

Decision Notice

Decision 168/2016: Ms X and the Scottish Qualifications Authority

Examination statistics

Reference No: 201502180

Decision Date: 20 July 2016



Scottish Information
Commissioner

Summary

On 9 August 2015, Ms X asked the Scottish Qualifications Authority (the SQA) for the old maths higher exam 2015 and the new maths higher exam 2015 statistics.

The SQA responded by providing a link to its website, where it stated it would be publishing national attainment statistics and citing regulation 27(1) of FOISA (which relates to information intended for future publication). Ms X sought a review on the basis that the link provided did not give her the information she had asked for. The SQA responded to the review request and altered its position, claiming that it did not hold the information because providing information additional to that already published would involve creating new information.

The Commissioner investigated and concluded that the SQA held the information Ms X was looking for. As the SQA had not cited any exemptions to withhold it, the Commissioner required the SQA to disclose this information to Ms X, anonymising any personal data.

The Commissioner also found that the SQA failed to provide Ms X with adequate advice and assistance, and failed to communicate the outcome of its review to Ms X properly.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) General entitlement); 11(1) and (2) (Means of providing information); 15(1) (Duty to provide advice and assistance); 21(1), (4) and (5) (Review by Scottish public authority)

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 9 August 2015, Ms X made a request for information to the SQA. The information requested was –

For both the old maths higher exam 2015 and the new maths higher exam 2015:

- (a) *Number of candidates from independent schools*
- (b) *Number of candidates state schools*
- (c) *Number of other candidates*
- (d) *Total number of candidates*
- (e) *Number of independent school candidates who achieved A pass*
- (f) *Number of state school candidates who achieved A pass*
- (g) *Number of other candidates who achieved A pass*
- (h) *Total number of A passes.*

2. The SQA responded on 3 September 2015 and provided Ms X with a link to a publication schedule for national attainment statistics on its website. It stated that relevant statistics would be published, in accordance with this schedule, on 8 September 2015. In relation to this information, the SQA applied the exemption at section 27(1) of FOISA (Information intended for future publication).
3. On 18 September 2015, Ms X wrote to the SQA requiring a review of its decision, on the basis that the SQA's official publication had not provided the information she requested.
4. The SQA notified Ms X of the outcome of its review on 9 October 2015, stating that it upheld its position as communicated to her on 8 September 2015 (this was in fact a telephone conversation, where it appears to have indicated that providing any further information would involve the creation of new information). The SQA also provided Ms X with links to its own and other websites, where she might find information it considered relevant.
5. On 20 November 2015, Ms X wrote to the Commissioner's office. She applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Ms X stated she was dissatisfied with the outcome of the SQA's review because she could not obtain the information broken down as she had requested it.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Ms X made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 9 December 2015, the SQA was notified in writing that Ms X had made a valid application 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 SQA was asked for its comments, and in particular to explain the searches and enquiries it had undertaken to identify and locate any information falling within the scope of Ms X's request. It was also asked to clarify aspects of its response to Ms X: following its initial response to the Commissioner, further clarification was required and obtained from the SQA.
9. The SQA stated that it considered Ms X had asked for a digest of information and confirmed that it had not carried out any searches because it did not hold the information in that form. It provided submissions on the computer programming input it believed was necessary to produce what Ms X had requested. Eventually, it concluded that this meant it would have to create new information to respond to the request, so it did not hold the information requested. It also considered section 11 of FOISA relevant.
10. Ms X was also asked for her comments. She stated that she still did not have information which would answer points a), b), e) and f) of her request.

Commissioner's analysis and findings

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

Section 11 of FOISA (means of providing information)

12. Under section 11 of FOISA, a Scottish public authority is required, so far as is reasonably practicable, to give effect to the preference(s) of a person requesting information, where they express a preference for receiving information by one or more of three specified means. These means are:
- (a) a copy of the information, in permanent form or another form acceptable to the applicant;
 - (b) a digest or summary of the information or
 - (c) a reasonable opportunity to inspect a record containing the information.

