



Scottish Information
Commissioner
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Decision Notice 033/2025

Outcome of investigations into the conduct of Scottish Government Ministers

Applicant: The Applicant
Authority: Scottish Ministers
Case Ref: 202200808

Summary

The Applicant asked the Authority for information about investigations into the conduct of Scottish Government Ministers. The Authority provided some information but withheld other information under various exemptions in FOISA. The Commissioner investigated and found that the Authority had generally complied with FOISA in responding to the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1) and (2)(b) (Effect of exemptions); 26(c) (Prohibitions on disclosure); 35(1)(g) and (2)(b) (Law enforcement); 47(1) and (2) (Application for decision by Commissioner); 50(1)(a) (Information notices)

Background

1. On 12 May 2022, the Applicant made a request for information to the Authority. He asked for:

“(1) The outcome of the bullying investigation into Scottish Government minister Fergus Ewing.

(2) The number of closed and ongoing investigations into the conduct of Scottish Government ministers, both past and present since 2011, with names of relevant ministers attached to each investigation.

(3) The conclusions of any and all bullying complaints or other misconduct complaints upheld against ministers since 2015, with names of relevant ministers attached to each investigation.

(4) The conclusions of any and all bullying complaints or other misconduct complaints not upheld against ministers since 2015, with names of relevant ministers attached to each investigation.”

2. The Authority responded on 13 June 2022 in the following terms:

- For part one, it withheld the information requested under the exemptions in sections 35(1)(g) (as read with section 35(2)(b)), 36(2) and 38(1)(b) of FOISA.
- For part two, it stated that two investigations into the conduct of Ministers had concluded and explained that there had been two investigations which investigated three complaints. It also provided a link to information on the [Scottish Parliament's website](#)¹, to which it applied section 25(1) of FOISA. For the number of ongoing investigations, it stated that it did not hold any information. It also withheld information under sections 35(1)(g) (as read with section 35(2)(b)) and 38(1)(b) of FOISA.
- For parts three and four, it withheld the information requested under the exemptions in sections 35(1)(g) (as read with section 35(2)(b)), 36(2) and 38(1)(b) of FOISA.

3. On 13 June 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the Authority's decision because he believed that the exemptions did not apply or, if they did, that the public interest test was “demonstrably in favour of disclosure”.

4. The Applicant also commented that “there is no requirement within this FOI request to name complainers, nor necessarily to detail the exact details of what the outcome is. The government could choose to, for example, release the outcome on an “upheld/dismissed” basis, without further information”.

5. The Authority notified the Applicant of the outcome of its review on 6 July 2022, which fully upheld its original decision for all parts of the request.

6. On 20 July 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. He stated that he was dissatisfied with the outcome of the Authority's review because he did not believe the exemptions applied to the extent claimed by the Authority and he considered that the public interest favoured disclosure of the information.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

¹ <https://www.parliament.scot/chamber-and-committees/questions-and-answers/question?ref=S5W-18396>

8. On 15 August 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 all of the withheld information, except a single document (a "Decision Report") that had been viewed by the Commissioner in person in connection with a previous decision.
9. 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 related to the exemptions the Authority had applied and its consideration of the public interest test.
10. On 6 September 2023, the Authority stated that it also wished to apply the exemption in section 26(c) of FOISA to the Decision Report (while maintaining its reliance on the exemptions in sections 35(1)(g) and 38(1)(b) for that document). It also explained that it was withdrawing reliance on the exemption in section 36(2) with respect to all the withheld information. It notified the Applicant of its change of position and explained why.
11. The case was subsequently allocated to an investigating officer.
12. During the investigation, the Commissioner requested the Authority provide him with the Decision Report. Given the sensitivity of the information and the Authority's concerns about disclosing it voluntarily, the Commissioner issued an Information Notice to the Authority under section 50(1)(a) of FOISA, which required it to provide him with the Decision Report. The Authority complied in full with the Information Notice.

