



Scottish Information
Commissioner
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Decision Notice 005/2026

Exam support materials

Applicant: Anonymous

Authority: Scottish Ministers

Case Ref: 202200991

Summary

The Applicant asked the Authority for all communications over a specified period between the Authority and the Scottish Qualifications Authority (SQA) relating to “the exam support materials”. The Authority withheld the information on the basis that disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views. The Commissioner investigated and found that the Authority had partially complied with FOISA in responding to the Applicant’s request. He required the Authority to disclose a small amount of 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); 30(b)(ii) (Effective conduct of public affairs); 47(1) and (2) (Application for decision by Commissioner).

Background

1. On 25 March 2022, the Applicant made a request for information to the Authority. He asked for:

“All communication [from 1 January 2022 to the date of his request] between the [Authority] (specifically ministers, special advisers, communications/PR staff and staff from the learning directorate and the SQA regarding or relating to the exam support materials.”

2. The Authority responded on 22 July 2022. It disclosed some information to the Applicant and withheld other information under the exemptions in sections 30(b)(ii) and 38(1)(b) of FOISA.
3. On 25 July 2022, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision because:
 - he believed that the Authority had applied the exemptions speculatively, inconsistently and incorrectly
 - the Authority had failed to respond to his request within the statutory timescales and to provide an explanation for this.
4. The Authority notified the Applicant of the outcome of its review on 25 August 2022, which upheld its original response.
5. On 6 September 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 disagreed with the extent of the Authority's application of the exemption in section 30(b)(ii) of FOISA.

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 27 October 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 was also asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and its comments.
8. The case was subsequently allocated to an investigating officer.
9. During the investigation, further comments were sought and obtained from the Authority.
10. The Commissioner's investigation will be limited to considering the information withheld under the exemption in section 30(b)(ii) of FOISA as this was the only exemption specifically challenged by the Applicant in his application to the Commissioner.

Commissioner's analysis and findings

11. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.
12. As stated in previous decisions, in Scottish Ministers v Scottish Information Commissioner [2006] CSIH 8¹, at paragraph [18], the Court of Session recognised that:

"… in giving reasons for his decision, [the Commissioner] is necessarily restrained by the need to avoid, deliberately or accidentally, disclosing information which ought not to be disclosed."

¹ <https://webarchive.nrscotland.gov.uk/20240713015729/https://scotcourts.gov.uk/search-judgments/judgment?id=a94886a6-8980-69d2-b500-ff0000d74aa7>

13. In this decision notice, the Commissioner has endeavoured to give as full account of his reasoning as he can, but, by necessity, in this case the comments of the Court of Session are applicable to some aspects.

Information disclosed during the investigation

14. The Authority re-examined the withheld information when it provided it to the Commissioner and concluded that some of the information it withheld under the exemptions in sections 30(b)(ii) and 38(1)(b) was not exempt from disclosure. It therefore disclosed this information to the Applicant.
15. The Commissioner must find that the above-described information was not exempt from disclosure and that the Authority's failure to disclose it by the date of the review outcome (at the latest) was a breach of Part 1 of FOISA (specifically, section 1(1)).

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

16. The Authority withheld information under the exemption in section 30(b)(ii) of FOISA in the following documents: Documents 4, 7, 10, 12, 13, 13.1 (withheld in its entirety) and 14.
17. 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. The exemption is subject to the public interest test in section 2(1)(b) of FOISA.
18. In applying the exemption in section 30(b)(ii) of FOISA, the chief consideration is not whether the information constitutes opinions 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.
19. 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 need 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.
20. 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 (certainly the foreseeable) future, not simply a remote or hypothetical possibility.

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

21. The Applicant disagreed that the exemption in section 30(b)(ii) of FOISA had been correctly applied, given the extent to which it had been used to withhold information. He did not consider that the application of the exemption, in all instances, met the threshold set out in the Commissioner's guidance to public bodies.

The Authority's submissions on section 30(b)(ii)

22. The Authority said that the redactions made under the exemption in section 30(b)(ii) of FOISA were applied to email exchanges between Authority officials and SQA officials discussing the timing, content and messaging relating to revision support for the 2022 National Qualifications.
23. The Authority submitted that it was essential for its officials to be able to communicate, often in confidence, with external stakeholders such as the SQA on a range of issues, including

those of an operational nature. It argued that disclosure of the full content of these communications, particularly without the SQA's consent, would be likely to undermine the SQA's trust in the Authority and would substantially inhibit communications on this type of issue in the future.

24. Specifically, the Authority considered that the SQA would be reluctant to provide their views fully and frankly, either in writing or at meetings, if they believed that their views were likely to be made public, particularly when these discussions related to sensitive issues such as the SQA's approach to exam support material.
25. The Authority explained that it considered it necessary that it was able to engage in discussion on the future development of a range of matters in relation to the education system and the awarding of qualifications in Scotland and to engage in discussions to ensure that any issues are supported as robustly as possible and that sufficient research has been undertaken, sought, communicated and developed to ensure that the process of refining revision materials for pupils remains credible and valid. It argued that if the means by which such a position was arrived at were disclosed, its ability to robustly test proposed positions before using them publicly would be compromised substantially if every preliminary thought that had been recorded had to be disclosed.
26. The Authority noted that it had reached this view after consulting with the SQA. It provided the Commissioner with evidence of this.