Did Ms X ask for a digest?

13. The SQA explained that, at the time of Mrs X's request, SQA had published the national attainment statistics by subject and level. From this published statistical table, the SQA continued, the only information it held at the time of the request was the total number of candidates and the total number of A passes (points (d) and (h) of the request respectively). To provide information for the other six points would require the application of computed code to the raw data, to produce the "statistical summaries" requested.
14. In the light of the explanation set out in the previous paragraph, the SQA concluded that Ms X was seeking a digest. It believed this conclusion was reinforced by the fact that it was unable to provide a reasonable opportunity to inspect a record containing the information (because no such record existed at the time of the request).
15. The SQA has been given several opportunities to clarify its position in this case. The relevance of the point about inspecting a record has not been explained to the Commissioner. Put simply, the obligation in section 11(1) is to give effect to any of the means of provision listed in section 11(2), where practicable and where that means of provision has been expressed as a preference by the applicant. In this case, the applicant did not express a preference in having an opportunity to inspect a record containing the information described in her request, so the question of affording her such an opportunity should not arise. That means of provision has no relevance in this case.
16. The question is whether Ms X has asked for a digest. The SQA noted that Lord Hope referred to section 11 in relation to digests when considering whether or not information could be said to be held, in the case of *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47¹. In the SQA's view, it followed that there was clearly a relationship between the question of whether information was held and the format in which it had been requested.
17. The Commissioner presumes the SQA is alluding to Lord Hope's deliberation in paragraphs 15 and 16 of the judgment referred to. There, he affirms that "this part of the statutory regime" (relating to the question of whether the public authority holds the information requested) "should ... be construed in as liberal a manner as possible." Where he refers to section 11, Lord Hope states:

"The latitude which should be given to a request which cannot be met in the form requested is indicated by section 11(2) of FOISA which provides for the provision of a digest or summary of the information and by section 11(4) which provides that information may be given by any means which are reasonable in the circumstances."

¹ <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>

18. None of this suggests that anything in section 11 is designed to constrain the provision of information by a Scottish public authority in response to an information request. By contrast, the SQA's position appears to be that because it has chosen to publish particular sets of statistics, anyone asking for alternative sets will be asking for a "digest". It submits that the information sought by Ms X is a digest by necessary implication, because the figures that would need to be extracted would be a summary or digest of one or more of its datasets.
19. This approach appears to miss the point of section 11(2). The provision is about meeting the applicant's stated requirements as to the means of providing the information, where reasonably practicable. It is not about the form in which the information is held, about which the applicant may know little or nothing.
20. If the list of statistics sought by Ms X must by definition be a digest, then any list of statistics sought by a requester would appear to fall into the same category. For the reasons set out above, the Commissioner does not believe that to be consistent with the intentions underlying section 11(2).
21. Here, in the Commissioner's view, Ms X simply asked for information. Information she believed the SQA should hold in recorded form, as defined in section 73 of FOISA. She described the information she was looking for, as required by section 8(1)(c) of FOISA. The SQA would appear to have had no difficulty understanding what Ms X was looking for, even if it may later have questioned whether it held the information. The question is simply whether it did hold the information and therefore was required to comply with the request in terms of section 1(1) of FOISA.
22. In all the circumstances of this case, therefore, the Commissioner has concluded that section 11 of FOISAS has no relevance here. The section is designed to facilitate the provision of information, and in particular to facilitate the provision in information (where practicable) in a form acceptable to the applicant. It is not intended to deter applicants from seeking information a Scottish public authority has not chosen to publish, and the Commissioner finds it disappointing that it appears to have been deployed on that basis here.

Does responding to the request require the creation of new information?

