, and non-ministerial office holders of the Scottish Administration, and their respective staff) is exempt information if it relates to the formulation or development of government policy.

20. The Commissioner's view, expressed in her briefing on section 29², is that:

"formulation" suggests the early stages of the policy process, where the options are identified and considered, risks are identified, consultation takes place and recommendations and submissions are presented to the Ministers; while

"development" suggests the processes involved in reviewing, improving upon or amending existing policy; it can involve piloting, monitoring, analysing, reviewing or recording the effects of existing policy.

21. For information to fall under this exemption, it need only "relate" to the formulation or development of government policy. That is, information relating to the consideration or development of options and priorities for Scottish Ministers, who will then determine which of these should be translated into political action and/or legislation, and when.

The Ministers' submissions

22. In relying upon this exemption, the Ministers explained that the NIF for Scottish education builds on the best practice within the Curriculum for Excellence in using a range of data and evidence to report and plan improvements for children. In order to provide the necessary support to children and young people, the Ministers submitted that they needed to know more, on a consistent and systematic basis, about the performance of the education system. The Ministers stated that the NIF would provide the evidence to make substantial progress in eliminating the attainment gap within a decade.

23. The Ministers were asked to explain how the withheld information comprises information which relates to the formulation or development of policy. The Ministers commented that views were freely provided by two recognised experts before the First Minister's announcement of new national standardised assessments on 1 September 2015. The views were provided by the two Professors as part of the first stage in the development of the Government's policy on the NIF.

24. The Ministers explained that the introduction of the assessments is only one part of the NIF which was being developed. The development of the NIF (as a whole) was informed by a consultation and engagement exercise on the draft document. Further discussion and development of the policy around the format of the assessments themselves, and how the data from them will be collected and used, was ongoing. The Ministers explained that work was still underway to develop the assessments, and discussions with stakeholders on this and other areas of the NIF continue. The assessments will need to be developed and piloted before they are fully introduced in the academic year 2017/18. Their development remains an area of ongoing policy development.

The Commissioner's view

25. Having considered the withheld information, the Commissioner is satisfied that the withheld information relates to the formulation of Government policy and, accordingly, that the exemption in section 29(1)(a) of FOISA is engaged. The withheld information provides the Professors' views on the issue of standard assessments. The Commissioner is satisfied that this information was intended to assist Ministers and officials in formulating policy on the NIF.

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section29/Section29.aspx>

Public interest test

26. The exemption in section 29(1)(a) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Having decided that the information is exempt under section 29(1)(a), the Commissioner must go on to 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 Ministers' public interest submissions

27. The Ministers recognised that there is a public interest in the disclosure of information as part of open, transparent and accountable government, and to inform public debate about such an important issue as children's education. The Ministers considered that this interest had been met to a significant degree by the information which had been published about the NIF on the Scottish Government website³.
28. The Ministers considered that there is a greater public interest in protecting high quality policy and decision-making, and in the properly considered implementation and development of policies, particularly on such an important subject as national standardised assessments. Ministers and officials need to be able to consider full and frank advice from recognised experts, such as the Professors, and other stakeholders, so that the Ministers can take into account all available options and debate those rigorously, to fully understand their possible implications for children's education.
29. The Ministers argued that putting such exchanges into the public domain while the policy process remains in development would be likely to give a misleading impression of Ministers' intentions, and could undermine the ongoing consultations. The Ministers considered that this clearly would not be in the public interest. Therefore, taking account of all the circumstances of this case, the Ministers concluded that the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

Mr McEnaney's public interest submissions

30. Mr McEnaney stated that it was clear that the government had received only very limited advice on this issue. He considered that it was vital that the nature of that advice was disclosed in order to inform a full and rigorous debate about a policy which (he stated) the government itself has already conceded is "controversial". He considered that, broadly speaking, the opinions of the two individuals who provided advice are publicly known, so disclosing the information would not compromise any aspect of government policy making.
31. Mr McEnaney considered it was not in any way unreasonable to expect the disclosure of written evidence submitted as part of the development of a major policy, particularly when this evidence has been sought and provided on a professional and academic basis. He believed that the only reason to keep the information secret was "to avoid further embarrassment for the government whose flagship education policy has come under sustained attack since it was announced last year".
32. Mr McEnaney considered that education was set to be a key battleground in the forthcoming Scottish Parliamentary election [9 May 2016], and that this supported his view that there was a clear public interest case in disclosing the requested information.

³ <http://www.gov.scot/Topics/Education/Schools/NationalImprovementFramework>

33. He considered that if the withheld information was contradictory advice from just two sources then the Ministers' decision to accept one position and not the other could display a clear ideological position in relation to education policy, directly contradicting the First Minister's claims that her educational policies are not ideologically driven. He believed such a contradiction would be of the utmost importance and the revelation of it clearly in the public interest.
34. In conclusion, Mr McEnaney considered that the public could not judge the government's education record, or come to a fully informed judgement on the policies currently being proposed, while the possibility remains that this policy has been developed without proper consultation or a solid evidence base. He believed it was clearly in the public interest for the information to be disclosed.

