Decision Notice

Decision 060/2009 Mr F and the Scottish Qualifications Authority

Details of appointees responsible for examinations in three subjects

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Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610

Summary

Mr F requested information about the individuals appointed to carry out certain roles within the examination process for three subjects for which qualifications are awarded by the Scottish Qualifications Agency (SQA). Mr F also asked for minutes of some meetings relating to these examinations. SQA refused to provide details of its appointees, considering this information to be personal data which should not be disclosed. SQA provided copies of the minutes, where available, with some personal data redacted. Following a review, Mr F remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that SQA had partially dealt with Mr F's request for information in accordance with Part 1 of FOISA, by correctly applying the exemption in section 38(1)(b) to some information where disclosure would contravene the first data protection principle. The Commissioner found that the other information was not exempt from disclosure under section 38(1)(b), section 30(c) or section 39(1) of FOISA and should be provided to Mr F.

The Commissioner found that SQA also failed to comply with section 1(1) of FOISA by omitting to provide some of the information it held in relation to Mr F's request. Given that SQA has now provided this information to Mr F, the Commissioner did not require SQA to take any action in response to this failure.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (3) and (6) (General entitlement); 2(1) and 2(e)(ii) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs); 38(1)(b), (2)(a)(i) and (b) (Personal information) and 39(1) (Health, safety and the environment)

Data Protection Act 1998 (the DPA) section 1 (Basic interpretative provisions) (definition of personal data); schedules 1 (The data protection principles) (the first data protection principle) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (condition 6(1))

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 17 July 2007, Mr F wrote to SQA requesting information about three examination subjects (Psychology, Philosophy, and Religious, Moral and Philosophical Studies (RMPS)) at Intermediate Two, Higher and Advanced Grade level. He asked for:

   a) *the markers who have undertaken course marking and for how log. Reference should also be made to which educational establishment, if any, they belonged.*

   b) *the moderators who undertook Unit marking, whether centrally or postal etc and for how long. Reference should also be made to the which educational establishment, if any, they belonged.*

   c) *the exam setters for each subject including reference to how long they have undertaken this function and the educational establishment, if any, to which they belong. The names of the Principal examiners for each subject.*

   d) *the names of any individuals involved in preparing and verifying Unit moderations (i.e. National Assessment Bank (NAB) items), including reference to how long they have carried out this function and any educational establishment to which they have belonged.*

   e) *all minutes of all Social Science Advisory Panel meetings and minutes of Subject Advisory Panel meetings since 1992.*

2. SQA responded on 20 August 2007. In relation to points (a) to (d) above, it advised Mr F that the information requested was considered to be personal data, as defined by the DPA, and exempt from disclosure under section 38(1)(b) of FOISA, in conjunction with section 38(2)(a)(i). SQA also considered the information to be exempt from disclosure under sections 30(c) and 39(1) of FOISA. In response to request (e) above, SQA advised that it did not hold such documents for years before 2000, but provided copies of 16 documents described as "all the relevant documents we hold" after redacting such personal data as it believed to be exempt from disclosure under section 38(1)(b) of FOISA. It explained that Panels met once or twice yearly as required.

3. On 29 August 2007, Mr F wrote to SQA requesting a review of its decision. Mr F raised two points for review:

   a) He asked SQA to reconsider its refusal to provide the information requested in (a) to (d) above.

   b) He complained that no minutes of Subject Advisory Panels for Philosophy and Psychology had been provided.

4. SQA notified Mr F of the outcome of its review on 1 October 2007. In relation to Advisory Panel meetings for Philosophy and Psychology, it confirmed that he had received copies of all the relevant documents which were held. SQA advised that further inquiries had confirmed that no minutes of assessment panel meetings were taken; Mr F had already received the action notes from those meetings, which would include reference to any specific actions relating to Philosophy and Psychology.

5. In relation to the other parts of Mr F's request (points (a) to (d) in paragraph 1 above), SQA advised that, after review, it had decided that the names of Principal Assessors and Senior Verifiers should be included on their reports, commencing with the 2008 diet. (No further information was provided to Mr F at this time, but on 25 April 2008 SQA sent him the names of the Principal Assessors and Senior Verifiers.) SQA upheld its decision to withhold information about the identities of the other individuals involved in the examination process.

6. On 27 November 2007 Mr F wrote to the Commissioner, stating that he was dissatisfied with the outcome of SQA's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr F queried whether he had been supplied with all relevant minutes, advising that he was in possession of some minutes which SQA had claimed did not exist. On 12 December 2007, Mr F sent a second letter to the Commissioner, setting out his complaint in relation to the decision to withhold the identities of the individuals involved in various parts of the examination process and explaining why he considered it to be in the public interest for this information to be released.

