



Scottish Information
Commissioner
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Decision Notice 034/2025

Muir report and exam support materials

Authority: Scottish Qualifications Authority
Case Ref: 202200814

Summary

The Applicant asked the Authority for information relating to the Muir report and information relating to exam support materials. The Authority provided some information, but withheld other information under various exemptions in FOISA. The Commissioner investigated and found that the Authority was entitled to withhold some of the information but not entitled to withhold other information. He required the Authority to disclose the wrongly withheld information to the Applicant.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 16(1) (Refusal of request); 30(b)(ii) (Prejudice to the effective conduct of public affairs); 36(2) (Confidentiality); 38(1)(b) (Personal information); 47(1) and (2) (Application for decision by Commissioner)

United Kingdom General Data Protection Regulation (the UK GDPR) Articles 4(1) (definition of "personal data") (Definitions); 5(1)(a) (Principles relating to processing of personal data); 6(1)(f) (Lawfulness of processing)

Data Protection Act 2018 (the DPA 2018) sections 3(2), (3), (4)(d), (10) and (14)(a), (b) and (c) (Terms relating to the processing of personal data)

Background

1. On 25 March 2022, the Applicant made a request for information to the Authority. He asked for the following information (from 1 January 2022 to the date of his request):
 1. All internal communication regarding or relating to a recently published report by Professor Ken Muir (the Muir report)
 2. All communication between the Authority and the Scottish Government regarding or relating to the Muir report
 3. All communication between the Authority and external individuals/organisations (not including the Scottish Government) regarding or relating to the Muir report
 4. Any draft copies of the Muir report (including comments and confirmation of changes that were made prior to final publication)
 5. All communication between the Authority and the Scottish Government regarding or relating to the exam support materials.
2. The Authority did not respond to the information request.
3. On 13 May 2022, the Applicant wrote to the Authority requiring a review in respect of its failure to respond.
4. The Authority notified the Applicant of the outcome of its review on 10 June 2022. It disclosed some information in response to each of part of the Applicant's request, withheld some information under the exemption in section 30(b)(ii) of FOISA in relation to each part of the request, and withheld information under the exemption in section 36(2) of FOISA in relation to parts one to four of the request.
5. On 21 July 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. He stated that he was dissatisfied with the outcome of the Authority's review because he did not agree that the cited exemptions 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 15 August 2022, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments. The Authority provided its comments.
8. The Authority was also asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information.
9. The case was subsequently allocated to an investigating officer.

Commissioner's analysis and findings

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

Section 16(1) – Refusal of request

11. Section 16(1) of FOISA stipulates that if a Scottish public authority intends to refuse to disclose information in response to an information request, claiming any of the exemptions in Part 2 of FOISA, it must provide the applicant with certain information about that decision.
12. In particular, the authority must disclose that it holds the information requested, state that it considers the information to be exempt from disclosure, indicate which exemption is considered to apply and state why that exemption applies (with consideration of the public interest test, where applicable)
13. During the investigation, the Authority indicated that it had erred in its review outcome in informing the Applicant that information had been withheld under section 30(b)(ii) of FOISA in response to part three of the request. However, no information was withheld under this exemption for this part of the request.
14. The Authority also withheld some information under the exemption in section 38(1)(b) of FOISA but failed to notify the Applicant of this in its review outcome.
15. In the circumstances, the Commissioner must therefore find that the Authority failed to fully comply with section 16 of FOISA.

Information in scope

16. During the investigation, the Authority also informed the Commissioner that it considered some of the information contained in the documents that had been withheld to fall outwith scope of the Applicant's request.
17. Having considered this information, the Commissioner agrees that the majority of it does not fall within scope of the Applicant's request. He will therefore not consider this information further in his decision notice.
18. However, the Commissioner does not accept that all of this information does fall outwith scope of the request. For one short passage of text, he asked that the Authority explain why it considered this passage to be out of scope.
19. The Authority informed the Commissioner that it considered this information was in fact in scope, that it considered its earlier redaction of this particular information to be in error, and that it could be disclosed to the Applicant.
20. As the Authority failed to identify and disclose all relevant recorded information when it responded to the Applicant's requirement for review, the Commissioner finds that the Authority failed to comply fully with section 1(1) of FOISA. He requires the Authority to disclose this information to the Applicant.

