Scottish Information Commissioner
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Decision Notice 118/2025

Rationale for reviewing Fitness to Teach

Authority: General Teaching Council for Scotland
Case Ref: 202401373 and 202401482

Summary

The Applicant asked the Authority for information on the rationale for an external review of its processes. The Authority disclosed some information but withheld other information under various exemptions in FOISA. The Commissioner investigated and found that the Authority was not entitled to withhold some information (which it later disclosed to the Applicant), but that it was entitled to withhold the information it had not disclosed.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions); 30(b) and (c) (Prejudice to effective conduct of public affairs); 38(1)(b), (2A)(a), (5) (definitions of "the data protection principles", "data subject", "personal data", "processing" and "the UK GDPR") and (5A) (Personal information); 47(1) and (2) (Application for decision by Commissioner).

United Kingdom General Data Protection Regulation (the UK GDPR) Articles 5(1)(a) (Principles relating to processing of personal data) and 6(1)(f) (Lawfulness of processing).

Data Protection Act 2018 (the DPA 2018) sections 3(2), (3), (4)(d), (5), (10) and (14)(a), (c) and (d) (Terms relating to the processing of personal data).

Background

1. On 16 August 2024 and 5 September 2024, the Applicant made separate requests for information to the Authority. The information requested was as follows:

   Request one (16 August 2024)

   "… all information held pre the approach to the [Professional Standards Authority for Health and Social Care] PSA last year with regard to the rational [sic] behind why [the Authority] felt it necessary to reach out to the PSA in the first instance."

   Request two (5 September 2024)

   "… information [related to logic / reasons for the Authority deeming commissioning an independent review from the PSA necessary] held in relation to the period October 2023 through to May 2024, i.e., from the point right after the [Authority] first reached out to the [PSA] through to the press release confirming the [Authority]'s decision to commission the PSA to carry out an independent review of its Fitness to Teach process."

2. For background, the PSA is the independent regulatory oversight body that oversee the work of UK health and social care regulators and accredited registers of healthcare practitioners. In May 2024, the Authority appointed the PSA to review its Fitness to Teach process.

3. The Authority responded on 13 September 2024 and 3 October 2024:

   - for request one, it disclosed some information but withheld other information, including a draft document entitled "Requirements for the Independent Reviewer", under the exemptions in sections 30(b)(i), 30(b)(ii) and 30(c) of FOISA

   - for request two, it withheld the information requested under the exemptions in sections 30(b)(i), 30(b)(ii), 30(c) and 38(1)(b) of FOISA.

4. On 16 September 2024 and 3 October 2024, the Applicant wrote to the Authority requesting reviews of its decisions:

   - for request one, he considered the public interest favoured disclosure of the "Requirements for the Independent Reviewer" document

   - for request two, he argued that the withheld information should be disclosed in the interests of accountability and transparency.

5. The Authority notified the Applicant of the outcomes of its reviews on 14 October 2024 and 5 November 2024:

   - for request one, it upheld its original decision and advised the Applicant that it was also applying the exemption in section 38(1)(b) of FOISA to a small amount of information in the "Requirements for the Independent Reviewer" document

   - for request two, it modified its position and disclosed some information, with redactions. It continued to withhold information under the exemptions in sections 30(b)(ii) and 38(1)(b) of FOISA, while other information was redacted as it was considered out of scope. It also advised the Applicant that some information falling within scope of the request was available on its website through its FOI disclosure log, which it therefore considered exempt under section 25 of FOISA.

6. The Applicant wrote to the Commissioner on 14 October 2024 and 10 November 2024, 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 reviews because:

- for his first request, he did not agree with the exemptions applied and considered the public interest favoured disclosure.
- for his second request, he considered further information was held by the Authority, the exemption in section 30(b)(ii) of FOISA did not apply and he did not consider the exemption in section 38(1)(b) of FOISA applied to the extent claimed.

Investigation

7. The Commissioner determined that both applications complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

8. On 6 November 2024 and 2 December 2024, the Authority was notified in writing that the Applicant had made valid applications regarding requests one and two. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information, and both cases were subsequently allocated to the same investigating officer.

9. 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 both applications and to answer specific questions relating to (i) how it established what information it held falling within scope of the requests and (ii) the exemptions it had applied to withhold information.

10. In his application to the Commissioner, the Applicant did not challenge the Authority's reliance on the exemption in section 25 of FOISA in relation to information it considered it was otherwise accessible to him. The Commissioner will not, therefore, consider the application of this exemption further in his Decision Notice, though he will consider the Applicant's belief (expressed in relation to the exemption in section 25 of FOISA) that the Authority failed to identify all information held and falling within the scope of his request.

