



# Decision Notice 224/2024

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## COVID-19 data and the 2022 exam diet

**Authority: Scottish Qualifications Authority**

**Case Ref: 202200584**

### Summary

The Applicant asked the Authority for information relating to comments made by the Cabinet Secretary for Education on 19 January 2022 during a debate on 2022 exam diet. The Authority provided some of the information requested, withholding other information on the basis that disclosure would substantially inhibit the free and frank exchange of views. The Authority also stated it did not hold some of the information requested.

The Commissioner investigated and found that the Authority had partially breached FOISA in responding to the request, as it wrongly withheld information under the exemptions claimed, disclosed further information during the investigation and failed to respond within legislative timescales. The Commissioner required the Authority to disclose certain 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); 10(1) (Time for compliance); 17(1) (Notice that information is not held); 30(b) (Prejudice to effective conduct of public affairs); 47(1) and (2) (Application for decision by Commissioner)

### Background

1. On 20 January 2022, the Applicant made a request for information to the Authority. The Applicant asked for information relating to comments made by the Cabinet Secretary for Education (Cabinet Secretary) on 19 January 2022 during a debate on the 2022 exam diet. Specifically:

- (i) FOI 21/22 125 – correspondence within the Authority around the “data” referenced by the Cabinet Secretary
  - (ii) FOI 21/22 126 – correspondence between the Authority and the Scottish Government around the above data between 1 September 2021 and 20 January 2022
  - (iii) FOI 21/22 127 – the above data used by the Authority between 1 November 2021 and January 2022
  - (iv) FOI 21/22 128 – the Authority’s definition of “further issues” as referenced by the Cabinet Secretary
2. The Authority failed to respond.
3. On 26 April 2022, following a number of emails chasing a response, the Applicant wrote to the Authority requesting a review of its failure to respond. The Applicant stated that he was dissatisfied with the Authority’s failure to respond as he considered it had done so deliberately because of the upcoming exam diet and to prevent embarrassment to itself and to the Cabinet Secretary.
4. The Authority notified the Applicant of the outcome of its review on 16 May 2022, in the following terms:
  - (i) FOI 21/22 125 – it issued a notice, under section 17(1) of FOISA, that it did not hold the information requested
  - (ii) FOI 21/22 126 – it disclosed some information and withheld the remaining information under section 30(b)(ii) (free and frank exchange of views) of FOISA
  - (iii) FOI 21/22 127 – it directed the Applicant to publicly available COVID-19 data
  - (iv) FOI 21/22 128 – it provided its opinion on what it believed the Cabinet Secretary meant by “further issues”
5. On 18 May 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority’s review for the following reasons:
  - it failed to abide by FOISA timescales
  - its claim that it held no information in relation to FOI 21/22 125 was incorrect, given the disclosure of information on substantively the same topic in FOI 126
  - the exemption applied to FOI 21/22 126 was incorrectly applied to too much information and, in any case, the public interest favoured disclosure
  - the qualitative information he asked for in FOI 21/22 127 was wrongly withheld
  - its response to FOI 21/22 128 offered no insight and avoided answering the question
  - he believed it held more information than it disclosed to him
  - he believed it deliberately delayed responding to his information request to avoid political scrutiny of that response prior to the start of the 2022 exam diet.

## 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 June 2022, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was subsequently 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 Authority was invited to comment on this application and to answer specific questions. These primarily related to how the Authority established what information it held within the scope of the overall request and its application of section 30(b)(ii) of FOISA.

## Commissioner's analysis and findings

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

### FOI 21/22 125

#### ***Section 17(1) – Notice that information is not held***

10. 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 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it.
11. The information to be given is that held by the public authority at the time the request is received, as defined by section 1(4). If no such information is held by the public authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
12. 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 of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. The Commissioner also considers, where appropriate, any reason offered by the authority to explain why it does not hold the information.
13. As noted above, the Applicant had commented, prior to information being disclosed to him during the investigation, that he found it difficult to believe that the Authority did not hold further information.

#### *The Authority's submissions*

14. The Commissioner asked the Authority to describe what searches it had carried out, which records had been searched and any keywords and other search parameters used.
15. The Authority confirmed that it had undertaken additional searches and had identified additional information falling within the scope of the Applicant's request, including one email relevant to FOI 21/22 125.

16. The Authority subsequently disclosed this email to the Applicant (subject to personal data redactions).
17. However, the Authority explained that it had not retained records or evidence of the original searches it had carried out. The Commissioner therefore requested the Authority carry out the searches again.
18. The Authority undertook new searches of the email inboxes (sent and received) of two senior SQA employees – the Director of Policy, Analysis and Standards and the Head of Statistics (the key staff involved in interacting with the Scottish Government on monitoring COVID-19 thresholds) – using the following search terms:
  - “Absence data”
  - “National Qualifications Examinations 2022”
  - “Data”
  - “Covid-related data sources”
  - “Plan B”
19. As a result of these searches, the Authority identified further information falling within the scope of the Applicant’s request (which it subsequently disclosed to the Applicant, subject to personal data redactions).