7. The application was validated by establishing that Mr F had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

8. On 21 January 2008, SQA was notified in writing that an application had been received from Mr F and was asked to provide the Commissioner with any information withheld from Mr F. SQA responded with the information requested and the case was then allocated to an investigating officer.

9. The investigating officer subsequently contacted SQA, providing it with an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, SQA was asked to confirm which exemptions it had applied and to explain in more detail why those exemptions should be upheld.

10. SQA provided a full submission on 7 May 2008, responding to the questions raised by the investigating officer and commenting on points raised by Mr F in his application to the Commissioner. SQA provide additional comments in relation to its submission and the circumstances of the case in further correspondence and telephone calls during the investigation.

Request for meeting minutes – scope of request

11. In his application to the Commissioner, Mr F queried whether he had been provided with all relevant minutes held by SQA, stating that he held copies of some of the minutes which (he said) SQA claimed did not exist.

12. In their correspondence, SQA and Mr F had used different terminology to describe the minutes requested, but were apparently content that each understood what information had been requested. However, the variation in terminology seems to lie behind one of the complaints raised in Mr F's application to the Commissioner.

13. Mr F originally asked for "All minutes of all Social Science Advisory Panel meetings and minutes of Subject Advisory Panel meetings since 1992". In its response, SQA used this wording as a paragraph heading, but went on to refer to "your request for the minutes of assessment panels since 1992". SQA provided sixteen documents it believed were relevant to this part of Mr F's request. These were action notes or "grids" from the assessment panel meetings for Social Sciences and RPMS, with personal data redacted. SQA later explained that because Mr F had targeted the assessment process in his initial request, and had asked for minutes from 1992, SQA had interpreted "Social Science Advisory Panel meetings" to refer to the Social Sciences Advisory Group wound up in 2002 and replaced with the Social Sciences Assessment Panel: the notes from the assessment panel had therefore been provided.

14. Mr F did not dispute that the Assessment Panel minutes provided were relevant to his request for minutes of Advisory Panel meetings: his request for review simply queries the fact that no minutes of Subject Advisory Panels for Philosophy and Psychology had been provided. However, in his application to the Commissioner, Mr F complained that SQA had not provided all minutes covered by his request, stating that he already possessed copies of some minutes from the Subject Advisory Panels for Philosophy and Psychology which had not been provided by SQA in response to his request.

15. SQA queried Mr F's statement that he was in possession of minutes from the Subject Advisory Panels for Philosophy and Psychology, and explained to the investigating officer that no such panel meetings had taken place. This point was raised with Mr F, who confirmed that the minutes he held were in fact minutes of the Subject Advisory Group, not the Subject Advisory Panel.

16. Following this confirmation from Mr F, SQA realised that his request could be interpreted more widely, to cover minutes or notes from the groups known as NQR Advisory Groups. These were groups of subject specialists brought together to revise courses under SQA/SEED 2001 NQR major review, and had previously also been known as Subject Advisory Groups. (They are now called Qualifications Design Teams to distinguish them from the Assessment Panels.) SQA sent Mr F copies of all the notes from the NQR Philosophy Advisory Group from 2003 to 2005, and one note from the Psychology NQR Advisory Group from 2003 (10 documents in all).

17. The issues presented by this part of Mr F's request are considered more fully in the next part of the decision notice.

Commissioner's analysis and findings

18. In coming to a decision on this matter, the Commissioner has considered all of the information and the submissions that have been presented to him and is satisfied that no matter of relevance has been overlooked.

19. It is clear from Mr F's application to the Commissioner that he has specific concerns relating to the examination process for the subjects listed in paragraph 1 above, and particular reasons for seeking the information covered by his request. In its submissions to the Commissioner SQA has commented on the issues raised by Mr F. However, in considering whether SQA's response to Mr F's information request complied with Part 1 of FOISA, it has not been necessary to examine in detail in this decision notice all the issues raised by Mr F or SQA.

Request for meeting minutes

20. As noted above, during the investigation it became clear that this part of Mr F's application to the Commissioner relates to minutes of the Subject Advisory Groups since 1992, rather than the Subject Advisory Panel to which he had mistakenly referred.

21. SQA did not accept that it had ever advised Mr F that minutes of the Subject Advisory Groups did not exist. It explained to the Commissioner that Subject Advisory Groups were superseded by the Assessment Panels, and that these meetings produced action notes rather than minutes. The Social Science Advisory Group was wound up on 22 May 2002 and the first Social Sciences Assessment Panel was held the day before, on 21 May 2002. Psychology and Philosophy were covered by both of these. RMPS did not have an Advisory Group, and the first RMPS Assessment Panel was held on 23 May 2001.

