



Scottish Information
Commissioner
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Decision Notice 041/2023

OECD Scotland's Curriculum for Excellence into the Future report

Applicant:

Authority: Scottish Ministers

Case Ref: 202101222

Summary

The Applicant asked the Authority for a draft copy of the OECD Scotland's Curriculum for Excellence into the Future report. The Authority withheld the report (on the basis that it was confidential information obtained from an international organisation) and its comments (on the basis that disclosure would prejudice the effective conduct of public affairs). The Commissioner agreed that the report and comments were exempt from disclosure.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs); 32(1)(b)(ii), (2) and (3) (definitions of "international organisation" and "State") (International relations); 47(1) and (2) (Application for decision by Commissioner)

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

Background

1. On 8 July 2021, the Applicant made a request for information to the Authority. He asked for the draft/review copy of the Organisation for Economic Co-operation and Development (OECD) Scotland's Curriculum for Excellence into the Future report sent to the Authority in early 2021 with the amendments requested by Ministers and Authority officials. He referred to information about the report on the [OECD's website](#)¹.
2. The Authority responded on 26 July 2021. It withheld the draft report under section 30(c) of FOISA. It considered that disclosing the draft, particularly without the consent of the OECD, was likely to undermine the OECD's trust in the Scottish Government and would substantially inhibit communications. In the Authority's view, the public interest was in favour of withholding the requested information.
3. Later that day, the Applicant wrote to the Authority requesting a review of its decision. The Applicant noted that the Authority had published draft reports in the past and provided the Authority with an example of a draft of a joint audit report which had been carried out on behalf of the Auditor General for Scotland and Accounts Commission.
4. The Authority notified the Applicant of the outcome of its review on 24 August 2021. It upheld its previous response without amendment, submitting that it is essential for officials to be able to communicate, often in confidence, with external stakeholders on a range of issues, and the public interest test favoured withholding the requested information. The Authority noted that other draft reports had been published, but that each request has to be assessed on its own merits.
5. On 28 September 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant was dissatisfied with the outcome of the Authority's review: he noted that the Authority had no objection to the principle of publishing drafts and suggested amendments, just this particular draft report and suggested amendments. He therefore requested an independent assessment of the content of the draft OECD report and the suggested amendments to ensure that the exemption had been correctly applied.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 29 September 2021, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was allocated to an investigating officer.
8. When the Authority provided a copy of the withheld information, it submitted that it now was relying on the exemption in section 32(1)(b)(ii) of FOISA, in addition to the exemption in section 30(c) of FOISA.

¹ <https://www.oecd.org/education/scotland-s-curriculum-for-excellence-bf624417-en.htm>

9. The Authority wrote to the Applicant on 13 October 2021, advising him that it was now applying section 32(1)(b)(ii) of FOISA, in addition to section 30(c). The Applicant confirmed that he did not agree that the exemption in section 32(1)(b)(ii) applied.
10. On 17 February 2022, the Applicant engaged in correspondence with the Commissioner's office, noting that the Scottish Qualifications Authority (the SQA) had published the draft OECD report and [its response](#)² to it. This disclosure was raised with the Authority but, on 25 February 2022, the Authority advised the Commissioner that it considered that the exemptions still applied.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to the searches conducted for the withheld information and the reasons for continuing to withhold the requested information. The Authority provided its submissions.
12. The Applicant was asked for, and provided, submissions as to why he considered it was in the public interest for the withheld information to be disclosed.

Commissioner's analysis and findings

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

Background

14. In 2020, the Scottish Government invited the OECD to assess the implementation of the Curriculum for Excellence (CfE) in primary and secondary schools to understand how school curricula have been designed and implemented in recent years. The report analyses the progress made with the CfE since 2015, building upon several months of observations in Scotland, the existing literature and experiences from other OECD countries.
15. The Authority was asked to comment in confidence on the draft [OECD report](#)³ into the CfE as the sponsor of the work. The SQA was also asked to comment in confidence on the draft report.

Section 32(1)(b)(ii) - International relations

16. The Authority withheld the draft report provided to it by the OECD for comment.
17. Under section 32(1)(b)(ii), information is exempt from disclosure if it is confidential information obtained from an international organisation or international court.
18. Section 32(1)(b)(ii) is subject to the public interest test. This means that, even if the exemption applies, the information must be disclosed unless the public interest in withholding that information outweighs the public interest in disclosing it.
19. An international organisation is an organisation with members which include any two or more States (section 32(3)). Usually, the organisation will have been created by treaty or will be a

² [OECD Report - SQA \(https://www.sqa.org.uk/sqa/98997.html\)](https://www.sqa.org.uk/sqa/98997.html)

³ [Scotland's Curriculum for Excellence: Into the Future | en | OECD \(https://www.oecd.org/education/scotland-s-curriculum-for-excellence-bf624417-en.htm\)](https://www.oecd.org/education/scotland-s-curriculum-for-excellence-bf624417-en.htm)

legal entity for the purposes of international law. Generally, only States or governments will be allowed to be a member of such an organisation.