#### *The Applicant's submissions*

20. The Applicant submitted that the Authority’s claim that it held no information in relation to FOI 21/22 125 was incorrect, given it had disclosed information on substantively the same topic in response to FOI 21/22 126.
21. The Applicant stated that he therefore considered the Authority had failed to carry out appropriate searches for the information requested.

#### *The Commissioner's view*

22. Having considered all of the relevant submissions and the terms of the request, the Commissioner accepts that the Authority has (now) carried out adequate and proportionate steps in the circumstances to establish if the information was held
23. The Commissioner is therefore satisfied, on balance, that the Authority has (now) carried out adequate and proportionate searches likely to identify all relevant information.
24. However, by identifying further information in the course of his investigation, the Commissioner must find that the Authority was not entitled to notify the Applicant, under section 17(1) of FOISA, that it did not hold information falling within the scope of his request.
25. The Commissioner also notes, with disappointment, that the Authority failed to retain records or evidence of the original searches carried out. This is contrary to the Commissioner’s [guidance](#)<sup>1</sup> on the matter, which is clear (at paragraph 50) that such records must be retained, in case the requester seeks a review or appeals to the Commissioner.

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<sup>1</sup> [BriefingSection17Informationnotheld.pdf \(itspublicknowledge.info\)](#)

***Information disclosed during the investigation***

26. During the investigation, the Authority confirmed that it had undertaken additional searches and had identified additional information falling within the scope of the Applicant's request, including a number of emails relevant to FOI 21/22 126.
27. The Authority subsequently disclosed those emails to the Applicant (subject to personal data redactions and a small amount of information being withheld under section 30(b)(ii) of FOISA).
28. During the investigation, the Commissioner queried an entry in the Schedule of Documents provided by the Authority to accompany the withheld information as it purported to withhold a document, but it did not state under what exemption.
29. The Authority confirmed that the document had been withheld in error, and subsequently disclosed that information to the Applicant.
30. The Commissioner must therefore find that the Authority's response to this element of the Applicant's information request failed to comply with section 1(1) of FOISA.

***Interpretation of the request***

31. The Applicant stated that he considered the information disclosed to him deliberately excluded correspondence from the Scottish Government to the Authority, due to the Authority's deliberately "obfuscatory" and "narrow" interpretation of his request.
32. As set out in paragraph 18, the searches carried out by the Authority during the investigation encompass emails sent and received by the Director of Policy, Analysis and Standards and the Head of Statistics (the key staff involved in interacting with the Scottish Government on monitoring COVID-19 thresholds).
33. The Commissioner notes that those searches generated results encompassing correspondence from the Scottish Government to the Authority.
34. In the circumstances, the Commissioner is satisfied that the Authority's interpretation of this element of the Applicant's request was reasonable and that it has (now) carried out adequate and proportionate searches likely to identify all relevant information.

***Section 30(b)(ii) – substantial inhibition to free and frank exchange of views***

35. Section 30(b)(ii) provides that information is exempt 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
36. The chief consideration when applying the exemption in section 30(b)(ii) 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 exchange of views. The inhibition in question must be, or must be likely to be, substantial and therefore of real and demonstrable significance.
37. As with other exemptions importing 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 that inhibition is a remote or hypothetical

possibility. For inhibition to be likely, there would need to be at least a significant probability of it occurring.

38. The Commissioner's [guidance](#)<sup>2</sup> on the matter states that when assessing whether disclosure will cause substantial inhibition, an authority should consider the content of the information and the circumstances in which it was created. Factors to consider may include:
- (i) The identity or status of the author and/or the recipient. There may be an inherent sensitivity in the fact that advice or views were passed from one person to another, depending on the relationship between those parties. Where advice or views are communicated and received as part of an individual's day-to-day professional functions, for example, then the risk of substantial inhibition may well be diminished.
  - (ii) The circumstances in which the advice or views were given. The context in which the communication took place might be relevant; for instance, views might be more sensitive during policy formulation or other discussions.
  - (iii) The sensitivity of the advice or views. The subject matter and content of the advice and opinions, as well as the way in which the advice or opinion is expressed, are likely to be relevant when determining whether the exemption applies. Timing may also be relevant: disclosing advice or opinions while a decision is being considered, and on which further views are being sought, might be more substantially inhibiting than disclosing the information once a decision has been taken. The degree to which a person will be, or is likely to be, inhibited in expressing themselves has to be of some real and demonstrable significance.