Commissioner's analysis and findings

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

Section 1(1) of FOISA – General entitlement

12. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section (6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in 1(6) are not applicable in this case.

13. The information to be given is that held by the authority at the time the request is received, as defined by section 1(4) of FOISA.

Information falling in scope of the request

14. During the investigation, in line with the review outcome for request two, the Authority confirmed that it considered some of the information contained in documents otherwise covered by the request fell outwith the scope of request two, because it related to aspects of the review other than the rationale for the review.

15. Having considered this information, the Commissioner agrees that this information does not fall within scope of the Applicant's request. He will therefore not consider this information further in his Decision Notice.

Does the Authority hold any further relevant information?

16. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.

17. The Commissioner also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations as to what information the authority should hold, ultimately the Commissioner's role is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).

Submissions from the Applicant

18. In relation to his second request, the Applicant considered the Authority held more information than it had identified. He did not think it "believable or credible" that so little information existed.

19. The Applicant submitted that the Authority had not disclosed any internal emails or meeting minutes. In particular, noting the general absence of any internal emails or meeting minutes, he highlighted a request for feedback on two papers presented to a committee where no feedback appeared to have been recorded.

Submissions from the Authority

20. The Authority explained that it identified information through keyword searches of its project folder. It also manually reviewed internal correspondence that it considered could contain relevant information without necessarily featuring the key words. Staff members involved in the project were also consulted and checked for any additional records (including OneNote documents) in scope.

21. The Authority explained that, contrary to the Applicant's claims, internal correspondence had been identified, and this has been disclosed to the Applicant. It also explained that the majority of internal correspondence on this topic did not relate to the logic or rationale for the review.

22. The Authority explained that it does not ordinarily record narrative minutes of committee or council meetings and, in this instance, discussion of the rationale for the review (including the feedback in question) was not recorded.

23. The Authority also stated that it did not consider it necessary or proportionate to minute internal meetings, whether pre-arranged or spontaneous, between its staff. It therefore submitted that no such minutes existed.

The Commissioner's view

24. The Commissioner has carefully considered the submissions from both parties, together with the information identified and the supporting evidence and explanation of searches. Having done so, he is satisfied that the searches carried out by the Authority were adequate and proportionate in the circumstances, and would have been capable of identifying any relevant information.

25. The Commissioner therefore concludes, on balance, that the Authority does not (and did not, on receipt of the request) hold further information falling within the scope of the request, beyond that already identified by these searches.

26. While the Applicant believed and expected more information to be held by the Authority, the Commissioner is satisfied that this was not the case.

Information to be considered in this decision

27. The Authority considered the document entitled "Requirements for the Independent Reviewer" to fall within the scope of both requests.

28. At the time of the review outcome of request one, the Authority withheld the full document under various exemptions in FOISA. However, following Decision 227/2024[1] (which related to a similar subject matter), the Authority revised its position in relation to the document and disclosed the majority of it as part of its review outcome for request two. In the context of request one, it confirmed that it was no longer relying on the exemptions claimed earlier in respect of this disclosed information.

29. The Commissioner welcomes the Authority learning from his previous decisions. However, he must find that, in respect of the information from the "Requirements for the Independent Reviewer" document disclosed as part of its review outcome for request two, the Authority was not entitled to rely upon the exemptions in sections 30(b)(i), 30(b)(ii) and 30(c) of FOISA to withhold this information in response to request one. In this respect, he must find that the Authority failed to comply with section 1(1) of FOISA in responding to request one.

30. The Authority has maintained reliance upon the exemptions in sections 30(b)(ii) and 38(1)(b) of FOISA to withhold some information in the "Requirements for the Independent Reviewer" document. It also considered some information to fall outwith the scope of the request. As stated above, the Commissioner agrees that this information does fall outwith the scope of the request.

31. The Commissioner will go on to consider the remaining withheld information in the "Requirements for the Independent Reviewer" document, as well as the following withheld information:

    - A document (labelled "One Note PSA") withheld in its entirety under the exemption in section 30(b)(ii) of FOISA.

    - A bundle of documents, described as review records and which also contain the "Requirements for the Independent Reviewer" document, provided to the Applicant with information withheld under the exemptions in sections 30(b)(ii) and 38(1)(b) of FOISA.

[1] Decision227-2024.pdf

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

32. As stated above, the Authority withheld one document and certain information within the "Requirements for the Independent Reviewer" document (contained within the review records bundle) under the exemption in section 30(b)(ii) of FOISA.

33. Section 30(b)(ii) of FOISA 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.

34. In applying the exemption in section 30(b)(ii) of FOISA, the chief consideration 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.