Is the OECD an international organisation?

20. The OECD's [website](#)⁴ states that:

"that OECD is an international organisation that works to build better policies for better lives...

Together with governments, policy makers and citizens, we work on establishing evidence-based international standards and finding solutions to a range of social, economic and environmental challenges... we provide a unique forum and knowledge hub for data and analysis, exchange of experiences, best-practice sharing, and advice on public policies and international standard setting."

21. The Commissioner is satisfied the OECD falls within the definition of an "international organisation" in terms of section 32(3) of FOISA.

Was the information provided in confidence?

22. Section 32(1)(b)(ii) focusses on the circumstances under which the information was obtained by a public authority. If the terms under which the information was obtained require it to be held in confidence, or if there is a reasonable expectation on the part of the organisation supplying the information that it should be held in confidence, then it will be confidential for the purposes of section 32(1)(b).

The Authority's submissions on the exemption

23. The Authority explained that the report was completed and shared in draft form for comment. The draft report was shared on a confidential basis and was marked up as "confidential" both on the report itself and within the covering email received from the OECD. The OECD's code of conduct, which it applies to all of its publications around the world, prohibits the sharing of confidential material. The Authority therefore considered that the OECD would have had a clear expectation that the draft report would be held in confidence.

24. The Authority had sought views on disclosure from the OECD, at every stage of the request, and the OECD were consistent in their view that, as the material was marked confidential, or referred to confidential material, then under their information handling policy and code of conduct, the material should not be released. The Authority made the OECD aware of the release of some material by the SQA, but this did not change the OECD's position.

25. The Authority submitted that it is the OECD's clear view that disclosure of such draft working documents would significantly undermine the free exchange between OECD Members and the Secretariat and therefore greatly impede the organisation's ability to conduct its work. The Authority considered that disclosure in these circumstances would also significantly damage the working relationship between the OECD and itself which in turn would affect the OECD's willingness to work with it on such matters in future. Given the expertise and international standing of the OECD, the potential loss of the ability to be able to engage with the OECD could be of significant detriment to future policy development.

26. The Authority noted that the final published report is largely similar to the draft report provided in confidence by the OECD with certain exceptions. As the report was provided "in

⁴ <https://www.oecd.org/about/>

confidence” by the OECD, an international organisation, the Authority was satisfied that the draft report was exempt from disclosure under section 32(1)(b)(ii). Disclosing the parts of the draft which were in the public domain would, in effect, disclose the areas of the report on which comments were provided and/or further consideration was given by the OECD.

The Applicant’s submissions on the exemption

27. The Applicant noted that the Commissioner had previously refused to uphold the Ministers’ use of the international relations exemption in a number of cases, including [Decision 072/2010](#)⁵, which involved a request for the minutes of a meeting between former First Minister, Alex Salmond, and former US Secretary of state, Hillary Clinton. In that decision, the Commissioner had concluded that the discussions were specific to Scotland and “had no direct relevance to relations between the two states”.
28. The withheld OECD report is purely about Scottish education, the Applicant submitted. He commented that the Authority has a long history of good relations with the Paris-based OECD, and France has had a law on free access to administrative documents since 1978. He also submitted that the report was commissioned by Scottish Ministers; it was not simply obtained from the international organisation.

The Commissioner’s conclusions on the exemption

29. Given the evidence provided by the Authority, the Commissioner is satisfied that the terms on which the information was obtained by the Authority from the OECD require it to be held in confidence.
30. In reaching this conclusion, the Commissioner has also taken account of section 32(2) of FOISA, which states that information is confidential “at any time” while the terms on which that information was obtained require it to be held in confidence.
31. The Applicant has referred to several decisions in which the Commissioner has overruled the Authority’s reliance on section 32 of FOISA. However, each case falls to be considered on its own merits and not all of those cases considered the specific exemption being considered here.
32. In this case, as the OECD has marked the report confidential, and confirmed in writing to the Authority that it should remain confidential, the Commissioner has no option but to conclude that the information was obtained from an international organisation in circumstances which would make it reasonable for the OECD to expect the information to be held in confidence. In other words, the exemption in section 32(1)(b)(ii) applies.

Public interest

33. As the Commissioner has found that the exemption in section 32(1)(b)(ii) was correctly applied, he must go on to consider the public interest test in section 2(1)(b) of FOISA.