Commissioner's analysis and findings

13. The Commissioner has considered all the submissions made to him by the Applicant and the Authority.
14. The Commissioner has endeavoured to give as full account of his reasoning as he can, but, as recognised by Court of Session in [Scottish Ministers v Scottish Information Commissioner \[2006\] CSIH 8](#)², at paragraph [18]:

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

Response to part two of the request

15. Part two of the request asked for (emphasis added):

"The number of closed and ongoing investigations into the conduct of Scottish Government ministers, both past and present since 2011, **with names of relevant ministers attached to each investigation.**"
16. The Authority does not appear to have fully engaged with element of the request in bold text above. While it stated in its initial response and review outcome that it was withholding some information in relation to part two of the request under the exemptions in sections 35(1)(g) and 38(1)(b) of FOISA, the Authority listed no information being withheld in relation to part two of the request in the schedule of information (which lists the withheld information, the

² https://www.bailii.org/scot/cases/ScotCS/2008/CSIH_08.html

part of the request it relates to and the exemptions being applied) it provided to the Commissioner.

17. The Authority's response to part two of the request otherwise confirmed there have been two investigations of three complaints into the conduct of Ministers. In response to part one of the request, it effectively confirmed there was an investigation into the named Minister (as does information in the public domain). In response to part two of the request, the Authority provided the Applicant with a link to information in the public domain that confirmed that identity of the other Minister whose conduct had been investigated.
18. The Commissioner must therefore find that by failing to fully respond to part two of the request, the Authority failed to comply with section 1(1) of FOISA. Given that the identities of the Ministers are apparent from other information the Authority provided in response to the request, the Commissioner does not require it to take any action in response to this failure.

Section 26(c) – Contempt of court

19. Under section 26(c) of FOISA, information is exempt information if its disclosure by a Scottish public authority (otherwise than under FOISA) would constitute, or be punishable as, a contempt of court. This exemption is not subject to the public interest test in section 2(1)(b) of FOISA.
20. The Authority argued that section 26(c) of FOISA applied to the Decision Report in its entirety, which fell within the scope of parts three and four of the request (and which it also withheld under sections 35(1)(g) and 38(1)(b) of FOISA). It noted that the Decision Report had previously been considered by the Commissioner in [Decision 100/2022](#)³.

The section 11 order and the undertaking

21. On 29 August 2018, Alex Salmond, former First Minister, commenced judicial review proceedings against the Authority in which he sought to challenge the handling of certain complaints that had been made against him.
22. On 8 October 2018, Lord Woolman made an order under section 11 of the 1981 Act ("the section 11 order") in relation to these proceedings. The order was in the following terms (emphasis added):

"The Lord Ordinary ... makes an order in terms of Chapter 102.3(5) of the Rules of Court **withholding** from the public in these proceedings **the names and the designations, past and present, of the complainers** referred to in the decision report which is the subject matter of this petition **and any other information concerning those complainers which would lead to their identification**; orders, in terms of section 11 of the Contempt of Court Act 1981, that no publication by any means, including on social media, of any of the aforementioned information relating to the complainers, be made ..."

23. The parties entered into a Joint Minute which brought the proceedings to a conclusion. As part of this, the Authority gave the following undertaking:

"Save insofar as necessary to comply with any lawful requirement, to co-operate with any criminal investigation, or as may otherwise be approved by the Court, the [Authority] will not cause or permit the publication or dissemination to any other person of the said Investigating

³ <https://www.foi.scot/decision-1002022>

Officer's report or any of the statements or other material taken or prepared by her in the course of preparing same."

24. On 8 January 2019, the judicial review proceedings were concluded. However, Lord Pentland emphasised that the section 11 order continued (and continues) to have effect.