35. 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. It is important to bear in mind that the exemption, where applicable, will apply to particular information and not inherently to a process (such as drafting).

36. As with other exemptions involving a similar test, the Commissioner expects authorities to demonstrate 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 Authority's submissions on section 30(b)(ii) of FOISA

37. The Authority highlighted that it had considered what information could be appropriately disclosed and only a small proportion of the information in scope had been withheld. The information withheld under this exemption was held in draft documents which were circulated to a limited number of staff members.

38. The Authority explained that inviting the PSA to carry out a review was a significant step for it to take and that this was the first time it had commissioned an independent review of this kind. The purpose of instructing an independent review was to ensure that it continued to improve and develop its Fitness to Teach process and to learn from an external independent body.

39. The Authority considered it was necessary for the Authority, as a responsible regulator, to regularly review the procedures it carries out as part of its statutory obligations, including its obligation to perform its functions in a way which is consistent with best regulatory practice.

40. The Authority explained that the decision to initiate the review was entirely voluntary and self-directed, to ensure it kept pace with ongoing changes within the regulatory environment and that its processes continually improved. It stated that it initiated the review not because the Fitness to Teach function was being discharged ineffectually, but to ensure that it remained effective in the future. It also noted that the review process involved a significant investment of financial and human resources for the Authority, in the context of its overall organisational scale and capacity.

41. The Authority submitted that, as part of its internal decision-making process, it required a private space to note and share views for the purpose of later discussion and deliberation. It

argued that creating internal documents where its staff could note down their own thoughts, suggestions and early ideas, in order that they could be explored, discussed and deliberated with relevant members of the team, was essential to allow the Authority to develop planned or proposed work.

42. The Authority submitted that a key part of its work is to explore new ways of doing things, develop ideas and find improvements within its processes and systems. In order to do so effectively, it considered it essential that it could properly document its discussions, and how its plans might develop, while retaining privacy and confidentiality.

The Applicant's submissions on section 30(b)(ii) of FOISA

43. The Applicant argued that the withheld information should be disclosed in the interests of transparency. In the circumstances, he considered it more important that the public understand the rationale for the Authority's actions as there must always be full and frank conversations on matters relating children's safety – nothing less would suffice.

44. The Applicant submitted that he found the Authority's position "deeply concerning", given that it provides a key public service to ensure that teachers are fit to teach children. He considered to claim that those tasked with protecting children would withhold advice because it might be published was not credible, given that they had a clear obligation to children and the public and failure to do so would breach this obligation.

45. The Applicant also did not consider it relevant that the document requested in his first request was a draft. He argued that while it might have been intended for internal consumption, this made the document no different to many non-draft documents.

The Commissioner's view

46. The Commissioner accepts that there is a need for the Authority and its employees to have a private space to develop and discuss its approach and plan significant projects such as the review by the PSA. Such a process will involve the free and frank exchange of views.

47. Although draft documents are not inherently exempt under section 30(b)(ii) of FOISA, the Commissioner considers that, in the circumstances of this case, the draft status of these documents is relevant as it affirms that these documents represent the developing thoughts of the Authority's employees, not necessarily the final agreed position of the Authority.

48. Having considered the information withheld, the Commissioner accepts that disclosure of this information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation, which would thereby inhibit the Authority's ability to fully explore options in relation to major projects such as the PSA review.

49. Consequently, the Commissioner is satisfied that the Authority was entitled to rely upon the exemption in section 30(b)(ii) of FOISA to withhold this information. He will now go on to consider the application of the public interest test in section 2(1)(b) of FOISA for this information.

Public interest test – section 30(b)(ii))

50. 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 Authority's submissions on the public interest

51. The Authority submitted that it is committed to, and places great value in, openness and transparency. It stated that it believes it important to ensure that members of the public can have access to information it holds, where it is appropriate and proportionate to disclose that information.

52. The Authority agreed that there is public interest in transparency and, in particular, there might be an element of public interest in understanding the deliberations that took place in considering the commission of an independent review.

53. However, the Authority argued that this must be balanced against the public interest in the Authority being able to hold internal discussions and debate in a private space, including to note ideas, suggestions and views about a proposal to ensure a thorough and effective review could be carried out about the effectiveness of its statutory regulatory function. To allow open and frank exchanges to support informed decision making, the Authority's staff must be safe in the knowledge that information will not routinely be publicly disclosed.

54. The Authority highlighted that it shared other information on this review, including formal contract documentation, where it could appropriately do so.