Section 38(1)(b) – Personal information

21. During the investigation, the Authority stated, as rehearsed earlier, that it had withheld some information under section 38(1)(b) of FOISA.
22. Section 38(1)(b), read in conjunction with section 38(2A)(a), exempts information from disclosure if it is "personal data" (as defined in section 3(2) of the DPA 2018) and its disclosure would contravene one or more of the data protection principles set out in Article 5(1) of the UK GDPR.

23. The exemption in section 38(1)(b) of FOISA is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.
24. To rely on the exemption in section 38(1)(b), the Authority must show that the information is personal data for the purposes of the DPA 2018 and that disclosure of the information into the public domain (which is the effect of disclosure under FOISA) would contravene one or more of the data protection principles in Article 5(1) of the UK GDPR.

Is the withheld information personal data?

25. The first question the Commissioner must address is whether the information is personal data for the purposes of section 3(2) of the DPA 2018, i.e. any information relating to an identified or identifiable individual.
26. Information will "relate to" a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
27. An "identifiable living individual" is one who can be identified, directly or indirectly, by reference to an identifier (such as a name) or one or more factors specific to the individual (see section 3(3) of the DPA 2018).
28. The Commissioner is satisfied that the information being withheld under section 38(1)(b) of FOISA is personal data: the data withheld comprises names and contact details of individuals. Living individuals are identifiable from this information and the information clearly relates to those individuals.

Would disclosure contravene one of the data protection principles?

29. Article 5(1)(a) of the UK GDPR requires personal data to be processed "lawfully, fairly and in a transparent manner in relation to the data subject."
30. The definition of "processing" is wide and includes (section 3(4)(d) of the DPA 2018) "disclosure by transmission, dissemination or otherwise making available". For the purposes of FOISA, personal data are processed when made available in response to a request. This means that the personal data can only be made available if doing so would be both lawful (i.e. it would meet one of the conditions for lawful processing in Article 6(1) of the UK GDPR) and fair.
31. The Commissioner must consider whether disclosure of the personal data would be lawful. In considering lawfulness, he must consider whether any of the conditions in Article 6 of the UK GDPR would allow the data to be disclosed.
32. The Commissioner considers that condition (f) in Article 6(1) is the only condition which could potentially apply in the circumstances of this case.

Condition (f) – legitimate interests

33. Condition (f) states that processing shall be lawful if it is necessary for the purposes of legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data.
34. Though Article 6 states that this condition cannot apply to processing carried out by a public authority in the performance of their tasks, section 38(5A) of FOISA makes it clear that public authorities can rely on Article 6(1)(f) when responding to requests under FOISA.

35. The three tests which must be met before Article 6(1)(f) can be met are as follows:

- Does the Applicant have a legitimate interest in the personal data?
- If so, would the disclosure of the personal data be necessary to achieve that legitimate interest?
- Even if the processing would be necessary to achieve the legitimate interest, would that be overridden by the interests or fundamental rights and freedoms of the data subjects which require protection of personal data?

Does the Applicant have a legitimate interest in obtaining the personal data?

36. Neither the Authority nor the Applicant provided any specific submissions on his legitimate interest in obtaining the personal data. (The Applicant was invited to but declined.)
37. However, the Commissioner considers that the public, including the Applicant, has a legitimate interest in understanding the conversations that the Authority held in relation to the Muir report. He accepts that information on the identities of the individuals involved in these exchanges would assist in understanding these exchanges (especially when these individuals are senior).
38. The Commissioner therefore considers that the Applicant had a legitimate interest in obtaining the personal data.

Is disclosure of the personal data necessary?

39. Having accepted that the Applicant has a legitimate interest in the personal data, the Commissioner must consider whether disclosure of that personal data is necessary for the Applicant's legitimate interest. In doing so, he must consider whether that legitimate interest might be reasonably be met by any alternative means.
40. "Necessary" means "reasonably" rather than "absolutely" or "strictly" necessary. When considering whether disclosure would be necessary, public authorities must consider whether the disclosure is proportionate as a means and fairly balanced as to the aims to be achieved, or whether the requester's legitimate interests can be met by means which interfere less with the privacy of the data subject.
41. Neither the Authority nor the Applicant provided any specific submissions on whether disclosure of the personal data would be necessary.
42. However, the Commissioner accepts that disclosure of the personal data would be necessary to satisfy the Applicant's legitimate interest. He can identify no other viable means of meeting the Applicant's legitimate interest than providing this withheld information.

Interests of the data subject

43. The Commissioner has acknowledged that disclosure of the information in question would be necessary to achieve the Applicant's legitimate interests. This must be balanced against the interests or fundamental rights and freedoms of the third party. Only if the legitimate interests of the Applicant outweigh those of the data subject could personal data be disclosed without breaching the first data protection principle.