22. SQA advised that the designation "Subject Advisory Group" was also given to groups of subject specialists brought together for the purposes of a major review of courses (these groups are now called Qualifications Design Teams). After receiving confirmation that Mr F's complaint related to minutes of Subject Advisory Groups (rather than Subject Advisory Panels, as stated) SQA identified another ten sets of meeting notes falling within the scope his request, comprising all notes from the Subject Advisory Groups for Philosophy (2003 – 2005) and one note from the Psychology Advisory Group from 2003. These documents were provided on 22 May 2008, after SQA had redacted information which it considered exempt under section 38(1)(b) of FOISA. SQA stated that it had supplied redacted copies of all the relevant action notes which it held.

23. The issues for the Commissioner to consider in relation to the minutes are:

- whether all of the minutes supplied to Mr F fall within the scope of his request;

- whether all of the information falling within this part of Mr F's request has now been identified;

- the extent to which SQA complied with the provisions of FOISA in responding to this part of Mr F's request; and

- whether SQA was justified in redacting certain information from the minutes before supplying copies.

24. The Commissioner notes that Mr F did not query whether the notes from the Assessment Panel meetings, supplied on 20 August 2007, were relevant to his request for "All minutes of all Social Science Advisory Panel meetings and minutes of Subject Advisory Panel meetings since 1992". The Commissioner finds that, on the basis of the explanations provided by SQA (see paragraphs 13 and 21 above), it was reasonable for SQA to consider the Assessment Panel notes to fall within the scope of Mr F's request, despite the variation in terminology.

25. The next question is whether all information relating to Mr F's request has now been identified. The Commissioner accepts that, in dealing with Mr F's request, SQA carried out searches which it might reasonably have expected to retrieve any relevant documents, given the records management knowledge and practices within SQA. It is clear that SQA believed it had provided redacted copies of all relevant meeting notes and had not sought to withhold any documents. However, after Mr F clarified that he had mistakenly referred to Subject Advisory Panels rather than Subject Advisory Groups when making his request, SQA identified another 10 documents which were also covered by his request and which had not been retrieved by the initial searches.

26. It seems that SQA was already aware that notes from the Subject Advisory Groups detailed in paragraph 22 above would be covered by the terms of Mr F's request, but believed that the notes had been routinely destroyed. SQA stated that it had moved premises in 2006, at which time all documents were reviewed and either retained, scanned to electronic file, or destroyed. SQA believed that a full search of the existing files, both hard copy and electronic, had been undertaken in order to respond to Mr F's request. Only when Mr F's request was reconsidered during the investigation was it discovered that some of the notes were still retained. SQA had been unaware that a member of staff had retained nine meeting notes which would ordinarily have been routinely destroyed (one other relevant document was discovered misfiled with those notes). SQA pointed out that the series of meetings covered by the notes had a short life (2003 – 2005) and believed this went some way to explaining why the notes were not identified as being within the scope of the request at an earlier stage.

27. The Commissioner accepts that these documents were inadvertently rather than deliberately withheld, but would remind Scottish public authorities that when responding to information requests their response must take into account all information they hold, and searches should be adequate to retrieve all relevant information. The Commissioner has concluded that SQA failed to comply with section 1(1) of FOISA, in failing to provide Mr F with information which he had requested and which was held by SQA. The Commissioner notes that SQA has remedied this failure and has now provided Mr F with redacted copies of all documents covered by this part of his request.

28. The Commissioner would also comment that where there is any ambiguity or doubt about the specific information requested by an applicant because of the terminology used in the request, the public authority should take steps to clarify this as soon as possible. In this case, even though SQA believed it understood what information was represented by the terminology in Mr F's request, much of the confusion on this point could have been avoided by seeking his confirmation.

29. The Commissioner will go on to consider whether SQA was justified in withholding some of the information in the minutes, or whether this information should also have been provided under FOISA.

Information withheld

30. In addition to his request for minutes, Mr F asked for the names of SQA appointees undertaking certain roles in relation to assessment and quality assurance in three examination subjects, together with their length of service in relation to that function, and the education establishment to which they belonged (see points (a) to (d) of paragraph 1, above).

31. During the investigation it became clear that although Mr F's request for minutes extended to information dating from 1992, his request for the details of appointees related to examinations which had been introduced following the "Higher Still" reform of 1999. The Commissioner therefore finds those parts of Mr F's request listed in points (a) to (d) of paragraph 1 above to be limited in scope to the years in which the particular examinations he specified were held, and not to cover any earlier examinations in those subjects.