The Authority’s submissions on the public interest test

34. The Authority recognised that there is a public interest in transparency, particularly in the work the OECD have undertaken to assess the CfE in Scotland, and in education policy in Scotland more broadly. However, the Authority submitted that this public interest had been met, at least in part, by the publication of the final report.

⁵ <https://www.itspublicknowledge.info/decision-0722010>

35. The Authority stated that there is a greater public interest in allowing the OECD to check facts before finalising such a report without that part of the process necessarily being put into the public domain, and in allowing the OECD to work on drafts in a manner which allows it to explore fully the issues in question and to ensure that the final version is accurate. The Authority also considered that there is a greater public interest in protecting the relationship between it and the OECD given the expertise and international standing of the OECD and the benefits of the insight provided to support effective policy decisions in future.

The Applicant's submissions on the public interest test

36. The Applicant argued that, if the exemption was maintained, it would effectively hand politicians a licence to avoid scrutiny by outsourcing controversial inquiries to international bodies.
37. He also considered it was not in the public interest for scrutiny leading to major reform of devolved Scottish policy to be outsourced to international organisations, which are not subject to Scottish public scrutiny. In addition, withholding the OECD report, would, in his view, diminish its standing as an impartial and independent assessor of public policy.

The Commissioner's view on the public interest test in relation to section 32(1)(b)(ii)

38. The Commissioner has considered the arguments presented by both parties. He accepts that there is a strong public interest in transparency and accountability, particularly in relation to the decision-making processes of public agencies at all levels. He also notes the publication of the final report.
39. The Commissioner has considered the public interest arguments provided by the Applicant. However, it is clear to the Commissioner that the information is held in confidence, and it is clear that the OECD does not want the draft report disclosed, and in the particular circumstances of this case he accepts that disclosure would undermine the OECD's relationship with the Authority. Given the important role played by the OECD, this would not be in the public interest.
40. On balance, therefore, the Commissioner has concluded in this case that the public interest in maintaining the exemption in section 32(2)(b)(ii) of FOISA outweighs that in disclosure of the information. He therefore concludes that the Authority was entitled to withhold the version of the report in question.

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

41. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure.
42. The standard to be met in applying the tests contained in section 30(c) is high: the prejudice in question must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a

case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).

43. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.

The Authority's submissions on section 30(c)

44. The Authority withheld the comments it had provided to the OECD on the draft report under section 30(c) of FOISA.
45. It submitted that disclosure would damage relations between itself and the OECD. Both parties participated on the understanding that the draft remain confidential; maintaining such confidences is critical for the Authority's capacity to be trusted by interlocutors and to protect and promote Scottish interests. There was no expectation that the comments would be disclosed into the public domain.
46. The Authority considered that disclosure would lead to unwarranted focus on changes made to the report before the final version was published. Disclosure would be likely to undermine the credibility and authority of the final published version.
47. The Authority submitted that the OECD had been clear that publishing the information would be against their code of conduct and would impact on the Authority's reputation and its ability to work with the OECD in future. Not being able to have access to OECD to conduct future work in education policy sphere would be detrimental to effective delivery of public affairs. Whilst the report is in relation to education, the negative impact would be compounded as OECD would be reluctant to work with the Authority across all areas of government policy.
48. The Authority considered that disclosure could lead to other international organisations to reconsider the nature and substance of their contact with it.

The Applicant's submissions on section 30(c)

49. The Applicant did not consider that disclosing a draft of a report that is already in the public domain would cause "real and demonstrably significant" damage to relations between the UK and the OECD. He was not aware of any threat from the OECD to cut ties with the UK over the SQA disclosure of the draft report and its comments.
50. He considered that no harm had been demonstrated and that the exemption did not apply.

The Commissioner's view on section 30(c)

51. The Commissioner has considered the submissions made by the Authority and the Applicant, along with the withheld information under consideration.
52. The Commissioner has accepted that the version of the report provided by the OECD to the Authority is exempt from disclosure under section 32(1)(b)(ii) of FOISA. The only information being considered under section 30(c) are the comments made by the Authority on the report.
53. The Commissioner is aware that the SQA published [its comments](#)⁶ on the draft report in September 2021, after the Authority's had reviewed the report.
54. In reaching a decision on whether disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs, the information must be considered in its proper context, including the purpose for which it was created, and the wider context of relations and discussions with the OECD. Public authorities need to concentrate on the

⁶ [OECD Report - SQA \(https://www.sqa.org.uk/sqa/98997.html\)](https://www.sqa.org.uk/sqa/98997.html)

potential impact that disclosure may have on a particular relationship or interest, rather than looking solely at the nature, content and/or sensitivity of the information. Disclosing information in relation to one report may have little or no impact, while disclosing innocuous information about a different report may have a substantial impact.

