

Decision Notice

Decision 187/2015: Mr Andrew Denholm and the Scottish Qualifications Authority

Draft deficit and draft budget for 2015/16

Reference No: 201501080

Decision Date: 8 December 2015



Scottish Information
Commissioner

Summary

On 20 March 2015, Mr Denholm asked the Scottish Qualifications Authority (SQA) for its draft deficit and draft budget for 2015/16. The SQA refused to provide the information, on the basis that disclosure would substantially prejudice the effective conduct of public affairs.

The Commissioner investigated and found that the SQA had wrongly withheld the information covered by Mr Denholm's request. She required the SQA to give Mr Denholm the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 20 March 2015, Mr Denholm made an information request to the SQA. He asked for the overall draft deficit for 2015/16, and the SQA draft budget for 2015/16, both of which were referred to in the SQA Board minutes dated 28 January 2015¹.
2. The SQA responded on 21 April 2015. The SQA stated that the information requested by Mr Denholm could change substantially before it was finally approved by the Scottish Government, and explained why this could happen. It advised that it would publish budget figures after the Scottish Government had given approval. The SQA withheld the information under section 30(c) of FOISA, on the grounds that disclosure would prejudice an ongoing discussion.
3. On 27 April 2015, Mr Denholm emailed the SQA requesting a review of its decision. Given that the SQA and the Scottish Government were fully aware of the figures in the draft document, he believed this information was not relevant to the ongoing discussions and its disclosure would be unlikely to prejudice these discussions or the effective conduct of public affairs.
4. The SQA notified Mr Denholm of the outcome of its review on 26 May 2015. It upheld its decision without amendment. The SQA stated that once the budget was approved, it would provide a copy to Mr Denholm.
5. On 9 June 2015, Mr Denholm applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Denholm stated he was dissatisfied with the outcome of the SQA's review because he noted that other organisations had disclosed draft documents under FOI. He also rejected the argument that disclosure of the draft budget information would prejudice the SQA's discussions with the Scottish Government. He considered that reporting on the financial health of the SQA is of very significant public interest and would outweigh any public interest in withholding the information.

¹ http://www.sqa.org.uk/files_ccc/MinutesoftheBoardmeetingheldon28January2015.pdf

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Denholm made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 25 June 2015, the SQA was notified in writing that Mr Denholm had made a valid application. The SQA was asked to send the Commissioner the information withheld from him. The SQA provided the information and the case was allocated to an investigating officer.
8. On 10 July 2015, the SQA provided Mr Denholm with a copy of the approved budget. Mr Denholm confirmed that he still required a decision from the Commissioner on whether the draft deficit and budget should have been withheld. Mr Denholm considered that the public has the right to know how the draft budget compared to the finalised budget, and that public authorities should not be allowed to withhold draft documents as a matter of right.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The SQA was invited to comment on Mr Denholm's application and answer specific questions, including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.
10. Following receipt of the SQA's submissions on 13 August 2015, it was asked to provide further information about its budget and the harm that was likely to follow if the information was disclosed.

Commissioner's analysis and findings

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

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

12. 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 use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by release of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
13. There is a high threshold to be crossed in applying the test contained in the section 30(c) exemption. The prejudice in question must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).

The SQA's submissions

14. The SQA explained that it derives its principal income from education authorities, further education colleges, training organisations, higher education institutions, employers and independent schools by means of (exam) entry charges. The remainder of its income is derived from consultancy service charges and other contracts.
15. The SQA noted that from time to time it may also receive funding from the Scottish Government for specific developmental purposes, e.g. for development of qualifications, courses or related purposes. The SQA is expected to account to the Scottish Government for this funding in the same way as for its other expenditure. The procedure for payment to the SQA of any development funding will be subject to negotiation between the Scottish Government and the SQA. Such payments will be made subject to need.
16. The SQA submitted that, as a consequence of this funding model, in a climate of increasing austerity and cutbacks the SQA will always be in a deficit position until Government funding is approved each year. The SQA noted that this is not a reflection of the financial health of the SQA at that point in time; rather it is an integral part of the budget forecasting process for the following year.
17. The SQA commented that in the current year there had been a greater level of uncertainty around the candidate entry figures due to the implementation of Curriculum for Excellence and the dual running of the Higher examinations. It stated that income from Qualification Entry figures is a major part of the forecasting process in the SQA. As a result of these changes, there was no reliable precedent to help accurately predict the SQA's income figure prior to the closing date for candidate entries of 31 March 2015.
18. The SQA explained although the draft budget has now been approved (page 9 of its Corporate Plan²), it will be monitored over the year and will be updated in line with scheduled reforecasting exercises.
19. The SQA considered that if it had disclosed the draft budget and deficit information in response to Mr Denholm's request, increased public pressure would have influenced the negotiations between the SQA and the Scottish Government. The SQA stated that in the previous financial year, public pressure led to the Scottish Government intervening and imposing dual running of the Higher examinations in 2015, which was a major change to the strategic plan for the implementation of Curriculum for Excellence and the budget forecasting process for the SQA.
20. The SQA submitted that it is very important that its budget reflects the organisation's finalised operational plans and that there is clarity around the approved budget figure if the SQA is to be held accountable by the Scottish Government and by the public for delivering against that budget. It argued that opening a debate around the SQA's financial position when the draft budget had not been approved through agreed governance channels could have resulted in substantial harm at such a critical time in the implementation of the new qualifications.
21. The SQA noted that public debate of expenditure on education is critically important, but argued that such debate should be informed by, and based on, budget figures which have been developed and agreed through appropriate governance channels. The draft budget discussed by the SQA Board reflected assumptions around the possible presentations that would be made by schools for the new qualifications. There was no history to inform those

² http://www.sqa.org.uk/sqa/files_ccc/SQA_Corporate_Plan_2015_18.pdf

assumptions; consequently, it was recognised by the SQA Board and by the Scottish Government that the estimated figures in the draft budget would be updated once the actual presentation practice was known, following the deadline of 31 March. The SQA should be, and is, held accountable by the Scottish Government and by the public for delivering against that finalised budget.