#### *The Authority's submissions*

39. The Authority considered that it and the Scottish Government should have the chance to discuss issues in a free and frank manner and that, were the withheld information to be made public, it considered there would be great reticence from staff to record information and their opinions in future situations.
40. The Authority explained that disclosure of the views in the withheld information would, or would be likely to, cause substantial inhibition because the information related to the planned return to formal examinations for the first time since they were cancelled in response to COVID-19.
41. The Authority noted that it was unclear whether the impact of COVID-19 would fully allow this and that the alternative approach to awarding in 2020 and 2021 had led to high profile and sustained criticism.
42. In this context, and with few certainties to work with, the Authority explained that it considered it critical that its officials and those in the Scottish Government were able to express their views openly, honestly and without fear of those views being revisited and criticised following the pandemic when its course and consequences were clear.
43. The Authority submitted that disclosure of the withheld information would inhibit the free and open exchange of views and opinions between officials, particularly in situations where those exchanges were critical.

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<sup>2</sup> <https://www.itspublicknowledge.info/sites/default/files/2022-04/BriefingSection30PrejudicetotheEffectiveConductofPublicAffairs.pdf>

44. While it recognised that accountability for decisions was important, the Authority stated that it believed extreme circumstances – such as COVID-19 – should offer its officials a degree of protection from scrutiny of their decisions.
45. The Authority submitted that if consideration of how a decision made in extreme circumstances will look when reviewed in future is at the forefront of the minds of those making those decisions, there is a risk that decisions will not be made in the best interests of those most affected by them.

#### *The Applicant's submissions*

46. The Applicant submitted that the Authority had incorrectly applied the exemption in section 30(b)(ii) of FOISA to too much information and that, in any case, the public interest favoured disclosure of the information requested.

#### *The Commissioner's view*

47. The Commissioner has taken account of all of the relevant submissions, together with the content of the withheld information.
48. The withheld information primarily relates to interactions from two senior employees of the Authority with the Scottish Government on monitoring COVID-19 thresholds, which were communicated as part of the Authority's employees' day-to-day professional responsibilities.
49. In general terms, the Commissioner considers that it would have been contrary to their professional responsibilities not to have provided views of the type withheld in this case.
50. More specifically, the Commissioner cannot, for the following reasons, accept the arguments advanced by the Authority regarding the substantial inhibition that would be caused, or would likely to be caused, by disclosure of the withheld information:
  - given that it is their professional responsibility to do so, he does not agree that employees of the Authority would not express views of the type they have in the withheld information, on the basis they thought those views would subsequently be made public
  - he does not agree that there is a substantial risk that decisions would not be made in the best interests of those most affected if considerations of those decisions would be made public (i.e. he does not accept that employees of the Authority would refuse to provide views to inform decision-making when they have a professional responsibility to do so, particularly where they suspect failure to do so would lead to poorer outcomes)
  - in his view, the views in the withheld information were not exchanged with any particular frankness or freedom and there is little, if any, disagreement between the parties involved
  - despite twice being invited to do so, the Authority did not provide submissions on the effect of the disclosure of *the particular information* in dispute. Instead, the Authority took something of a class-based approach (an approach rejected by the courts) to the withheld information and only explained in fairly general terms why its application of section 30(b)(ii) should be upheld
  - there is little evidence, generally and historically, to support the sort of general "chilling effect" argument advanced here by the Authority.
51. The Commissioner recognises that there are some arguments in favour of upholding the Authority's application of section 30(b)(ii), namely the subject matter and the timing of the request.

52. However, on balance, the Commissioner is not persuaded, from the submissions he has received or the content of the information itself, that disclosure of the information withheld under section 30(b)(ii) would result in the harm claimed by the Authority.
53. The Commissioner therefore does not accept that the Authority was entitled to rely on the exemption in section 30(b)(ii) for withholding the information it did from the Applicant.
54. Given that the Commissioner does not accept that the Authority was entitled to rely on the exemption in section 30(b)(ii) for withholding this information, he is not required to consider the public interest in section 2(1)(b) for that information.