The Commissioner's view

25. As rehearsed earlier, the Commissioner previously considered the Decision Report in Decision 100/2022 where he found that it was exempt from disclosure under section 26(c) of FOISA on the grounds that disclosure of the Decision Report would breach the undertaking and would constitute a contempt of court.
26. Notwithstanding his previous finding, the Commissioner has fully considered the Decision Report, and the respective submissions of the Applicant and the Authority, in this decision notice.
27. The Commissioner must, at the latest, consider the position when the Authority carried out the review (July 2022). While its review outcome in this case was issued around a year after the review outcome in Decision 100/2022, the Commissioner is satisfied that the position is the same – the nature and content of the information has not changed, and the section 11 order continued (and continues) to have effect.
28. For the same reasons set out in Decision 100/2022, the Commissioner is therefore satisfied that the Decision Report is exempt from disclosure in terms of section 26(c) of FOISA.
29. The Commissioner has carefully considered the terms of parts three and four of the request, which asked for "the conclusions" of any and all bullying complaints or other misconduct complaints upheld and not upheld against Ministers since 2015, as well as the Applicant's suggestion that the Authority could simply disclose the outcome or conclusions of any bullying complaints or other misconduct complaints on an "upheld/dismissed" basis, without further information".
30. There may be some debate about what recorded information would constitute an outcome or conclusion. Whatever interpretation is adopted would require disclosure of information held within, or derived from, the Decision Report (which the Commissioner has accepted is exempt from disclosure in terms of section 26(c) of FOISA on the basis that disclosure would breach the undertaking and would constitute a contempt of court).
31. As the Commissioner is satisfied the Decision Report is exempt from disclosure under section 26(c) of FOISA, he will not go on to consider whether that information is also exempt from disclosure under the other exemptions applied by the Authority.

Section 35(1)(g) – Law enforcement

32. Under section 35(1)(g) of FOISA, information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the exercise by any public authority (as defined by the Freedom of Information Act 2000) or by any Scottish public authority (as defined by FOISA) of its functions for any of the purposes listed in section 35(2). (The Authority is a Scottish public authority for the purposes of FOISA.)
33. The Authority withheld all the information relevant for parts one, three and four of the request under this exemption. (As rehearsed earlier, the Authority does not appear to have withheld any information for part two of the request.)

34. The Commissioner will now consider whether the exemption in section 35(1)(g) of FOISA applies to all of the information withheld under that exemption (other than the Decision Report, which he has accepted is exempt from disclosure under the exemption in section 26(c) of FOISA).
35. The exemptions in section 35 of FOISA are all qualified exemptions, in that they are subject to the public interest test in section 2(1)(b) of FOISA. In addition, the exemptions can only apply where substantial prejudice would, or would be likely to, occur as a result of the disclosure of the information.
36. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner's view is that the harm in question must be of real and demonstrable significance. An authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure, at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.
37. The Commissioner must therefore consider three separate matters:
 - does the Authority have a function in relation to the purpose mentioned in section 35(2)(b)?
 - if it does, would disclosure of the information prejudice substantially, or be likely to prejudice substantially, the Authority's ability to exercise that function?
 - if such prejudice would, or would be likely to, occur, does the public interest in maintaining the exemption outweigh that in disclosure of the information?

The Authority's submissions

38. The Authority submitted that the exemption in section 35(1)(g) of FOISA (as read with section 35(2)(b)) applied to all of the withheld information. This exemption applied because disclosure would be likely to prejudice substantially the exercise by the Authority of its functions in relation to ascertaining whether a person is responsible for conduct which is improper.
39. The Authority concluded that disclosure of the outcome of any investigations into bullying or misconduct complaints against Ministers would cause substantial prejudice to its ability to investigate future complaints of improper conduct. This was because publication of such information would be "very likely to deter other complainers from coming forward in future".
40. The Authority explained that those who make such complaints have a reasonable expectation of confidentiality, and that this is particularly important where there is an imbalance of power (as when a civil servant makes a complaint about a current or former Minister).
41. The Authority stated that the process under which the complaints were taken, its Government's Fairness at Work Policy, was clear on the fact that issues raised under that policy will be dealt with confidentially. All participants in the process would have a reasonable expectation of confidentiality, including that the details of the complaints would not be made public.
42. The Authority considered that if future complainers reasonably apprehend that information about their complaints of improper conduct against current or former Ministers will be disclosed publicly, then they would be substantially inhibited from making complaints.