55. Timing is also relevant: the Commissioner has considered whether disclosing the comments would, or would be likely to, impact negatively on the Authority's relations with the OECD, by making public the Authority's internal thinking and views so shortly after the final report was published. The Commissioner accepts that disclosure of the comments would open up the early stages of discussions. Faced with this prospect, the Authority might become more reluctant to conduct wide ranging consultations or at the very least become disinclined to proactively make available the responses.
56. The Commissioner has already accepted that the draft report is itself exempt from disclosure. Disclosing the comments would, in effect, disclose the draft report, which the OECD required to keep confidential, and could reveal whether the OECD had changed its final report on the basis of the Authority's submissions. Regardless of whether the comments from the Authority were accepted by the OECD, the Commissioner accepts that the working relationship between the Authority and the OECD would be harmed by disclosure.
57. The Commissioner considers that disclosure of the comments in this case would be likely to inhibit the extent of consultation in the future and reduce the quality of responses the Authority receives in any future consultations. This would undermine the consultation process and be detrimental to good governance.
58. For the reasons set out above, the Commissioner is satisfied that disclosure of the comments would, or would be likely to, prejudice substantially the effective conduct of public affairs. He therefore finds the comments to be exempt from disclosure under section 30(c) of FOISA.

Public interest

59. As the Commissioner has found that the exemption in section 30(c) was correctly applied, he must go on to consider the public interest test in section 2(1)(b) of FOISA.

The Authority's submissions on the public interest test

60. The Commissioner must now go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.
61. The Authority acknowledged that there is a public interest in transparency, particularly in the work that the OECD have undertaken to assess the CfE in Scotland, and in education policy in Scotland more broadly. It considered that this public interest had been met, at least in part, by the publication of the final OECD report.
62. It stated that it was not in the public interest to jeopardise relations by, in effect, disclosing information provided in confidence. The public interest lies in maintaining good relations, based on trust and respect, between the OECD and the Authority, given the expertise and international standing of the OECD and the benefits of the insight provided to support effective policy decisions in future.

The Applicant's submissions on the public interest test

63. The Applicant argued that the comments from the Authority on the report were in the public interest, particularly given the subject matter of the report.
64. He considered it was in the public interest to reveal whether the OECD had changed, or had been pressured, to change its final report on the basis of the Authority's comments.
65. He considered that the comments on the OECD report should be subjected to the same public interest comments relating to the Priestley Review⁷ or the Hayward Inquiry⁸. In his view, given that the comments originated from a Scottish public authority, it was irrelevant that the comments were sent outwith Scotland.

The Commissioner's view on the public interest - section 30(c)

66. The Commissioner accepts there is a general public interest in ensuring transparency and accountability, particularly when the Authority is engaged in discussions about a topic that affects the education of children in Scotland.
67. The Commissioner accepts that it is in the public interest for journalists, such as the Applicant, to be able to report on the activities of the Authority, so that the public are informed about such important and wide-ranging policy.
68. However, the public interest in the disclosure of the information must be balanced against the public interest in maintaining the exemption. The Commissioner has already accepted that disclosure would, or would be likely to, cause substantial prejudice to the effective conduct of public affairs: in this case, disclosing the comments so soon after the consultation process, would not have been in the public interest.
69. The Commissioner is satisfied that if the Authority's comments made to the OECD about the report were published, particularly so soon after the issue of the report, it would undermine the efficacy of such discussions and process. Such an outcome would not be in the public interest.
70. The Commissioner has also considered the extent to which the public interest has been met by what has been published already, and the facts that the comments were provided on a confidential basis.
71. On balance, therefore, the Commissioner finds that the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption. The Commissioner therefore finds that the Authority was entitled to withhold the information under section 30(c) of FOISA.

Decision

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

⁷ [National Qualifications experience 2020: rapid review - gov.scot \(www.gov.scot\)](http://www.gov.scot)

⁸ [Scott Hayward | Grenfell Tower Inquiry](#)

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Daren Fitzhenry
Scottish Information Commissioner

12 May 2023

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- ...

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.
- ...

32 International relations

- (1) Information is exempt information if-
 - ...
 - (b) it is confidential information obtained from-
 - ...
 - (ii) an international organisation or international court.
- (2) For the purposes of subsection (1), information obtained from a State, organisation or court is confidential at any time while-
 - (a) the terms on which that information was obtained require it to be held in confidence; or

- (b) the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.

(3) In subsection (1)-

"international organisation" means-

- (a) an international organisation whose members include any two or more States; or
- (b) an organ of such an international organisation;

"State" includes-

- (a) the government of any State; and
- (b) any organ of such a government,

and references to a State other than the United Kingdom include references to any territory outwith the United Kingdom.