44. [The Commissioner's guidance on section 38 of FOISA](#)¹ lists certain factors that should be taken into account in balancing the interests of the parties. He makes it clear that much will depend on the reasonable expectations of the data subjects and that these are some of the factors public authorities should consider:
- (i) whether the information relates to an individual's public life (their work as a public official or employee, wherein their seniority and whether their role is public-facing is a factor) or to their private life (their home, family, social life or finances)
 - (ii) whether the individual objected to the disclosure
 - (iii) the potential harm or distress that may be caused by disclosure.
45. The Authority explained that, in accordance with its standard practice, it had withheld the names of its junior staff and the names and of individuals not employed by it.
46. Disclosure under FOISA is not simply disclosure to the person requesting the information; information disclosed under FOISA is effectively placed into the public domain. This must always be borne in mind when considering the effects of disclosure.
47. The Commissioner has considered the circumstances, the source and content of the withheld information and carefully balanced the legitimate interests of the data subjects against those of the Applicant. Having done so, he finds that legitimate interest served by disclosure of the withheld personal data is outweighed by the unwarranted prejudice that would result to the rights and freedoms or legitimate interests of junior staff members.
48. Having found that the legitimate interest served by disclosure of the personal data are outweighed by the unwarranted prejudice that would result to the rights and freedoms or legitimate interests of the junior staff members, the Commissioner finds that condition (f) in Article 6(1) of the GDPR cannot be met and that disclosure of the information in question would be unlawful.
49. Given that the Commissioner has concluded that the processing of the personal data would be unlawful, he is not required to go on to consider whether disclosure of the personal data would otherwise be fair and transparent in relation to junior staff members.
50. The Commissioner is satisfied, in the absence of a condition in Article 6 of the UK GDPR which would allow the data to be disclosed, that disclosure would be unlawful. The personal data of junior staff members is therefore exempt from disclosure under section 38(1)(b) of FOISA.
51. However, some of the individuals whose names were withheld hold senior positions in other public authorities. Given the seniority of these individuals, who all possess a degree of public profile by virtue of their roles, the Commissioner considers that these individuals would reasonably anticipate that their involvement in this work would be disclosed.
52. Having carefully balanced the legitimate interests of the Applicant against the interests or fundamental rights or freedoms of these data subjects, the Commissioner finds that the legitimate interests served by disclosure of the personal data would not be outweighed by any unwarranted prejudice that would result to the rights and freedoms and legitimate interests of these data subjects.

¹ <https://www.foi.scot/sites/default/files/2022-04/BriefingSection38PersonalInformationGDPR.pdf>

53. In the circumstances of this particular case, the Commissioner finds that condition (f) in Article 6(1) of the UK GDPR can be met in relation to the names of senior individuals outwith the Authority.

Fairness

54. The Commissioner must also consider whether disclosure would be fair. He finds, for the same reasons as he finds that condition (f) in Article 6(1) can be met, that disclosure of the names of senior individuals would be fair.

Conclusion on the data protection principles

55. In the absence of any reason for finding disclosure of the names of senior individuals to be unlawful other than a breach of Article 5(1)(a) (and none has been put forward by the Authority), and given that the Commissioner is satisfied that condition (f) can be met, he must find that disclosure of the names of senior individuals would be lawful in this case.
56. The Commissioner therefore finds that disclosure of the names of senior individuals would not breach the first data protection principle, and so the Authority was not entitled to withhold this information under the exemption in section 38(1)(b) of FOISA. He requires the Authority to disclose this information to the Applicant.
57. The Commissioner notes the Authority's practice of redacting the names of external individuals. However, each request must be handled on its own merits and public authorities must consider whether information should be disclosed on a case by case basis.
58. Where public authorities are unsure on the expectations of individuals who are named in information that has been requested, they may, as set out in part 2, section 7 of the [Scottish Ministers' Code of Practice](#)², consult with the individuals in question.