43. The Authority also submitted that persons complained about would be less likely to cooperate voluntarily with investigations if they apprehend that information provided by them in the context of the investigation is likely to be disclosed outwith the investigation process and policy in force at the time of the complaint being made and investigated. Disclosure of the information could significantly undermine the trust of all parties in the confidentiality of the process.
44. In summary, the Authority argued that disclosure of the withheld information would substantially prejudice its ability to investigate such complaints and therefore would constitute substantial prejudice for the purposes of the exemption in section 35(1)(g) of FOISA.

The Applicant's submissions

45. In his application, the Applicant submitted that he stood by the arguments he had made at review stage, and he did not believe the exemptions applied to the extent claimed by the Authority. He believed that it was "demonstrably counter to meaningful and, to an extent, basic accountability and transparency" for a bullying or harassment complaint against a Minister to be "kept secret".
46. The Applicant also referred to the public statements made by Nicola Sturgeon on future complaints against Ministers and how they would be handled in terms of publicity around outcomes. He argued that this demonstrated that the Authority recognised the public interest in the information requested and should therefore disclose it.
47. Specifically, the Applicant commented that by not disclosing the withheld information, the Authority was protecting the "embarrassment" of the current Government and a former Minister to a degree a future Minister would not benefit from. He argued that, on the grounds of transparency and accountability, this could not be correct.

Does the Authority have a function in relation to section 35(2)(b)?

48. The Commissioner agrees with the Authority (as he did in Decision 100/2022) that the investigation of complaints is a function of the Authority.
49. The Commissioner is therefore satisfied that the Authority has a function in relation to section 35(2)(b) of FOISA (i.e. to ascertain whether a person is responsible for conduct which is improper).

Would disclosure prejudice the exercise of that function?

50. The Commissioner acknowledges that complaint investigations of this kind rely upon the cooperation of witnesses coming forward and providing evidence: generally, they would expect their identities to be revealed only in the context of the investigation and any subsequent action which would follow that investigation.
51. The Commissioner accepts that disclosure outwith that context would be likely to have a serious negative impact on the investigative process, inhibiting individuals who might otherwise have done so from coming forward and providing full and frank statements. He has borne in mind that investigations of this kind will always have a degree of political sensitivity attached to them.
52. The Commissioner is satisfied, in the circumstances, that disclosure of the information requested would make it much less likely that those participating in such an investigation, such as complainers and witnesses, would be willing to provide information about concerns,

to the substantial prejudice of the Authority's ability to investigate matters concerning the conduct of persons. This would, in turn, be to the substantial prejudice of the Authority's function to promote the observance of standards of conduct.

53. The Commissioner notes that the Applicant submitted that the Authority could simply disclose the outcome or conclusions of any bullying complaints or other misconduct complaints on an "upheld/dismissed" basis, without further information".
54. The Commissioner has considered this point carefully, in view of the nature and content of the withheld information and the exemptions applied by the Authority. In all of the circumstances of this case, he considers, on balance, that disclosure of information restricted to outcome or conclusion (however either term is defined) would still engage the exemption in section 35(1)(g) of FOISA.
55. The Commissioner recognises the difference between substantive or specific information in relation to complaints and information simply relaying the outcome or conclusions of such complaints. He also acknowledges that the Minister named in part one of the request [publicly confirmed](#)⁴ (prior to the date of the request in this case) that a formal investigation into a complaint against him was under way.
56. While there may, as rehearsed earlier, be some debate about what recorded information would constitute an outcome or conclusion, the Commissioner considers that, on a reasonable interpretation, such information would still engage the exemption in section 35(1)(g) of FOISA – even in the limited form suggested by the Applicant.
57. In other words, the Commissioner accepts, on balance, that the Authority's arguments on the harm that would, or would be likely to, result from disclosure also apply to information simply relaying the outcome or conclusions of complaints.
58. While the considerations are not identical, the Commissioner considers that disclosure of this information, even in the limited form suggested by the Applicant, would, or would be likely to, create a significant deterrent effect, discouraging complainers and witnesses from coming forward with complaints due to concerns about confidentiality. This would undermine the effectiveness of the complaints process, which relies on the trust and confidence of complainants (who may view any disclosure – however limited – as a breach of the confidentiality they expected when making the complaint).
59. The Commissioner considers this to be the case, notwithstanding any changes the Authority has since made to how it handles complaints or how it chooses to publish information regarding the outcomes of complaints.
60. Complainants and other parties participate in processes based on the assurances provided as part of those processes. The Commissioner considers retroactive application of any new process to justify disclosure of the information in question, whether under FOISA or otherwise and even in the limited form suggested by the Applicant, would undermine trust and discourage future engagement or participation if individuals believed confidentiality assurances given at the time would later be disregarded.
61. In all the circumstances, the Commissioner is satisfied, on balance, that disclosure of the information would have prejudiced substantially, or would have been likely to prejudice substantially, the exercise of the Authority's functions for the purpose mentioned in section