The Commissioner's view

35. The Commissioner has considered carefully the representations made by both Mr McEnaney and the Ministers when balancing the public interest for and against disclosure of the information withheld under section 29(1)(a).
36. In the Commissioner's view, disclosure of the policy discussions would serve the public interest in informing the public about the development of the policy, and specifically the expert views that were considered in relation to national standardised assessments. The decision to introduce such tests will have a direct effect on a significant proportion of the Scottish population, either the children themselves or the parents / carers of those children. The Commissioner accepts that there is a strong public interest in the disclosure of information which would show why the development of this policy took the direction it did.
37. In general, the Commissioner accepts the Ministers' argument that it is in the public interest that views provided to inform policy formulation should be considered candidly by the Ministers and (particularly in the early stages of policy formulation) that they should be afforded a private space for doing so. However, in the circumstances of this case, the Commissioner does not accept the argument that putting such exchanges into the public domain while the policy process remains in development would be likely to give a misleading impression of the Ministers' intentions. The Commissioner notes that Mr McEnaney's request was made two days after the First Minister announced the intention of introducing national standardised tests. The intentions of the Ministers in relation to the direction of the policy were not in question, even though it had not yet been finalised.
38. In the circumstances of this case, the Commissioner considers that the public interest in allowing the Ministers to have a private space to consider advice (such as that provided by the two experts) is outweighed by competing public interest considerations which favour disclosure. In this instance, the withheld information comprises the advice provided by the two individuals, and does not relate to other discussions that informed the development of the NIF or specifically the decision to introduce national standardised assessments. The experts' comments are limited to their views on standardised testing. The Commissioner considers that the subject of education and the testing of children is an issue of key public interest and finds that, in this instance, it is in the public interest for the withheld information to be disclosed.
39. Recognising that there will usually be scope for an authority to mitigate the potential for information being taken out of context, the Commissioner has concluded that disclosure of the withheld information, at the time the Ministers were dealing with Mr McEnaney's request and request for review, would not have been likely to harm the policy-making process to any

significant degree, and any adverse effects of disclosure (in terms of the public interest) would be outweighed by the benefits likely to follow disclosure of the information.

40. Having considered all of the representations made by Mr McEnaney and the Ministers, the Commissioner has concluded that the public interest in disclosure of the withheld information outweighs the public interest in maintaining the exemption in section 29(1)(a) of FOISA.

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

41. The Ministers withheld some information within the four documents under section 30(c) of FOISA.
42. 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 section 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 release 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.
43. In order for the exemption in section 30(c) to be upheld, the prejudice caused by disclosure must be substantial and 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 Ministers’ submissions

44. The Ministers withheld the information under this exemption, as they considered it essential for Scottish Government officials to be able to communicate, often in confidence, with key experts and other external stakeholders on a range of issues, such as the development and implementation of national standardised assessments. They argued that disclosing the views provided by the two Professors was likely to undermine their trust in the Scottish Government and would substantially inhibit such communications in the future. Key stakeholders would be reluctant to provide advice, especially as fully and frankly as the Ministers would wish, if they believe that it is likely to be made public, particularly while discussions are still ongoing and decisions have not been taken.
45. The Ministers considered that disclosure could adversely affect the Government’s ability to gather all of the evidence needed to make fully informed policy decisions on the implementation of national standardised assessments, which would significantly harm the Government’s ability to carry out this part of its programme.
46. In conclusion, the Ministers submitted that, on the basis of their arguments, disclosure would result in substantial prejudice to the effective conduct of public affairs for the purposes of this exemption.

The Commissioner’s view

47. The Commissioner does not dispute that it is often essential for the Ministers or Scottish Government officials to be able to communicate with key experts or other external stakeholders on a range of issues, and that on occasions this communication needs to be

confidential. However, the views provided by the two Professors in this case were unsolicited. The circumstances in which the advice was provided do not imply that a high level of confidentiality was expected or offered