Parliamentary statement

59. The Authority withheld a parliamentary statement under exemptions under sections 36(2) and 30(b)(ii) of FOISA. (These exemptions are described more fully under their respective headings, below.)
60. During the investigation, the Authority indicated that, given the passage of time and the fact that the statement had been "made in the chamber", it considered the parliamentary statement could now be disclosed to the Applicant.
61. Given the statement had been [made in the Scottish Parliament on 9 March 2022](#)³, prior to both the request and the Authority's review outcome, the Commissioner is not satisfied that the Authority has adequately explained why, at the time of the review, it still considered this statement to be exempt under either section 30(b)(ii) or section 36(2) of FOISA.
62. The Commissioner therefore finds that the Authority was not entitled to withhold the parliamentary statement under the exemptions in section 30(b)(ii) and section 36(2) of FOISA and that, in doing so, the Authority failed to comply with section 1(1) of FOISA. He requires the Authority to disclose the parliamentary statement to the Applicant.

² <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2016/12/foi-eir-section-60-code-of-practice/documents/foi-section-60-code-practice-pdf/foi-section-60-code-practice-pdf/govscot%3Adocument/FOI%2B-%2Bsection%2B60%2Bcode%2Bof%2Bpractice.pdf>

³ <https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=13626>

Section 36(2) – Confidentiality

63. The Authority also withheld the draft Muir report (requested in part three of the request) and the draft parliamentary statements (requested in question two of the request) under the exemption in section 36(2) of FOISA.
64. Section 36(2) of FOISA provides that information is exempt from disclosure if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure, by the authority obtaining it, to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person.
65. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA. However, it is generally accepted in common law that an obligation of confidence will not be enforced to restrain disclosure of information which is necessary in the public interest.

Information obtained from another person

66. Section 36(2) therefore contains a two-stage test, both parts of which must be fulfilled before the exemption can be relied upon. The first is that the information must have been obtained by a Scottish public authority from another person. “Person” is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.
67. The Authority explained that the draft Muir report was provided to it by Professor Ken Muir, who was the Independent Advisor on Education Reform, on a confidential basis. The draft statements were likewise provided to it by the Scottish Ministers on a confidential basis.
68. Given the circumstances, and the nature of the information, the Commissioner agrees that this information was obtained from another person.

Actionable breach of confidence

69. The second part of the test is that disclosure of the information by a public authority must constitute a breach of confidence actionable either by the person who gave the information to the public authority or by any other person. The Commissioner takes the view that “actionable” means that the basic requirements for a successful action must appear to be fulfilled.
70. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
 - (i) The information must have the necessary quality of confidence;
 - (ii) The public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
 - (iii) Unauthorised disclosure must be to the detriment of the person who communicated the information.
71. The Applicant was invited to make a submission as to why the withheld information was not confidential. He declined to do so.

Necessary quality of confidence

72. The Authority explained that it received a draft of the Muir report from the Independent Advisor, which it did not consider appropriate to disclose, especially as the final report had been published.
73. The Commissioner recognises that the final Muir report is publicly available and acknowledges that, unless any amendments were made to the draft report, the information within the draft report is publicly available in the final report.
74. However, disclosing the withheld information would have the effect of disclosing the extent and nature of any amendments made to the draft report prior to publishing the final report. Similarly, disclosing the draft statements would have the effect of disclosing the extent and nature of any changes made prior to the statement being made in the Scottish Parliament.
75. In the circumstances and given any such amendments are not common knowledge and are not publicly available, the Commissioner is satisfied that the withheld information fulfils the criteria of having the necessary quality of confidence.

Obligation to maintain confidentiality

76. The Authority explained that the draft Muir report and the draft statements had been received in confidence and were clearly marked as such. It considered that it was obliged to adhere to Scottish Government categorisation of confidential material.
77. The Commissioner notes that the draft Muir report was clearly marked as restricted and was described as confidential. The draft statements were also marked as sensitive. In addition, the Scottish Government provided handling instructions, limiting access to the document to the office of the Authority's Chief Executive, the Chair of the Authority's Board and the organisation's Executive Management Team.
78. While confidentiality markings do not, in themselves, mean information is exempt from disclosure the Commissioner has taken these markings into account in considering whether there is an express or implied obligation to maintain confidentiality.
79. In all the circumstances, the Commissioner accepts that the withheld information was received in the context of a clearly expressed obligation to maintain confidentiality. He therefore accepts that there was an obligation to maintain confidentiality.

Unauthorised disclosure would cause detriment

80. The third requirement is that unauthorised disclosure of the information must be to the detriment of the person who communicated it. The damage need not be substantial and indeed could follow from the mere fact of unauthorised use or disclosure in breach of confidence.
81. The Commissioner recognises that the Scottish Ministers and the Independent Advisor benefit from a private space in which they can share and test draft documents before publication. He considers that disclosure of this information (which he has accepted was received in the context of a clearly expressed obligation to maintain confidentiality) would be likely to lead to a loss of confidence in the confidentiality of these communications, which would inhibit the process of testing, developing and quality assuring draft documents.
82. The Commissioner is therefore satisfied that the tests for an actionable breach of confidence are met in this case, in relation to the information being withheld under section 36(2) of FOISA.

