

Decision Notice 077/2021

Curriculum for Excellence Review 2020/21

The Applicant

Public authority: Scottish Ministers

Case Ref: 202000960



Scottish Information
Commissioner

Summary

The Ministers were asked for specified information in correspondence regarding the Curriculum for Excellence Review 2020/21, which they withheld on the grounds that disclosing this information would be likely to prejudice the effective conduct of public affairs. The Applicant believed at least some of the information should be disclosed.

The Commissioner investigated and found that the Ministers misapplied section 30(c) of FOISA to the information and required disclosure (excluding details not needed by the Applicant).

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(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 8 June 2020, the Applicant made a request for information to the Scottish Ministers (the Ministers) for “all correspondence or documentation ... between the Scottish Government and the OECD [Organisation for Economic Co-operation and Development] regarding the Curriculum for Excellence Review 2020/21 ... from 1 April 2020 up to 28 April 2020.”
2. The Ministers responded on 6 July 2020, refusing to provide the information under section 30(c) of FOISA as they believed disclosure would prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.
3. On 7 July 2020, the Applicant wrote to the Ministers, requesting a review of their decision. He considered it disproportionate to apply a blanket exemption to all the information specified in the request. The Applicant believed there was a public interest in disclosure of at least some of the information.
4. The Ministers notified the Applicant of the outcome of their review on 4 August 2020, upholding the original decision without modification. They expanded on their reasoning.
5. On 21 August 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Ministers’ review. He believed the public interest test had been applied disproportionately and at least some of the information was capable of disclosure.

Investigation

6. 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.
7. On 3 September 2020, the Ministers were notified in writing that the Applicant had made a valid application. The Ministers were asked to send the Commissioner the information withheld from the Applicant. 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 to answer specific questions. These related to both the searches carried out for the information and the reasoning used (with supporting evidence, where applicable) when applying section 30(c) of FOISA to the information identified during those searches.
9. The Applicant stated he was content for names and contact information to be withheld, to protect the confidentiality of the individuals concerned. For this reason, names and contact information need not be considered further in this investigation.

Commissioner's analysis and findings

10. 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 him by both the Applicant and the Ministers. He is satisfied that no matter of relevance has been overlooked.
11. 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.
12. In their submissions to the Commissioner, the Ministers provided detailed explanations and evidence of the searches undertaken and the approach taken, including which staff would be likely to hold the information or were best placed to conduct searches. Most of the information was held in a central records management system, but searches of individual email accounts were also conducted.
13. The Commissioner is satisfied that the Ministers took adequate and proportionate searches to identify information capable of addressing the terms of the Applicant's request.

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

14. The Ministers identified four items (documents A, B, C and D) which they withheld in their entirety under section 30(c) of FOISA.
15. In his application, the Applicant was critical of what he submitted was a "blanket approach" to the material sought, and believed at least some information was capable of disclosure for public interest reasons.
16. Section 30(c) of FOISA exempts information if its disclosure would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. (The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b).) This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
17. There is no definition of "substantial prejudice" in FOISA, but the Commissioner considers the harm in question would require to be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur: therefore, the authority needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.
18. The Ministers submitted that it had contacted the OECD and been informed that the OECD expected all communications relating to negotiations and discussions on work in progress to

be treated as confidential, to protect its ability to hold open and frank discussions with its members. The OECD'S response referred to its rules and practice, although only in general terms. As a general rule, the OECD submitted that it protected email correspondence with its members from disclosure since it might contain confidential information and/or personal data.

19. In the circumstances, the Ministers believed their relationship with a key external stakeholder (the OECD) would be substantially damaged by disclosure, in turn substantially harming the Ministers' ability to carry out their work in relation to the Curriculum for Excellence review.

The Commissioner's conclusions on section 30(c)

20. The Commissioner has considered all of the submissions made by the Ministers and the Applicant, along with the withheld information under consideration. He has also taken account of the views of the OECD, which appears to have been aware of the Ministers' legal responsibilities in terms of FOISA (in fact, their response suggested a potential exemption). Unfortunately, there is nothing in either the Ministers' submissions or the OECD comments which identifies the basis, in the OECD's rules and practice or elsewhere, of an expectation of confidentiality of direct relevance to the particular information under consideration here. Given the generality of the submissions on this point, the Commissioner can only form a view on the basis of the information itself..
21. The Commissioner has considered the content and nature of the withheld information in terms of any harm disclosure would, or would be likely to, have. The information relates to the process being followed to prepare for, and to some extent the scoping of, the review. In the Commissioner's view, none of it contains anything that would carry a realistic likelihood of inhibiting future communications between the Ministers and OECD. It is all expressed in a considered and professional manner and appears to include nothing that would be at all surprising to a reasonably informed observer. While other communications in the course of a review such as this might result in the harm claimed if disclosed, it is not apparent why this should be the case for any of the information under consideration here (and, as the Applicant has submitted, it is important that an exemption such as this, both harm-based and subject to the public interest test, is not applied in a blanket manner, without regard to the particular information that has been withheld).
22. Given the Commissioner does not accept that the Ministers have demonstrated substantial prejudice in this case, he must find that section 30(c) was not correctly applied. In light of this finding, the Commissioner need not go on to consider the public interest test in section 2(1)(b) of FOISA.
23. He now requires the Ministers to disclose this information to the Applicant (excluding the contact details and names which the Applicant does not require).

Decision

The Commissioner finds that, in respect of the matters specified in the application, the Scottish Ministers (the Ministers) 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 the Ministers misapplied section 30(c) of FOISA to the withheld information under consideration, and in so doing, they failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the Ministers to disclose all of the withheld information (minus contact details and names as stipulated above) by **29 June 2021**.

Appeal

Should either the Applicant or the 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 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.

Margaret Keyse
Head of Enforcement

13 May 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.
- ...
- (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.
- ...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

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

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