22. The SQA argued that once the draft deficit figure was in the public domain, there was no guarantee that any caveats or explanation it provided about the figure would be used in published comment. It feared that such publicity could have an adverse effect on the SQA as a commercial business competing for contracts.
23. The SQA considered that putting the draft budget figures prematurely into the public domain could fuel public debate regarding education spending by Scottish Government “rather than it being a strategic business decision by the SQA”. It argued that the strategic planning process of a public body would be impaired.
24. The SQA considered it had a right to conduct the strategic planning process internally in partnership with those who are directly involved in the development and delivery of education in Scotland, away from the distracting influence of public debate which could be generated by the premature publication of budget figures.

Mr Denholm's submissions

25. Mr Denholm noted that the SQA and Scottish Government were both fully aware of the figures in the draft budget. He believed this information was not relevant to their ongoing discussions and its disclosure would be unlikely to prejudice these discussions or the effective conduct of public affairs.

The Commissioner's conclusion

26. The Commissioner has considered the withheld information in detail. It reflects the SQA's proposed budget, including estimations of revenue to be received and expenditure to be made. The Commissioner notes that, at the time of Mr Denholm's request, the SQA did not know the income it would receive from entry charges. She accepts that there was uncertainty around the candidate entry figures due to the implementation of Curriculum for Excellence and the dual running of the Higher examinations, which meant that there was no reliable precedent to help the SQA accurately predict income from exam entry charges.
27. The Commissioner must decide whether disclosure of this unconfirmed draft budget information would, or would be likely to, cause substantial prejudice to the effective conduct of public affairs, as argued by the SQA. She has considered each of the arguments put forward by the SQA in support of this view.
28. The SQA has argued that disclosure would risk the draft deficit and budget being misinterpreted, as any caveats or explanations provided with the information could be ignored. However, the SQA has not explained why this would be likely, and has not provided any evidence that similar misrepresentation of information has happened in the past, or reason why it would expect misrepresentation to happen in future. The Commissioner does not accept that information should be withheld simply because of a general concern that it will be taken out of context or misinterpreted, unless there are genuine reasons to anticipate that this is likely to occur and that the consequences would, or would be likely to, substantially prejudice the effective conduct of public affairs.

29. The SQA has commented that disclosure would fuel public debate regarding education spending by the Scottish Government “rather than it being a strategic business decision by the SQA”. It argued that its strategic planning process would be impaired by this, and referred to the “distracting influence of public debate”. However, the SQA did not provide the Commissioner with any explanation of how disclosure, and any ensuing public debate, would harm its strategic planning process. It did not specify the nature of the harm, or attempt to show the extent to which disclosure would affect the strategic planning process. In order for the Commissioner to accept that information should be withheld under section 30(c) of FOISA, a Scottish public authority must show that disclosure of that information would, or would be likely to, cause harm at the level of substantial prejudice.
30. The Commissioner does not accept that the SQA has shown how disclosure of the information would have affected its negotiations with the Scottish Government. It has not explained the nature of these negotiations, or explained how disclosure of the draft budget would affect them. It is unclear to the Commissioner what harm the SQA anticipated, in this regard.
31. Similarly, the Commissioner does not accept that the SQA has shown how disclosure of the information would affect the SQA’s ability to compete commercially for contracts. No arguments or evidence were offered in support of this view.
32. The Commissioner does not accept that the SQA has provided evidence or reasons to show that disclosure would, or would be likely to, have any of the negative consequences outlined in its submission. The arguments put forward by the SQA appear to be hypothetical, and do not refer to any specific harm that would, or would be likely to follow disclosure of the information requested by Mr Denholm.
33. In the absence of any persuasive evidence or explanation, the Commissioner cannot accept that disclosure of the draft deficit and budget would, or would be likely to, prejudice substantially the effective conduct of public affairs. Having considered all the relevant submissions, therefore, the Commissioner does not accept that the SQA was correct to withhold the information under the exemption in section 30(c) of FOISA.
34. Given that the Commissioner does not accept that section 30(c) applies, she is not required to consider the public interest test in section 2(1)(b) of FOISA.

Decision

The Commissioner finds that the Scottish Qualifications Authority (SQA) failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Denholm. The SQA was not entitled to withhold the information under the exemption in section 30(c) of FOISA.

The Commissioner therefore requires the SQA to provide Mr Denholm with a copy of the draft deficit and budget for 2015/16, by **Friday, 22 January 2016**.

Appeal

Should either Mr Denholm or the SQA 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 SQA fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the SQA has failed to comply. The Court has the right to inquire into the matter and may deal with the SQA as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

8 December 2015

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.

...

- (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 –

...

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

...

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.

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