32. As noted previously, some of the terminology in Mr F's request differs from that now used by SQA. Where Mr F has referred to "Moderators who undertook Unit marking" this has been understood to refer to "Verifiers"; and SQA now uses the term "Principal Assessor" instead of "Principal Examiner". SQA had previously advised Mr F of these changes in terminology and consequently it can be assumed that both parties were referring to the same roles. SQA has also advised that where Mr F referred to "individuals involved in preparing and verifying Unit moderations", this was understood to refer to the NAB writers and vetters.

33. Having initially withheld the details of all individuals concerned, on reviewing its response to Mr F's request SQA decided that, commencing with the 2008 Diet, the names of the Principal Assessors and Senior Verifiers should be included on their published reports. SQA did not, at this point, decide that Mr F should be provided with the names of the Principal Assessors and Senior Verifiers for the years and subjects covered by his request, but this information was sent to him during the investigation of his case.

34. SQA did not provide information about the place of employment and length of service of the Principal Assessors and Senior Verifiers. The SQA also continued to withhold all of the information requested by Mr F relating to the other appointees. SQA considered these sets of information to be personal data exempt under section 38(1)(b) of FOISA, and also to be exempt under sections 30(c) and 39(1).

35. The information withheld from the minutes consisted of the names and other details about SQA appointees in the groups covered by parts (a) to (d) of Mr F's request, and the names of some other individuals who participated in the meetings or whose views are recorded in the minutes. This information was also withheld on the grounds that the exemptions in sections 38(1)(b), 39(1) and 30(c) of FOISA applied.

Section 38(1)(b) – personal information

36. The Commissioner first considered whether the exemption in section 38(1)(b) of FOISA should be upheld in relation to the information withheld from Mr F; that is, the details of the appointees and the names redacted from the minutes provided to him.

37. Section 38(1)(b), read in conjunction with either section 38(2)(a)(i) or (2)(b) (as appropriate), provides that information is exempt information if it constitutes personal data (as defined in section 1(1) of the DPA) and if its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in the DPA. This is an absolute exemption and therefore is not subject to the public interest test laid down by section 2(1)(b) of FOISA.

38. In order for a public authority to rely on this exemption, it must show firstly that the information which has been requested is personal data for the purposes of the DPA, and secondly that disclosure of the information would contravene at least one of the data protection principles laid down in the DPA.

39. The Commissioner is satisfied that all of the information withheld in this case (i.e. the details of the appointees, and the information withheld from the minutes provided to Mr F) is personal data. He notes that all of this information relates to living individuals who can be identified from those data, or from those data in conjunction with other information available to the data controller (or, indeed, members of the public).

40. Turning to consider the data protection principles, SQA argued that disclosure of the information would contravene the first data protection principle. This principle states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met, and in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met. (SQA did not suggest to the Commissioner that the information in question is sensitive personal data and so the Commissioner is satisfied that he is not required to consider whether any of the conditions in Schedule 3 to the DPA can be met.)

41. The first data protection principle therefore includes three separate aspects: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. However, these three aspects are in many ways connected. For example, if there is a specific condition which permits the personal data to be disclosed, it is likely that the disclosure will also be fair.

42. The Commissioner considers that only condition 6(1) of Schedule 2 to the DPA might be considered to apply in this case. Condition 6(1) allows personal data to be processed (in this case, disclosed in response to Mr F's information request) if disclosure of the data is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

43. There are a number of tests which must be considered before condition 6(1) can apply:

• Does Mr F have a legitimate interest in having this personal data?

• If so, is the disclosure necessary to achieve those legitimate aims? (In other words, is disclosure proportionate as a means and fairly balanced as to ends or could these legitimate aims be achieved by means which interfere less with the privacy of the data subjects?)

• Even if disclosure is necessary for the legitimate purposes of the applicant, would disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects? This will involve a balancing exercise between the legitimate interests of Mr F and those of the data subjects. Only if the legitimate interests of Mr F outweigh those of the data subjects can the personal data be disclosed.

44. The Commissioner has considered these tests separately in relation to the two groups of information withheld.

Details of appointees (parts (a) – (d) of Mr F's request)

45. Regarding his legitimate interests, Mr F has highlighted his concerns about the narrow range of views represented by the SQA appointees in certain subjects, as evidenced by the fact that a high proportion of markers in some subjects are drawn from a small number of educational establishments, while some individuals are known to hold multiple appointments (e.g. senior moderator, course verifier, moderator and marker). Mr F believes such arrangements may make it difficult to ensure a fair and broad perspective on these subjects, and create difficulties in guaranteeing the quality of subject assessment instruments. He argued that disclosure of information which reveals where appointees are drawn from (in terms of educational establishment and schools of thought) would allow identification of the implications for a fair and open examination system.