48. The Commissioner acknowledges that, where private individuals have provided unsolicited comments to a public authority, they may not expect their correspondence to be disclosed because it falls within the scope of an information request. The Commissioner is conscious that ordering the disclosure of such correspondence could deter some individuals from providing their views in the future. However, this is not the situation under consideration here, where the advice was provided by acknowledged experts, accustomed to making their views known on educational policy matters.
49. On the basis of the Ministers' submissions, the Commissioner cannot accept the argument that disclosure would harm the ability to "communicate, often in confidence, with key experts and other external stakeholders".
50. The Commissioner does not accept the Ministers' argument that disclosure could adversely affect the Government's ability to gather all of the evidence it needs to make fully informed policy discussions. The withheld information relates to just one part of the overall policy discussion and the views from the two Professors were provided voluntarily. The intention to introduce standard national assessments was announced before Mr McEnaney made his request. It is difficult to see why disclosure, at that stage, would prevent the Government from gathering all the evidence it still required, and the Ministers have not provided a full explanation of this argument.
51. The Commissioner does not accept that the Ministers have provided evidence or reasons to show that disclosure would, or would be likely to, have any of the negative consequences outlined in their submission. The arguments put forward by the Ministers appear to be hypothetical, and do not refer to any specific harm that would, or would be likely to follow disclosure of the information requested by Mr McEnaney.
52. In the absence of any persuasive evidence or explanation from the Ministers, the Commissioner cannot accept that disclosure of the views provided by the Professors would, or would be likely to, prejudice substantially the effective conduct of public affairs. Having considered all the relevant submissions, therefore, the Commissioner does not accept that the Ministers were correct to withhold the information under the exemption in section 30(c) of FOISA.
53. Given that the Commissioner does not accept that section 30(c) applies, she is not required to consider the public interest test in section 2(1)(b) of FOISA.

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

54. The Ministers identified specific information within documents 1, 2 and 4 which they considered exempt from disclosure under section 30(b)(i) of FOISA.
55. To rely on the exemption in section 30(b)(i) of FOISA, the Ministers must show that disclosure of the information would, or would be likely to, inhibit substantially the free and frank provision of advice. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
56. In assessing whether the disclosure of the information would, or would be likely to, inhibit substantially the free and frank provision of advice, the Commissioner will take account of

factors such as the subject matter, the content of the information and the circumstances existing at the time of the request.

57. As set out in her guidance on the exemptions in section 30(b) of FOISA⁴, the Commissioner takes the view that, in order for the exemption in section 30(b)(i) to apply, the damage caused by disclosing the information must be both real and significant, as opposed to hypothetical or marginal. Also, the damage would have to occur in the near future, and not at some distant time. The harm in question should take the form of substantial inhibition from expressing advice in as free and frank a manner as would be the case if disclosure could not be expected to follow.
58. In the Commissioner's view, where advice is communicated or received as part of an individual's expected day-to-day professional activities, then the risk of substantial inhibition resulting from the disclosure of that information will be diminished.

The Ministers' submissions

59. The Ministers considered that the exemption applied because disclosure of free and frank advice would be likely to inhibit substantially the provision of such advice in future. Obtaining this type of honest, expert advice is a key part of the process of developing the Scottish Government's keynote policy on standardised assessments. The Ministers emphasised that the advice was unsolicited, and argued that disclosing the content of this unsolicited advice, particularly as it was given in the early stage of the policy development process, would substantially inhibit the experts involved from providing similarly free and frank advice as the development of this policy continues.
60. The Ministers explained that the only advice they received came from the two Professors, in the form of informal views offered within e-mail correspondence. They submitted that this correspondence also did not result directly in the announcement of the national standardised assessments. The views were provided at the initial stages of the policy development, and the Ministers explained that it is at that stage in development that they rely on free and frank advice from appropriate stakeholders to identify likely issues and problems with any policies in development. The Ministers wanted to avoid the Professors and other stakeholders from being inhibited from providing full and frank advice in future.
61. The Ministers considered that other key stakeholders will be considerably more circumspect in providing free and frank advice to the Scottish Government, if it is widely known that advice provided in these initial stages of policy formulation is likely to be disclosed (i.e. before scoping work and wider consultation has been undertaken and when there is unlikely to be substantial body to the policy yet created).
62. In relation to the inhibition which disclosure could cause, the Ministers informed the Commissioner they had contacted the two Professors about Mr McEnaney's request. Mr McEnaney had already contacted the two Professors directly and asked them to provide the information now withheld by the Ministers. The Ministers understood that the Professors had both declined to give him any more information than that which was already in the public domain.