The Commissioner's view on section 30(b)(ii)

27. The Commissioner has considered all of the submissions made to him, along with the withheld information under consideration. He must consider the withheld information with regard to the circumstances at the time of the Authority's review outcome.
28. As the Commissioner noted earlier, in order for this exemption to be engaged, disclosure of the withheld information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. In this context, "inhibit" means to restrain, decrease or suppress the freedom with which opinions or options are expressed.
29. Having considered the content of the withheld information, the Commissioner agrees that disclosure of most 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.
30. The Commissioner accepts that the officials involved (both from the Authority and the SQA) in these discussions required a private space to discuss matters freely and frankly, without concern that their comments would be made public. Having considered the content of the withheld information and the submissions from both the Authority and the SQA, he is satisfied that disclosure of most of this information would, or would be likely to, result in the inhibition claimed by the Authority.
31. However, in the Commissioner's view, a small amount of the withheld information is not expressed in a particularly free or frank fashion – nor is it apparent to him that disclosure of this information would, or would be likely to, result in the inhibition claimed by the Authority. On balance, he is not persuaded, either from the submissions he has received or the content of the information itself, that this information should be exempted from disclosure under the exemption in section 30(b)(ii) of FOISA. While disclosure of this specific information is unlikely to be of interest either to the Applicant or to the public more generally, it must be disclosed if no exemption under FOISA applies.

32. As stated above, the Commissioner must be careful not reveal the content of the withheld information. However, part of the small amount of withheld information to which he has found the exemption in section 30(b)(ii) of FOISA does not apply indicated that further information relevant to the Applicant's request might be held by the Authority.
33. The Commissioner explored this possibility with the Authority. In the circumstances, he accepts that the Authority does not hold further information of the description indicated by the withheld information. (The Applicant did not challenge the volume of information identified by the Authority in response to his request, so the Commissioner has not otherwise considered the adequacy of the Authority's searches in his decision notice.)
34. As the Commissioner cannot agree that this small amount of information is exempt from disclosure in terms of section 30(b)(ii) of FOISA, 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.
35. 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 most 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.

The public interest test

36. The exemption in section 30(b)(ii) of FOISA is subject to the public interest test in section 2(1)(b). Where this exemption is correctly applied, the Commissioner must 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.

The Applicant's comments on the public interest

37. The Applicant argued that, if the exemption in section 30(b)(ii) of FOISA applied, then the public interest favoured, in at least some cases, greater disclosure.

The Authority's comments on the public interest

38. The Authority recognised there is a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. It also acknowledged the public interest in relation to the delivery of National Qualifications and the support material associated with it.
39. However, the Authority considered there to be a greater public interest in allowing a private space within which it can obtain full and frank advice from key stakeholders, such as the SQA, as part of the process of developing and refining communications, so that stakeholders receive clear and consistent messaging to support the safe awarding of qualifications.
40. The Authority argued that this private thinking space is essential to enable all options to be properly considered, based on the best available expert advice, so that good policy decisions can be taken.
41. The Authority also submitted that it would not be in the public interest to damage its relationship with the SQA and to undermine the SQA's trust in it through disclosure of information the SQA had indicated would substantially prejudice their ability to take this important area of work forward in the future.

42. Taking account of all of the circumstances of this case, the Authority considered that the public interest in disclosing the information to be outweighed by the public interest in maintaining the exemption in section 30(b)(ii) of FOISA.

The Commissioner's view on the public interest

43. 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.
44. As stated above, the Commissioner must consider the withheld information with regard to the circumstances at the time of the Authority's review outcome
45. The Commissioner acknowledges the general public interest in transparency and accountability and recognises the public interest that exists in relation to communications the Authority had with the SQA regarding or relating to exam support materials.
46. However, the Commissioner also recognises the 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 exam support provision following disruption caused by the COVID-19 crisis.
47. 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 exam support materials and in protecting its relationship with the SQA to be, in this case, greater than the public interest in disclosing the withheld information.
48. The Commissioner also considers that the public interest that exists in relation to communications the Authority had with the SQA regarding exam support materials has been met, to some extent, by the information already disclosed to the Applicant in response to his request.
49. 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.

Handling of the request

50. As the Applicant did not raise the matter of the Authority's failure to respond to his request within the statutory timescale laid down by FOISA, the Commissioner cannot reach a formal finding on this point. However, in the circumstances, he considers that he should comment on it.
51. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.
52. It is a matter of fact that the Authority did not provide a response to the Applicant's request for information within 20 working days. It therefore failed to comply with section 10(1) of FOISA.
53. In fact, the Applicant did not receive a response to his request until 22 July 2022, when the Authority should have responded by 3 May 2025 (at the latest). This is a particularly egregious failure to comply with the requirements of section 10(1) of FOISA. The

Commissioner would urge all public authorities to ensure that they take whatever steps necessary to ensure their compliance with the statutory timescales under FOI law.

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 exemption in section 30(b)(ii) of FOISA, the Authority complied with Part 1.

However, the Commissioner finds that the Authority failed to comply with Part 1 (in particular, section 1(1)) of FOISA by:

- not disclosing until during the investigation some information to which it accepted no exemption in FOISA applied, and
- incorrectly withholding some information under the exemption in section 30(b)(ii) of FOISA.

The Commissioner therefore requires the Authority to disclose to the Applicant the information that was wrongly withheld, by 27 February 2026. He will specify to the Authority 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.

Euan McCulloch
Head of Enforcement

13 January 2026