46. The Commissioner accepts that there is a legitimate interest in information which enables reasonable scrutiny of the public examination process in Scotland and which increases the transparency and accountability of that process, particularly where specific questions have been raised in relation to that process. The Commissioner accepts that Mr F has a legitimate interest in information about the way in which examination process in Scotland is conducted, given its potential impact on the lives of many people.

47. In particular, the Commissioner accepts that Mr F has a legitimate interest in information which would show the extent to which responsibility for the different parts of the examination process is concentrated on a small group of individuals, in relation to the subjects referred to in his information request. The Commissioner notes that SQA has released Assessment Panel minutes in which similar concerns to those raised by Mr F are recorded. For instance, as Mr F pointed out during the investigation, the Social Sciences Assessment Panel Action Grid of 15 March 2005 records the view that in relation to Higher Philosophy, "we are always looking for new markers", and also records discussion about the need to rotate teams, in the face of concerns that some appointments were seen as "a job for life".

48. The Commissioner must next consider whether disclosure of the personal data relating to the appointees is necessary to achieve Mr F's legitimate interests. In reaching his view on this point, the Commissioner has taken into account submissions made by both Mr F and SQA. SQA has sought to refute many of the points raised by Mr F in his application to the Commissioner, in explaining his reasons for requiring information about SQA appointees. While acknowledging that markers in the three subjects are drawn from a small pool, and that some appointees hold multiple appointments, SQA has pointed to the quality assurance processes it has in place which mean that no single individual is responsible for a student's exam mark.

49. The Commissioner has considered all of these points, and wishes to make clear that his consideration of this case does not require him to reach a decision as to whether Mr F's concerns about the examination process are borne out by the analysis of the information he has requested. However, he does accept that full understanding of the management of the examinations that are of interest to Mr F would require access to the information he has requested. He therefore concludes that the processing (via disclosure) is necessary for the purposes of the legitimate interests identified by Mr F.

50. The Commissioner must finally consider whether disclosure of the details of the appointees would cause unwarranted prejudice to the rights and freedoms of the data subjects. As noted above, this will involve a balancing exercise between the legitimate interests of Mr F and those of the appointees. Only if the legitimate interests of Mr F outweigh those of the appointees can the information be disclosed without breaching the first data protection principle.

51. In a briefing recently published by the Commissioner[1], the Commissioner notes a number of factors which should be taken into account in carrying out this balancing exercise. These include:

    a. whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances)

    b. the potential harm or distress that may be caused by the disclosure

    c. whether the individual has objected to the disclosure

[1] "Personal information" - http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.asp

d. the reasonable expectations of the individuals as to whether the information would be disclosed

52. The Commissioner has also taken into account guidance from the (UK) Information Commissioner, which advises that where personal data relates to an individual's public function rather than their private life, it is relevant to consider their seniority when deciding whether the information should be disclosed.[2]

53. The Commissioner has first considered the effect of disclosure on the individual appointees. The SQA has submitted that appointees concerned have an expectation of confidentiality, given that their identities have historically not been disclosed. SQA has pointed to a statement in the Appointee Handbook to the effect that personal data held for appointment purposes will not be used or disclosed in any manner incompatible with that purpose.

54. The SQA consulted appointees about the possibility of disclosing their names (but not about the possibility of disclosing the other information sought by Mr F) and this elicited a mixed response, with a significant proportion of those responding expressing concern at the prospect of their name being released.

55. The SQA raised particular concerns about individual appointees being contacted regarding their duties directly at home or their work by members of the public. The SQA emphasised in its submissions that marking is undertaken in accordance with detailed instructions, and is then subject to a rigorous quality assurance process where marks are checked and, if necessary, revised. The SQA therefore took the view that the appropriate route for any person to raise questions or concerns regarding the examination process was via the SQA itself.

56. In considering this test, the Commissioner has drawn a distinction between the personal data of senior appointees, that is, the Senior Verifiers and Principal Assessors, and the other appointees included in Mr F's information request.

57. In relation to the course markers, the verifiers ["moderators who undertook Unit marking"], the exam setters and the NAB writers and vetters, the Commissioner takes the view that, where these individuals did not also hold any post as a Senior Verifier or Principle Assessor, these were not senior appointees with a public profile, or with significant levels of personal responsibility for the examination process.

58. The Commissioner recognises that these individuals would not generally have expected their details to be disclosed in response to a request such as that made by Mr F, and that the examination process has proceeded in the past without such disclosure. He also recognises that public disclosure could lead to individual markers being contacted by members of the public in a way which could intrude into their private lives or primary professional duties.