55. Given that the project remained an ongoing piece of work, the Authority referred to the following extract from Decision 160/2021[2] of the Commissioner, which it considered relevant:

"[T]he Commissioner accepts that there is a greater public interest in ensuring that the views of staff about such an important project can be made fully and frankly, in circumstances where both parties have confidence that the content of these would not be disclosed, particularly regarding matters of sensitivity and while a project is ongoing."

56. The Authority stated that, until the formal conclusion of the review by the PSA and "reasonable implementation" of the review, it considered the sensitivity of the withheld information required the protection of section 30(b)(ii) of FOISA.

The Applicant's submissions on the public interest

57. The Applicant submitted that significant concern existed about the Authority's conduct with regard to its Fitness to Teach process. He provided the Commissioner with information discussing these concerns, including reporting by the BBC, a FOI release from the Scottish Government, a letter from a member of the Scottish Government and a parliamentary petition.

58. The Applicant indicated that the Authority had denied there were reasons for concern. He therefore considered it unclear why the Authority decided it was necessary to commission the PSA to conduct an independent review of its Fitness to Teach process. He submitted that it was in the public interest for the "true reason" for the review to be published.

The Commissioner's view on the public interest

59. The Commissioner has considered the submissions from both parties, together with the withheld information.

60. The Commissioner recognises that there is a clear public interest in transparency of public authorities, especially regarding potential reforms to the Authority's approach to regulation.

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[2] https://www.foi.scot/decision-1602021

61. While there is a public interest in such transparency, this must be balanced against the public interest in the Authority being able to hold internal discussions and debate in a private space regarding the commissioning of an independent review.

62. The Commissioner acknowledged that the ability of the Authority to do so, safe in the knowledge that information will not routinely be publicly disclosed, will be required on occasion, to allow open and frank exchanges to support informed decision-making. He accepts that the public interest does not lie in disclosing information that would limit such discussion in future, particularly on important matters such as the commissioning of an independent review.

63. 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.

Section 38(1)(b) of FOISA – Personal information

64. The Authority withheld a small amount of information throughout the documents disclosed to the Applicant under the exemption in section 38(1)(b) of FOISA.

65. Section 38(1)(b), read in conjunction with section 38(2A) (a) or (b), exempts information from disclosure if it is "personal data", as defined in section 3(2) of the Data Protection Act 2018 (the DPA) and its disclosure would contravene one or more of the data protection principles set out in Article 5(1) of the UK GDPR.

66. 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.

67. 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?

68. 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.

69. 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.

70. 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).

71. In this case, the Authority has withheld names and sections of email signatures including job titles as personal data. The Applicant confirmed that he had no concern with the withholding of names as personal information. The Commissioner will therefore only consider the information in email signatures.

72. Given the leadership roles held by the individuals in question and the limited number of staff involved in this project, the Commissioner is satisfied that these individuals could be

identified from their job titles and that the information therefore relates to identifiable living individuals. He accepts that the information is personal data as defined in section 3(2) of the DPA 2018.

Would disclosure contravene one of the data protection principles?

73. 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."

74. The definition of "processing" is wide and includes (section 3(4)(d) of the DPA) "disclosure by transmission, dissemination or otherwise making available". For the purposes of FOISA, personal data are processed when disclosed in response to a request. This means that personal data could only be disclosed if disclosure would be both lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) of the UK GDPR) and fair.

75. 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.

76. 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

77. 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.

78. Though Article 6(1) states that this condition cannot apply to processing by a public authority in performance of its 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.

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

- Does the Applicant have a legitimate interest in obtaining 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 that legitimate interest, would that be overridden by the interests or fundamental rights and freedoms of the data subject?

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

80. The Authority explained that it would generally disclose the names of its leadership team and of the chief executives (and officials of similar seniority) of other organisations. However, none of the individuals in the withheld information were of this seniority.

81. The Authority noted that the focus of the Applicant's interest was the rationale for the review and highlighted that the Applicant had accepted personal information could be redacted. It did not consider that the identities of staff members working on this would assist the Applicant in understanding the rationale of the review.

82. As stated above, the Applicant has already advised the Commissioner that he does not require the names of the Authority's staff.

83. In all the circumstances, the Commissioner finds that the Applicant does not have a legitimate interest in obtaining the withheld third party personal data. He is therefore satisfied that this information has been properly withheld under the exemption in section 38(1)(b) of FOISA.

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.

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

However, by incorrectly withholding some information under the exemptions in sections 30(b) and 30(c) of FOISA, the Commissioner finds that the Authority failed to comply with section 1(1) of FOISA.

Given that the incorrectly withheld information has now been disclosed to the Applicant, the Commissioner does not require the Authority to take any action in respect of this failure, in response to the Applicant's application.

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.

Euan McCulloch
Head of Enforcement
19 May 2025