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# Decision Notice 022/2025

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## Jurisdiction on complaints and obtaining information during an investigation

Applicant: The Applicant

Authority: Scottish Public Services Ombudsman

Case Ref: 202301613

### Summary

The Applicant asked the Authority for information relating to the Authority's jurisdiction to consider complaints and to obtain information during an investigation. The Authority responded to the Applicant. The Commissioner investigated and found that the Authority had complied with FOISA in responding to the Applicant's request.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 15(1) (Duty to provide advice and assistance); 47(1) and (2) (Application for decision by Commissioner)

### Background

1. On 18 September 2023, the Applicant made a request for information to the Authority. He provided background information, including the reference number to a case, and asked the Authority:
  - (1) "To provide the statutory instruments as to the lawfulness of the Scottish Government Directorate to adjudicate a complaint relating to the Scottish Criminal Case Review Commission (SCCRC)"

- (2) “On what statutory basis could the Scottish Government Directorate is able to establish a legal basis for adjudication between the [the Authority] in relation to the SCCRC (where it states that the [Authority] cannot adjudicate reviews of the SCCRC) but unable to provide the legal basis to adjudicate between the SCCRC, the Directorate and a member of the public?”
2. The Applicant also referred to a previous complaint in which a request was made to “support an investigation process” and said that the Authority had “refused to obtain, disclose or pursue such information” which he believed it held or had the right to obtain. He noted that “the information requested has not been disclosed” and stated that:
- “It is hoped you can provide this information, exercise the right to obtain the information or provide the legal basis on which you are unable to disclose this information and explain in detail with legal reference that your organisation cannot exercise the right to obtain or hold the information.”
3. The Authority responded to the request on 6 October 2023. In relation to parts (1) and (2) of the request, it issued the Applicant with a notice, in terms of section 17(1) of FOISA, on the basis that it appeared he was requesting information that does not exist. It explained that it interpreted these parts of his request as follows:
- (1) “specific evidence (the legislation or other statutory instrument) which shows the Scottish Government have the right to adjudicate a complaint about the SCCRC”
- (2) “the statutory basis saying [the Authority] cannot adjudicate on reviews conducted by the SCCRC, and the statutory/legal basis for [the Authority] being able to adjudicate in complaints about Scottish Government in respect of complaints about the SCCRC”.
4. The Authority explained that the SCCRC was “not a body under jurisdiction”. It stated that the Scottish Government was a body under jurisdiction, but that did not mean that the Authority could adjudicate on a subject matter which was out of jurisdiction. It explained that the [Scottish Public Services Ombudsman Act 2002](#)<sup>1</sup> (the SPSO Act) gives the Authority its powers, and it provided the Applicant with a link to the SPSO Act and stated it was, therefore, exempt information under section 25 of FOISA. It added that it was not for it to answer questions about other public bodies and such questions would be more appropriately addressed to the respective public bodies themselves.
5. On 25 October 2023, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision because, while it had informed him that it did not hold the information requested, it had failed to address the element of his request (set out above in paragraph 2) regarding whether it may exercise the right to obtain certain information.
6. On 7 November 2023, the Authority acknowledged receipt of the Applicant’s requirement for review. It noted that it was not clear from his requirement for review what aspect of its decision he was unhappy with. It explained that it would progress its review on the basis that he was unhappy that it had failed to explain whether it may exercise the right to obtain certain information but asked him to let it know if this was incorrect.
7. The Applicant did not respond.

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<sup>1</sup> <https://www.legislation.gov.uk/asp/2002/11/contents>

8. The Authority notified the Applicant of the outcome of its review on 21 November 2023. In relation to the element of his request set out in paragraph 2 above, the Authority explained that it was for it to decide how to conduct an investigation and that it had decided not to request additional information from the Scottish Government regarding its jurisdiction in relation to complaints about the SCCRC.
9. The Authority further explained that FOISA provides a right to access recorded information – it does not place an obligation on it to obtain information that it does not hold, or to create explanations of its actions. It concluded that it had appropriately advised the Applicant to direct questions about other public bodies to those bodies.
10. On 18 December 2023, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. He stated that he was dissatisfied with the outcome of the Authority’s review because it continued to provide an “inaccurate” narrative to explain its position and to “hold the view that the information requested does not exist”, and because it was speaking on behalf of the Scottish Government Directorate instead of requesting the Directorate “to answer the questions raised and provide the legal basis for its course of action”.

## **Investigation**

11. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
12. On 1 February 2024, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments. The Authority provided its comments, and the case was subsequently allocated to an investigating officer.
13. The Commissioner agrees with the Authority that the Applicant’s requirement for review did not challenge the Authority’s response to parts (1) and (2) of the request. He will therefore not consider the Authority’s response to these parts of the request further in his decision notice.