[2] Freedom of Information Act Environmental Information Regulations Practical Guidance: When should names be disclosed? Available at http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/whenshouldnamesbedisclosed.pdf

59. The Commissioner has concluded that the legitimate interests of these individuals outweigh those of Mr F in this case. As a result, he has concluded that no condition in schedule 2 of the DPA can apply in this case, and therefore disclosure of information about these individuals would contravene the first data protection principle. Therefore, the Commissioner finds information about these individuals to be exempt from disclosure under section 38(1)(b) of FOISA.

60. However, the Commissioner has identified a method of providing some of the information relating to these appointments which would partially fulfil Mr F's legitimate interests without disclosing the actual identities of the individuals concerned. Consequently, the information would no longer be personal data and would no longer be exempt under section 38(1)(b).

61. The Commissioner considers that, for each of the examinations specified by Mr F, the number of individuals appointed to each role, the number of educational establishments represented by the individuals appointed to each role, and information about the length of service of the appointees in each role should be disclosed.

62. Turning to the more senior appointees, the Commissioner notes that the names of the Senior Verifiers and Principal Assessors have already been released to Mr F by SQA and will be published in future. The educational establishments and the length of service of these individuals have not been disclosed.

63. The Commissioner also notes that some of the Senior Verifiers and Principal Assessors held multiple appointments within SQA, which included some less senior roles such as marker, exam setter, or verifier. The details of these less senior appointments are covered by parts (a) to (d) of Mr F's request.

64. The Commissioner accepts that, on the basis of past practice by SQA, the senior appointees would not expect information about their other SQA appointments, their length of service or their educational establishment to be disclosed to others. However, the Commissioner notes that the names of senior appointees will now be published by SQA, and understands this decision recognises the seniority of those appointees, in terms of responsibility and decision-making.

65. The Commissioner also notes that once the names of senior appointees are known, in many cases it is not difficult to find out the educational establishment in which the individual works, from other information publicly available.

66. In the circumstances, the Commissioner has concluded that it would not cause unwarranted prejudice to the rights and freedoms or legitimate interests of this group of data subjects (those who hold or have held posts as Senior Verifiers or Principal Assessors) to disclose information about the other SQA appointments they hold or have held, their length of service in these roles, and their educational establishment. The Commissioner does not believe this would greatly diminish the privacy of the data subjects, particularly given that the information does not relate to their personal lives, but about work done in relation to a professional appointment. The Commissioner finds that any prejudice to the data subjects' rights and freedoms and legitimate interests is not unwarranted and is outweighed by the legitimate interests of Mr F, as previously identified and discussed in this decision notice.

67. Having found that condition 6 of schedule 2 of the DPA can be met for the information requested by Mr F where it relates to the holders of these senior appointments, the Commissioner has gone on to consider whether (as required by the first data protection principle) disclosure would also be fair and lawful. The Commissioner considers that disclosure would be fair, for the reasons already outlined in relation to condition 6. SQA has not put forward any arguments as to why the disclosure of the information would be unlawful (other than in terms of a breach of the data protection principles), and the Commissioner is satisfied that the disclosure of the data under FOISA would not breach the first data protection principle.

68. The Commissioner therefore finds that the exemption in section 38(1)(b) of FOISA should not be upheld in relation to the details of all of the relevant appointments held by senior appointees, their length of service in those roles and their educational establishments.

Personal data withheld from minutes

69. In relation to the limited personal data withheld from the minutes, the Commissioner again accepts that there is a legitimate interest in information which would increase transparency regarding the review and development of educational qualifications in Scotland, and so allow this process to be open to reasonable scrutiny. However, he is not persuaded that disclosure of the personal data withheld from the SQA minutes would serve this purpose, except where it relates to the senior appointees whose details were considered above.

70. Where the redacted information names other individuals, the Commissioner has concluded that it does not contribute further to understanding the process recorded in the minutes, and that Mr F's legitimate interests are met by the disclosure of the minutes without requiring disclosure of this information.

71. The Commissioner therefore finds that condition 6 cannot be met in relation to the personal data withheld from the minutes, where this relates to individuals other than the senior appointees, because the information withheld is not necessary for the legitimate interests identified. As the Commissioner has not found that any of the conditions in Schedule 2 of the DPA are met, he concludes that disclosure of this personal data requested would contravene the first data protection principle; accordingly, he finds that the information is exempt from disclosure under section 38(1)(b) of FOISA.

72. The Commissioner has gone on to consider the balancing exercise required by condition 6 only in relation to the names of Principal Assessors redacted from documents 9, 10 and 16. Given that SQA has decided that names of Principal Assessors should be published, the Commissioner does not consider that disclosure would cause any significant further intrusion into the private lives of the individuals concerned, whether or not they would have expected their names to be withheld in this context. In all the circumstances, the Commissioner has concluded that the processing is not unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the Principal Assessors named in these documents. Therefore, condition 6 can be met for this information.