23. The Commissioner must now go on to consider whether the SQA held the information sought by Ms X, or whether it would have needed to create new information to respond to her request. In terms of section 1(4) of FOISA, the information a Scottish public authority is required to disclose in response to a request under section 1(1) is (where other qualifications in Part 1 of FOISA do not apply) the information it holds at the time that request is received. Where it holds no such information, section 17(1) of FOISA requires the authority to give the applicant notice to that effect.
24. The SQA submitted that computer programming input would be required to provide a breakdown of information into the categories required by Ms X. The SQA submitted that this would entail writing appropriate programming code to "create the summarised information requested" from the raw candidate attainment data (which it held).
25. The SQA explained that each annual dataset had approximately half a million records. Every year, it produced specific summaries of this dataset, using pre-written code created to meet the SQA's reporting obligations.
26. The SQA went on to explain that the statistical attainment dataset identified centres (for the purposes of this request, schools) and centre types by number. There were no textual

descriptors in the dataset and these would need to be merged in from other datasets. This would require dataset merge code and then code to summarise the resulting raw data.

27. The SQA appeared to suggest that the same process of adding text descriptors would be required in other areas (for example, subject), to make the codings meaningful. The work of producing the tables needed to answer the request could be done by a programmer or analyst.
28. The investigating officer highlighted to the SQA an information request that it had previously answered on the “What Do They Know” website, where it had broken down attainment statistics in a format similar to that requested by Ms X. The investigating officer asked the SQA to comment on this, on the basis that it appeared to suggest it was possible to collate and separate the data it held into figures for state school and figures for independent schools.
29. The SQA confirmed that it had applied code to obtain a summary of its main dataset for that earlier request. The code was written specifically for that request: the request sought independent and state school data separately, but in other respects it differed from Ms X’s request. New code would have to be written to answer Ms X’s request.
30. The SQA submitted that it had never claimed it was not possible to obtain the information required to respond to Ms X. Its position was that it did not hold the information in the format requested and it was not reasonably practicable to report candidate attainment data in that way.
31. The SQA noted that the response to the earlier request was issued in October 2014. It explained that since then it has been reviewing external communications across the organisation to improve its service to all stakeholders, including a review of FOI responses to see where it could proactively publish data frequently requested.
32. The SQA was of the view that it could not proactively publish statistical reports of candidate attainment to cover all the possible permutations of the information it held, and so could not cover all the possible permutations of that data requested by individuals
33. With the correct coding, the SQA acknowledged that it could produce a wide variety of statistical summaries. However, when making the decision about when and how much to publish proactively, it needed to have regard to the best use of public funds and adopt a proportionate approach to the publication of statistics within its wider statutory functions.
34. In making the decision on the level of proactive publication that was proportionate, the SQA submitted that it did not believe the fact it held statistics for national reporting should be used as an assessment of what it was reasonably practicable to produce in the way of bespoke reports for information requests. Producing such bespoke reports would, the SQA argued, divert resources from its statutory functions.
35. Although the SQA has been asked to clarify its position in this case on more than one occasion, it is still not entirely clear what that position is, in terms of Part 1 of FOISA. There is no doubt that the raw data required to answer the request is held by the SQA, even if work is required to extract and interrogate so that a response could be given. The work required would appear to be a combination of routine tasks for IT professionals within the SQA, of a kind which has been carried out already to answer another information request. There appears to be nothing forthcoming from SQA to suggest that this work could be said to involve a significant exercise of skill and judgement, of the kind the Commissioner would expect before she could accept that the creation of new information was involved. Indeed, it

is not entirely clear that the SQA believes it would be creating new information in performing these tasks.

36. The SQA's arguments appear to relate more to the reasonableness of being required to produce bespoke datasets of this kind from the raw data it holds, and in particular whether such work could be described as proportionate and a reasonable use of its resources. While these are highly relevant considerations for any Scottish public authority, the Commissioner cannot see what bearing they have on the question of whether the SQA held the information requested by Ms X. On the basis of the submissions provided, she must find that the SQA did (and does) hold the information requested.
37. As the SQA has not cited any exemptions or other provisions of FOISA which would allow it to refuse to disclose the information it holds, the Commissioner finds that the information should be disclosed to Ms X. If this would otherwise involve the disclosure of personal data, the SQA should anonymise the information fully before disclosing it.
38. In future cases, the Commissioner would urge the SQA to think carefully about its position in relation to any information it is asked for, ensuring that it identifies provisions of FOISA which are truly relevant to that position, for reasons which are truly relevant to the application of those provisions.