⁴ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section30/Section30.aspx>

The Commissioner's view

63. The Commissioner has considered carefully the Ministers' comments about the likelihood of inhibition, should the advice under consideration in this case be disclosed.
64. The Commissioner accepts the general point that disclosure of advice might lead individuals to be more circumspect in recording their advice or views, and to pay careful attention to the manner in which advice or views are expressed. However, if the effect of disclosure was simply to increase the care taken by officials when offering advice or exchanging views, to ensure they are justifiable and measured and provide an accurate representation of the issues being addressed, it is difficult to see how this could be viewed as causing substantial inhibition.
65. The Commissioner notes the Ministers' comment that if the withheld information was disclosed, the individuals concerned and other stakeholders would be more reticent in the future in providing advice and would do so orally as opposed to it being written down.
66. The Commissioner also notes that the Ministers have applied the exemption in section 30(b)(i) to only a few, specified comments in three of the documents, and have asked for the exemption to come into play only if she rejects the application of the exemptions in section 29(1)(a) and 30(c) of FOISA.
67. In relation to document 1, the Commissioner considers that the information withheld under section 30(b)(i) was provided by a knowledgeable, experienced professional. It is not expressed in particularly free and frank terms, or with evident informality. Given the professional status of the writer and the tone of the advice, the Commissioner does not accept that substantial inhibition would follow from disclosure. She therefore does not accept that the information in document 1 is exempt from disclosure under section 30(b)(i) of FOISA. She requires the Ministers to disclose this information to Mr McEnaney.
68. In relation to documents 2 and 4 the Commissioner considers that the withheld comments are free and frank, and more personal in nature. She accepts that the writer is unlikely to have expected the views, as expressed, to be made public. She accepts that disclosure under FOISA is likely to inhibit the writer (and others) from expressing similarly free and frank views in future. She therefore accepts that the exemption in section 30(b)(i) of FOISA applies to this information.
69. Where she has found that the exemption in section 30(b)(i) of FOISA applies to the information withheld from Mr McEnaney, the Commissioner must now go on to consider the application of the public interest test, as set out in section 2(1)(b) of FOISA, and 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.

Public interest test

The Ministers' submissions

70. The Ministers acknowledged that there is a public interest in disclosing the information. However, they considered that this is met to a significant extent by the information which they have already published.
71. The Ministers argued that there is a greater public interest in allowing a private space within which the Scottish Government can obtain full and frank advice from acknowledged experts and other key stakeholders as part of the process of developing and refining the Government's policy on national standardised assessments. This will enable the

Government to implement a new system of assessment that is sound and likely to be effective. The Ministers argued that it was essential to protect the private thinking space required to enable all options to be properly considered, based on the best available expert advice, so that good policy decisions can be taken. Therefore, taking account of all the circumstances of this case, the Ministers considered that the public interest in disclosing the information is outweighed by the public interest in applying the exemption.

Mr McEnaney's submissions

72. Mr McEnaney's arguments on the balance of public interest have been summarised previously (paragraphs 30 to 34).

The Commissioner's view

73. The Commissioner recognises that disclosure of the information withheld under section 30(b)(i) would increase transparency and allow the public to gain a better understanding of the information and advice provided to Ministers on this subject. She agrees with Mr McEnaney that it is in the public interest to have transparency in respect of educational policy development, particularly on an issue that will directly affect so many children and young people.
74. However, the Commissioner accepts that if disclosure of the information withheld under section 30(b)(i) would inhibit expert individuals from commenting frankly and willingly on such issues, this is likely to diminish the quality of decision making, which would not be in the public interest.
75. The Commissioner has reached the view that the public interest in disclosure of information relating to the policy development on national standardised assessments can be met by disclosure of the information which the Ministers did not consider exempt and the information which she now requires to be disclosed. She does not consider that disclosure of the information in documents 2 and 4 which was withheld under section 30(b)(i) would be so significantly in the public interest as to outweigh the public interest in avoiding a situation in which experts are inhibited from providing free and frank advice in future, for fear of disclosure.
76. On balance, the Commissioner has concluded that, in this instance, the public interest in maintaining the exemption in section 30(b)(i) outweighs that in disclosure of the information to which the exemption has been found to apply. She therefore concludes that the Ministers were entitled to withhold information from documents 2 and 4 under section 30(b)(i) of FOISA.

Decision

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

The Commissioner was satisfied that the Ministers had conducted proportionate searches and identified all information falling within scope of the request in line with section 1(1) of FOISA.

The Commissioner found that:

- (i) the Ministers correctly withheld information in documents 2 and 4 under section 30(b)(i) of FOISA, and
- (ii) the remaining information had been wrongly withheld as she did not accept it was exempt from disclosure under sections 29(1)(a), 30(b)(i) and 30(c) of FOISA.

The Commissioner therefore requires the Ministers to disclose the information which was wrongly withheld, by **Thursday, 18 August 2016**.

Appeal

Should either Mr McEnaney or the Scottish Ministers 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 Scottish Ministers (the Ministers) fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Ministers have failed to comply. The Court has the right to inquire into the matter and may deal with the Ministers as if they had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner

4 July 2016

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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

29 Formulation of Scottish Administration policy etc.

- (1) Information held by the Scottish Administration is exempt information if it relates to-

- (a) the formulation or development of government policy;

...

...

- (4) In this section-

"government policy" means-

- (a) the policy of the Scottish Administration; and

- (b) in relation to information created before 1st July 1999, the policy of the Government of the United Kingdom;

...

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

...

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

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