73. For the reasons set out in relation to condition 6 (and also as set out in paragraph 67 above), the Commissioner has concluded that disclosure would not be unfair or otherwise unlawful. Therefore the Commissioner has concluded that the disclosure of these names in the context of the minutes would not contravene the first data protection principle. The Commissioner finds that the information in the minutes relating to the Principal Assessors was wrongly withheld under section 38(1)(b) of FOISA.

Summary of conclusions relating to section 38(1)(b)

74. The Commissioner has found that the following information is not exempt from disclosure under section 38(1)(b) of FOISA.

- in relation to each of the examinations specified by Mr F, the number of individuals appointed to each role in each examination year, the number of educational establishments represented by the individuals appointed to each role in each examination year, and information about the length of service of the appointees in each role (e.g. *x* number of markers for Higher Philosophy with 3 years' service).

- in relation to the most recent and past Principal Assessors and Senior Verifiers for the examinations covered by Mr F's request, details of the other appointments these individuals hold or have held, in terms of the appointments specified in parts (a) to (d) of Mr F's request; their length of service in all relevant roles (including the senior roles); and their educational establishment.

- the names of Principal Assessors in documents 9, 10 and 16 (copies of minutes previously provided to Mr F in redacted form).

75. The Commissioner will go on to consider whether the other exemptions cited by SQA should be upheld in relation to this information.

Section 30(c) – prejudice to effective conduct of public affairs

76. SQA applied the exemption in section 30(c) to all information withheld from Mr F. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". (The word "otherwise" is used here to differentiate this particular exemption from the other types of substantial prejudice - such as substantial inhibition to the free and frank provision of advice or exchange of views – covered in other parts of section 30.)

77. Section 30(c) applies where the harm caused, or likely to be caused by disclosure is at the level of substantial prejudice. The Commissioner's published guidance on this exemption makes it clear that the damage caused by disclosure must be real and significant, as opposed to hypothetical or marginal.

78. SQA provided several arguments in support of the exemption in section 30(c). SQA's arguments were framed in terms of the harm that would occur if full details of all appointees were to be disclosed; however, the Commissioner has already indicated that no such disclosure is warranted by Mr F's legitimate interests. Some of SQA's arguments become irrelevant when considering disclosure of the limited information detailed in paragraph 68 above. The Commissioner has considered all arguments put forward by SQA but in this decision notice will discuss only those points which bear directly upon the decision whether the information in paragraph 74 is exempt from disclosure under FOISA or should be released.

79. SQA has argued that schools could be disrupted by attempts to contact appointees at their place of work, and feared this could lead to centres withdrawing their support of the appointee process.

80. The Commissioner notes that only the identities of senior appointees would be revealed through disclosure of the information in question, which is information that SQA has already decided to publish. The Commissioner does not accept that this limited disclosure would have the consequences outlined in the previous paragraph.

81. SQA also stated that it could not treat subjects and level in isolation, and any decision to publish information must be mirrored across the whole of the portfolio. SQA advised that there are approximately 15,000 appointees occupying some 20,000 positions, most of whom are engaged on a short term engagement and appointed annually. SQA anticipated a heavy administrative burden in seeking consent from all appointees for their details to be published, and argued that the time and resources required to undertake this task would be prejudicial to the conduct of its public affairs.

82. The Commissioner will only consider the effects of disclosure of information covered by the terms of Mr F's request, and in this decision notice has already made it clear that he does not require full details of all appointees to be disclosed, finding that Mr F's legitimate interests can be met by providing the statistical information previously detailed. Although SQA may take the view that any decision to disclose information must apply to all courses and subjects, the Commissioner cannot consider arguments relating to disclosure on this scale, which goes beyond the scope of Mr F's request.

83. The Commissioner does not consider that it would be unduly burdensome to provide Mr F with the statistical information detailed in paragraph 74.

84. The Commissioner therefore finds that in relation to the information outlined in paragraph 74, the exemption in section 30(c) of FOISA cannot be upheld. As he has found that the exemption does not apply, the Commissioner is not required to consider whether the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

Section 39(1) – Health, safety and the environment

85. SQA has applied the exemption in section 39(1) of FOISA to all of the information withheld from Mr F. Section 39(1) states that information is exempt information if its disclosure under FOISA would, or would be likely to, endanger the physical or mental health or the safety of an individual. This test is broad enough to cover harm which could foreseeably occur in the future as well as immediate harm. The exemption is subject to the public interest test contained in section 2(1)(b) of FOISA.