The Commissioner's view

83. In all the circumstances, the Commissioner is satisfied that all the tests for an actionable breach of confidence are met in this case.
84. Having found that the tests for the exemption in section 36(2) of FOISA have been met, and the exemption is properly engaged, the Commissioner must now go on to consider where the balance of public interest lies in relation to disclosure of the information.

Public interest defence – section 36(2)

85. As noted above, the exemption in section 36(2) of FOISA is an absolute exemption in terms of section 2(2) of FOISA and not subject to the public interest test in section 2(1)(b). However, the law of confidence recognises that, in certain circumstances, the strong public interest in maintaining confidences may be outweighed by the public interest in disclosure of the information. In deciding whether to enforce an obligation of confidentiality, the courts are required to balance these competing interests, but there is no presumption in favour of disclosure. This is generally known as the public interest defence.
86. The courts have identified a relevant public interest defence in cases where withholding information would cover up serious wrongdoing, and where it would lead to the public being misled on, or would unjustifiably inhibit public scrutiny of, a matter of genuine public concern.
87. The Authority confirmed that it did not consider any public interest defence would apply.
88. In all the circumstances, and having reviewed the withheld information, the Commissioner does not consider there to be sufficiently compelling reasons in this case for the disclosure of the withheld information (which he has accepted meets all the tests for an actionable breach of confidence) to be disclosed into the public domain public interest grounds.
89. Consequently, the Commissioner finds that the Authority was correct to withhold the draft Muir report and the draft statements under section 36(2) of FOISA.

Section 30(b)(ii) – Free and frank exchange of views

90. The Authority withheld some information, regarding all parts of the request other than part three, under the exemption in section 30(b)(ii) of FOISA.
91. Section 30(b)(ii) provides that information is exempt information if its disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
92. The chief consideration when applying the exemption in section 30(b) of FOISA is not whether the information constitutes opinion or views, but whether the disclosure of that information would, or would be likely to, inhibit substantially the free and frank exchange of views. The inhibition must be substantial and therefore of real and demonstrable significance.
93. Each request must be considered on a case-by-case basis, taking into account the effect (or likely effect) of disclosure of that particular information on the future exchange of views. The content of the withheld information will require to be considered, taking into account factors such as its nature, subject matter, manner of expression, and also whether the timing of disclosure would have any bearing.

94. As with other exemptions involving a similar test, the Commissioner expects authorities to demonstrate or explain why there is a real risk or likelihood that actual inhibition will occur at some time in the near future, not simply a remote or hypothetical possibility.

The Applicant's submissions

95. The Applicant argued that the Authority had applied this exemption speculatively, without demonstrating a genuine likelihood of harm would result from disclosure of the withheld information.

The Authority's submissions

96. Regarding discussions of the Muir report, both internally and with the Scottish Government (parts one, two and four of the request), the Authority considered that its staff must be able to discuss aspects of the draft report openly. It explained that the final report had not been published at the time of these discussions and it was important that it could discuss the contents and its response to it in a private manner.
97. While the Authority considered that the passage of time could reduce the sensitivity of these discussions, it considered there was still a risk that disclosing comments made regarding sensitive material, would create a great reluctance to record internal discussions. It argued that this would clearly hamper its ability to enter into discussions openly.
98. Regarding draft copies of (and comments on) the Muir report and communication with the Scottish Government on relating to the exam support materials (parts four and five of the request), the Authority argued that FOISA recognised the need for organisations to be able to discuss freely certain matters without the discussions being placed in the public domain.
99. The Authority submitted that disclosure of this information would substantially inhibit future provision of advice and the exchange of views as there would be a reluctance for people to share any views if it was considered that their views would be made public.