Review outcome

39. Section 21(4) of FOISA provides that a Scottish public authority, in response to a requirement for review, may:
 - (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
 - (b) substitute for any such decision a different decision, or
 - (c) reach a decision, where the complaint is that no decision has been reached.
40. The SQA's initial response to Ms X's request, on 3 September 2015, applied section 27(1) of FOISA (Information intended for future publication). The review outcome of 9 October 2015 purported to uphold a previous response to Ms X, but that was a response of 8 September 2015, by telephone. The review outcome did not make it clear what that new position was, although it was clearly not the position communicated in the SQA's initial response to the request.
41. Clearly, the telephone call of 8 September was not a response to Ms X's requirement for review. It was not a notice in writing, as required by section 21(5) of FOISA, and preceded Ms X's requirement for review in any case. The review needed to result in one of the outcomes specified in section 21(4), which needed to be communicated to Ms X in terms of section 21(5). The SQA appears to have substituted a different decision for its original one (section 21(4)(b)), but that was not clearly articulated to Ms X, with reference to the provision(s) of FOISA it now considered relevant and its reasons for applying them.
42. In the circumstances, the Commissioner finds that the SQA failed to comply with section 21(5) of FOISA.

Provision of advice and assistance

43. Section 15(1) of FOISA requires a Scottish public authority, so far as it is reasonable to expect it do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it.
44. In its review outcome of 9 October, the SQA provided Ms X with links to its own and other websites, which it appeared to consider relevant to her request. However the SQA did not provide any indication as to where on these websites she could find relevant information, or precisely how that information was considered relevant to her request. The Commissioner considers the SQA should have done this: in failing to do so, it failed to comply fully with its duty under section section 15(1) of FOISA.
45. The Commissioner does not require any action from the SQA in response to these breaches of sections 21 and 15 of FOISA as she cannot identify any further action which could be taken now to assist Ms X in the exercise of her rights in these areas. She would reiterate the need to take care in the handling of information requests, and to bear in mind the importance of requirements such as these in allowing applicant to exercise their rights fully and effectively under FOISA.

Decision

The Commissioner finds that the SQA failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms X.

The Commissioner finds that the SQA:

- (i) Held the information requested by Ms X.
- (ii) Failed to apply any exemption or other relevant provision of FOISA to the information held. As it failed to apply any exemption it should have disclosed the information to Ms X, and in failing to do so, SQA breached section 1(1) of FOISA

The Commissioner requires the SQA to disclose the information to Ms X, after rendering any personal data anonymous, by 5 September 2016.

The Commissioner also finds that the SQA failed to comply with the requirements of sections 21(4) and 15(1) of FOISA in handling Ms X's request. She requires no action in response to these breaches, in response to Ms X's application.

Appeal

Should either Ms X or the Scottish Qualifications 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 Scottish Qualifications Authority (the SQA) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the SQA has failed to comply. The Court has the right to inquire into the matter and may deal with the SQA as if it had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner

20 July 2016

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.

...

11 Means of providing information

- (1) Where, in requesting information from a Scottish public authority, the applicant expresses a preference for receiving it by any one or more of the means mentioned in subsection (2), the authority must, so far as is reasonably practicable, give effect to that preference.

- (2) The means are-

- (a) the provision to the applicant, in permanent form or in another form acceptable to the applicant, of a copy of the information;
- (b) such provision to the applicant of a digest or summary of the information; and
- (c) the provision to the applicant of a reasonable opportunity to inspect a record containing the information.

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

...

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

- (4) The authority may, as respects the request for information to which the requirement relates -

(a) confirm a decision complained of, with or without such modifications as it considers appropriate;

(b) substitute for any such decision a different decision; or

(c) reach a decision, where the complaint is that no decision had been reached.

- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

...

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