86. SQA anticipates that disclosure of the names and educational establishments of its appointees would leave them open to undue pressure and harassment from aggrieved candidates or their parents, which could affect the health and safety of appointees. The Commissioner will consider this argument in relation to the information not found to be exempt from disclosure under section 38(1)(b); that is, the names of senior appointees, details of the other appointments these individuals hold or have held, in terms of the appointments specified in parts (a) to (d) of Mr F's request; their length of service in these roles; and their educational establishment.

87. SQA expressed general concern that should an appointee be identified by disclosure of the information, the fact that they may have had no direct responsibility for the marking of a particular paper would not shield them from a determined candidate or parent. SQA explained that it deals with many complaints following the annual certification and by doing so aims to shield individual appointees from involvement in this process. SQA noted that some cases are pursued over a period of months or even years. SQA drew the Commissioner's attention to concerns about incidents in which appointees have been subject to potentially harassing behaviour.

88. The exemption in section 39(1) of FOISA can only apply if disclosure would or would be likely to endanger the appointee's physical or mental health, or their safety.

89. Turning to the words "would or would be likely to", the Commissioner is aware that the word "likely" is open to interpretation. It may mean 'more probable than not', or it may mean 'more than fanciful'. The general legal principle was explained by Chadwick LJ (in Three Rivers District Council v Governor and Company of the Bank of England (No 4) [2002] EWCA Civ 1182, [2003] 1 WLR 210) when he said that '"likely' does not carry any necessary connotation of 'more probable than not'. It is a word which takes its meaning from context." In other judgements 'likely' has been taken to mean 'may well', or it has been held that 'likely' implies a substantial rather than a merely speculative possibility, a possibility that cannot sensibly be ignored.

90. In relation to the exemption in section 39(1) of FOISA, the Commissioner takes the view that to conclude that endangerment would be likely, he would require there to be a well founded apprehension of actual harm, such that the prospect of such harm could be regarded as a distinct possibility.

91. SQA has not presented the Commissioner with any evidence to support its contention that aggrieved candidates or their parents are likely to harass the identified senior appointees to the point where it would be likely that the appointee's physical or mental health, or their safety, would be endangered. The Commissioner accepts that in certain instances contact could be difficult and distressing [….]. The Commissioner is not persuaded that disclosure of the educational establishment of senior appointees would cause those appointees to be at greater risk of harassment than any other identifiable employee of a Scottish public authority who engages with the public as part of his/her duties. He notes that in many cases it is already easy to find out the senior appointees' educational establishment from other information in the public domain, some of which originates from the individuals themselves.

92. The Commissioner therefore finds that the exemption in section 39(1) of FOISA was wrongly applied to the information about the names of senior appointees; details of the other appointments these individuals hold or have held, in terms of the appointments specified in parts (a) to (d) of Mr F's request; their length of service in these roles; and their educational establishment.

93. As the Commissioner finds that the exemption in section 39(1) was wrongly applied, he is not required to consider whether the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

Conclusion

94. The Commissioner requires SQA to disclose the information detailed in paragraph 74, having found that it is not exempt under Part 2 of FOISA.

DECISION

The Commissioner finds that the Scottish Qualifications Authority (SQA) complied in part with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to Mr F's request, and upholds the decision to withhold certain information under section 38(1)(b) of FOISA.

The Commissioner finds that SQA wrongly withheld certain information under section 38(1)(b), section 30(c) and section 39(1) of FOISA. The Commissioner requires SQA to provide Mr F with the information detailed in paragraph 74 of the decision notice. This information must be disclosed to Mr F no later than **10 July 2009.**

The Commissioner finds that SQA also failed to comply with section 1(1) of FOISA by omitting to provide some of the information it held in relation to Mr F's request for minutes (part (e) of his request). Given that SQA has now provided this information to Mr F, the Commissioner does not require SQA to take any action in response to this failure.

Appeal

Should either Mr F or SQA wish to appeal against this decision, there is an 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 notice.

Kevin Dunion
Scottish Information Commissioner
26 May 2009

Appendix

Relevant statutory provisions

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.

(…)

(3) If the authority –

(a) requires further information in order to identify and locate the requested information; and

(b) has told the applicant so (specifying what the requirement for further information is),

then, provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.

(…)

(6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

(1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

(a) the provision does not confer absolute exemption; and

(b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

(2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

…

(e) in subsection (1) of section 38 –

…

(ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

(…)

(c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

38 Personal information

(1) Information is exempt information if it constitutes-

(…)

(b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;

(…)

(2) The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles; or

(…)

(b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

(…)

39 Health, safety and the environment

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual.

(…)

Data Protection Act 1998

1 Basic interpretative provisions

In this Act, unless the context otherwise requires –

…

"personal data" means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

…

Schedule 1 – The data protection principles

Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

…

Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

...

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

…