The Commissioner's view

100. The Commissioner has considered all of the submissions made to him, along with the withheld information under consideration.
101. The Commissioner notes that the subjects specified in the request attracted considerable interest and public debate. He accepts that the officials involved (both internal and external) in these discussions required a private space to discuss matters freely and frankly, without concern that their comments would be made public.
102. While the sensitivity of some material may be lessened by the publication of the Muir Report, the Commissioner considers that some material – especially that relating to the preparation of the report and communications following publication – remained sensitive at the time of the request and the review outcome.
103. Having considered the content of the withheld information, the Commissioner agrees that disclosure of some of the withheld information would, or would be likely to, result in substantial inhibition to the free and frank exchange of views for the purposes of deliberation, as argued by the Authority. As such, he is satisfied that this information is exempt from disclosure in terms of section 30(b)(ii) of FOISA.
104. However, in the Commissioner's view, some of the withheld information is not expressed in a particularly free or frank fashion (including documents that contain primarily high level and factual information). On balance, he is not persuaded, from the submissions he has received

or the content of the information itself, that disclosure of this information would result in the harm claimed by the Authority.

105. Consequently, the Commissioner cannot agree that this information is exempt from disclosure in terms of section 30(b)(ii) of FOISA. Given this conclusion, he is not required to go on to consider the public interest test in section 2(1)(b) in relation to this information. He requires the Authority to disclose this information to the Applicant.
106. However, as the Commissioner is satisfied that the Authority was entitled to rely on the exemption in section 30(b)(ii) of FOISA to withhold some of the withheld information, he is required to go on to consider the public interest test in section 2(1)(b) of FOISA in relation to this information.

Public interest test

107. As noted above, section 30(b)(ii) is subject to the public interest test required by section 2(1)(b) of FOISA. As the Commissioner has found that the exemption in section 30(b)(ii) was correctly applied to some of the withheld information, he is now required 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.
108. The "public interest" is not defined in FOISA but has been described as "something which is of serious concern and benefit to the public", not merely something of individual interest. The public interest does not mean "of interest to the public" but "in the interest of the public", i.e. disclosure must serve the interests of the public.

The Applicant's submissions

109. The Applicant considered it clear that the public interest would favour disclosure.

The Authority's submissions

110. The Authority recognised the public interest in disclosing information as part of being an open, transparent and accountable public body, and to inform public debate. In this case, it acknowledged there would be an interest in whatever comments it made regarding the Muir report.
111. However, the Authority submitted that there were occasions where it is not in the public interest for information to be disclosed. In this case, it considered there was a greater public interest in withholding communications within the Authority and between the Authority, the Scottish Government and the Independent Advisor, to protect a private space within which officials can provide free and frank advice and views.
112. The Authority also noted that the exam support materials were an important topic, and considered there was a substantial public interest in protecting its ability to hold private conversations with the Scottish Government on this issue.

The Commissioner's view

113. The Commissioner has considered all of the arguments presented to him in relation to the public interest in withholding or disclosing the withheld information, along with the withheld information itself.
114. The Commissioner recognises the significant public interest that exists in relation to discussions within the Authority regarding the Muir report and exam support materials. Specifically, he agrees that there is a clear public interest in understanding the discussions

that the Authority held with regards the Muir report, which relates to reform of the education system in Scotland, and on the exam support materials used during the COVID-19 pandemic.

115. However, the Commissioner also recognises the significant public interest that exists in enabling the Authority and other relevant stakeholders to be able to discuss matters freely and frankly, without concern that exploratory discussions or preliminary views will be routinely disclosed into the public domain. He accepts that it is in the public interest that relevant stakeholders are not inhibited from giving their free and frank views in future, particularly on important matters like education reform and education provision during a crisis.
116. In all the circumstances, the Commissioner considers the public interest in protecting the Authority's ability to discuss and consider its approach in relation to education reform and education provision during COVID-19 is greater than the public interest in disclosing the withheld information.
117. On balance, therefore, the Commissioner finds that the public interest in disclosing the withheld information is outweighed by that in maintaining the exemption in section 30(b)(ii) of FOISA. Consequently, he finds that the Authority was entitled to maintain the exemption.

Decision

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

The Commissioner finds that by correctly withholding some information under the exemptions in sections 30(b)(ii), 36(2) and 38(1)(b) of FOISA, the Authority complied with Part 1.

However, the Commissioner finds that the Authority failed to comply with Part 1 of FOISA by incorrectly withholding information as out of scope and incorrectly withholding information under sections 30(b)(ii), 36(2) and 38(1)(b) of FOISA.

The Commissioner also finds that the Authority failed to fully comply with section 16 in responding to the Applicant's requirement for review.

The Commissioner requires the Authority to disclose the incorrectly withheld information, by **Monday 31 March**. He will provide the Authority with a marked-up copy of the information to be disclosed.

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.

Enforcement

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

David Hamilton
Scottish Information Commissioner

12 February 2024