## **Commissioner’s analysis and findings**

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

### ***Section 1(1) – General entitlement***

15. 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.
16. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4) of FOISA. This is not necessarily to be equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.

### *The Applicant's submissions*

17. The Applicant's requirement for review expressed dissatisfaction that the Authority had not explained whether it may exercise the right to obtain the information he had requested. He repeated this dissatisfaction in his application to the Commissioner.
18. Specifically, the Applicant submitted that the Authority must answer his question about its obtaining information – particularly with reference to section 12(4)(a) of the SPSO Act.

### *The Authority's submissions*

19. The Authority explained that the Applicant had requested a review on the ground that the Authority failed to explain whether it may exercise its right to obtain certain information. It confirmed that this referred to the Authority's powers to obtain information as part of its investigation of a complaint.
20. The Authority submitted that the Applicant's requirement for review did not note any dissatisfaction with its response that it did not hold the requested information. It explained that it therefore considered the Applicant's dissatisfaction related to the Authority not seeking information from the Scottish Government Directorate in connection with its consideration of the Applicant's complaint to the Authority.
21. Specifically, the Authority explained that it understood the Applicant considered the Authority had not provided an explanation in respect of its power to obtain information with reference to section 12(4)(a) of the SPSO Act.
22. The Authority submitted that the following extract from its review outcome had addressed this point:

"It is for this office [the Authority] to decide how to conduct an investigation, and the Complaints Reviewer decides whether it is necessary to obtain information during the course of their consideration of the complaint."
23. The Authority's noted that its review outcome also referred to internal processes in respect of dissatisfaction with the decision and handling of a complaint. Specifically, its review outcome stated that FOISA provides a right to recorded information held, and that it does not place an obligation upon the Authority to obtain information.
24. The Authority also referred to a subsequent communication with the Applicant which highlighted that FOISA "does not provide an alternative avenue for reopening discussions on their complaint". It explained that this point had been communicated to the Applicant previously.

### *The Commissioner's view*

25. The Applicant's request of 18 September 2023 appears to contain two elements, which are connected:
  - The first element is the express two-part request for information (set out in paragraph 1)
  - The second element (set out in paragraph 2) relates to his dissatisfaction that the Authority "refused to obtain, disclose or pursue" information he requested in relation to a Public Service Complaint he made to the Authority where he asked the Authority to provide "the legal basis" on which it was "unable to disclose this information" and to "explain in detail with legal reference" why it cannot "exercise the right to obtain or hold such information".

26. As rehearsed earlier, the Commissioner will not consider the two-part request for information (set out in paragraph 1) further in his decision notice as the Applicant did not challenge the Authority's response to these parts of his request in his requirement for review. However, his decision notice will consider the second element of the Applicant's request (set out in paragraph 2).
27. The Commissioner's remit extends only to consideration of whether a Scottish public authority has complied with Part 1 of FOISA (or with the Environmental Information (Scotland) Regulations 2004 (EIRs)) in responding to an information request. He has no locus to comment on whether Scottish public authority should obtain information in respect of one of its functions. He will therefore not consider the Applicant's dissatisfaction in relation to this point further in his decision notice.
28. The Commissioner has carefully considered the second element of the Applicant's request. The request is not clear, and it is difficult to understand what is being asked for.
29. To the extent that the Applicant requested that the Authority "explain in detail with legal reference" why it cannot "exercise the right to obtain or hold such information", the Commissioner does not consider the request to be a valid request for recorded information. This is because it would take the Authority beyond simply identifying information (i.e. recorded information) and would instead require a bespoke explanation to be created.
30. For the remainder of the second element of the request (i.e. the "legal basis" on which the Authority was "unable to disclose this information"), the Commissioner is satisfied that the Authority's response complied with Part 1 of FOISA. It explained in its initial response that the SPSO Act gives the Authority its powers and stated in its review outcome that it is for the Authority to decide how to conduct an investigation, and that it had decided not to request additional information from the Scottish Government regarding its jurisdiction in relation to complaints about the SCCRC.
31. The Commissioner also considers it was appropriate for the Authority to have advised the Applicant in its review outcome that FOISA provides a right to access recorded information – it does not place an obligation on it to obtain information that it does not hold, or to create explanations of its actions. Likewise, he is satisfied it was appropriate for the Authority to have advised the Applicant to direct questions about other public bodies to those public bodies.
32. In all the circumstances, having considered the terms of the request and the submissions of both the Applicant and the Authority, the Commissioner is satisfied that the Authority complied with Part 1 of FOISA in responding to the information request made by the Applicant.

## **Decision**

The Commissioner finds that the Authority complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

## **Appeal**

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

**Euan McCulloch**  
**Head of Enforcement**

**30 January 2025**