***Section 30(b)(i) – substantial inhibition to free and frank provision of advice***

55. As with section 30(b)(ii) of FOISA, the chief consideration is not whether the information constitutes advice or opinion, but whether the disclosure of that information would, or would be likely to, inhibit substantially (as the case may be) the provision of advice.
56. In its submissions, the Authority explained that it considered that section 30(b)(i) of FOISA should have been applied to some of the correspondence it had applied section 30(b)(ii) to, and specified a single document as an example of this.
57. The advice in the document in question consists of a fairly anodyne remark from an external stakeholder questioning the data basis of a calculation provided by an employee of the Authority.
58. In the Commissioner's view, it is obviously important that calculations – particularly those provided in order to inform decisions relating to COVID-19 and the 2022 exam diet – are based on robust data.
59. In the circumstances, the Commissioner is not persuaded that the external stakeholder, or another person, would be less likely to express such a view on the basis that it might be disclosed in future.
60. The Commissioner is therefore not, on balance, persuaded from the submissions he has received or the content of the information itself, that disclosure of the information withheld under section 30(b)(i) would result in the harm claimed by the Authority.
61. Consequently, the Commissioner does not accept that the Authority was entitled to rely on the exemption in section 30(b)(i) for withholding the information it did from the Applicant.
62. As the Commissioner does not accept that the Authority was entitled to rely on the exemption in section 30(b)(i) for withholding the information, he is not required to consider the public interest in section 2(1)(b).

**FOI 21/22 127**

63. 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 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.
64. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received. This is not necessarily to be equated with information an applicant believes the authority should hold.



65. The Applicant stated that he considered the Authority should have disclosed to him the qualitative information it referred to in its review response.
66. The Authority explained that the qualitative information it referred to in its review response was not formally recorded, but was derived from ongoing and daily interactions between its staff at all levels and their counterparts in other areas of the education system.
67. On balance, the Commissioner accepts the Authority's explanation that much of the qualitative data it referred to was derived from ongoing and daily interactions with stakeholders across the education system and it was therefore not formally recorded.
68. The Commissioner also notes that it is not his role to decide whether information that is not held by a Scottish public authority *should* be held.
69. During the investigation, the Authority identified (and disclosed to the Applicant) a document providing information relating to the qualitative data it referred to in its review response.
70. As in paragraph 28, the Commissioner queried another entry in the Schedule of Documents provided by the Authority to accompany the withheld information as it also purported to withhold a document, but it again did not state under what exemption.
71. The Authority confirmed that the document had been withheld in error, and subsequently disclosed that information to the Applicant.
72. The Commissioner must therefore find that the Authority's response to this element of the Applicant's information request failed to comply with section 1(1) of FOISA.

**FOI 21/22 128**

73. The Applicant submitted that the Authority's response to the information requested was "high level", offered "no insight" and avoided answering the question asked.
74. The Authority queried to what extent the Applicant's request could be considered valid under FOISA, as it did not appear to ask for recorded information.
75. The Authority explained that, in the spirit of being helpful, it, however, decided to provide a response to the Applicant and that it did not consider it had any further information it could have provided to him.
76. Section 73 of FOISA sets out that "information" means information *recorded* in any form. This means that FOISA does not, for example, cover someone's thoughts or opinions, unless they have been recorded in some way.
77. With this in mind, the Commissioner agrees with the Authority that this request is not valid under FOISA. This is because it is formulated in such a way that it can only reasonably be answered by reference to the Authority's opinion on what was meant by the phrase used by the Cabinet Secretary.
78. However, the Commissioner notes that the Authority's failure to respond to the Applicant's information request deprived him of the opportunity to clarify or refine his request.
79. If given that opportunity, the Commissioner considers it likely that the Applicant would have been able to clarify his request to enable the Authority to provide him with a more meaningful response.
80. In the circumstances, the Commissioner is satisfied the Authority's response to FOI 21/22 128 was adequate.

## Procedural matters

81. The Applicant was dissatisfied that the Authority failed to respond to his information request within the statutory timescales set out in FOISA.
82. 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.
83. It is a matter of fact that the Authority did not provide a response to the Applicant's information within 20 working days.
84. The Commissioner must therefore find that the Authority failed to comply with section 10(1) of FOISA in this case.
85. The Commissioner recognises the Applicant's belief that the Authority deliberately failed to respond to his request to avoid scrutiny of that response before the 2022 exam diet.
86. While still unacceptable, the Commissioner accepts, on balance, the Authority's explanation that its failure to respond was not deliberate and was instead a result of resource pressures and dealing with other complex requests submitted around the same time.

## 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 the Authority complied with Part 1 of FOISA in respect of its response to FOI 21/22 128.

However, the Commissioner finds that the Authority failed to comply with Part 1 of FOISA in the following respects:

- it wrongly issued a section 17(1) notice when it held further information falling within the scope of FOI 21/22 125
- it wrongly withheld information under section 30(b) relating to FOI 21/22 126
- it failed to disclose information relating to FOI 21/22 126 and 127 until during the investigation
- it failed to respond to all four information requests within the timescales laid down by section 10(1).

The Commissioner therefore requires the Authority to disclose to the Applicant the information it wrongly withheld under section 30(b) of FOISA relating to FOI 21/22 126, by **22 November 2024**.

The Commissioner does not require the Authority to take any action in respect of the other failures in response to the Applicant's information request.

## **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**

**8 October 2024**