⁴ <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-51571935>

35(2)(b) of FOISA. Consequently, he is satisfied that the information is exempt from disclosure in terms of section 35(1)(g) of FOISA.

Does the public interest in maintaining the exemption outweigh that in disclosure of the information?

62. As noted above, the exemption in section 35(1)(g) is subject to the public interest test contained in section 2(1)(b) of FOISA. This means that, although the Commissioner has accepted that the information is exempt from disclosure under section 35(1)(g) of FOISA, he must order the information to be disclosed unless he is satisfied, in all the circumstances of the case, that the public interest in maintaining the exemption outweighs that in disclosing the information.
63. The Authority acknowledged that there is a general public interest in disclosure as part of open and transparent government, and to inform public debate. It also noted that there is a public interest in understanding how it dealt with these complaints.
64. However, the Authority considered there was a greater public interest in ensuring that future complainants are not deterred from making complaints of improper conduct, and in respecting the confidentiality which they reasonably expect as part of that process. In its view, the function of ascertaining whether a person is responsible for conduct which is improper would be frustrated in its entirety if complainants were unwilling to make such complaints because they reasonably apprehended that information, including the ultimate decisions reached, would be made public
65. As stated above, the Applicant believed the public interest favoured disclosure of the withheld information because:
 - it was "demonstrably counter to meaningful and, to an extent, basic accountability and transparency" for a bullying or harassment complaint against a Minister to be "kept secret".
 - by not disclosing the withheld information, the Authority was protecting the "embarrassment" of the current Government and a former Minister to a degree a future Minister would not benefit from. He argued that, on the grounds of transparency and accountability, this could not be correct.
66. The Commissioner acknowledges the strong public interest in the accountability of public authorities. He also acknowledges the general public interest in the Authority being open and transparent, particularly given the subject and history of the complaints.
67. However, the Commissioner also accepts that there is a strong public interest in ensuring that future complainants are not deterred from making complaints of improper conduct and that the Authority continues to be able to ascertain whether individuals are responsible for improper conduct, albeit under new procedures. It is important, with a view to ensuring high standards of conduct are observed, that the Authority is able perform these investigative functions effectively.
68. As rehearsed earlier, the Authority's response to the request confirmed that there have been two investigations of three complaints into the conduct of Ministers and effectively confirmed the identities of the two Ministers subject to those investigations. In the circumstances, the Commissioner considers that the public interest has been satisfied, to some extent, by the information already in the public domain in so far as it is public knowledge that complaints

about certain Ministers have been subject to investigation through formal, established processes.

69. Taking account of all the circumstances of this case including the nature of the withheld information concerned, the Commissioner is satisfied that the public interest in maintaining the exemption outweighs that in disclosure. Consequently, he finds that the Authority was entitled to withhold the information in question under section 35(1)(g) of FOISA.
70. As the Commissioner is satisfied that the Authority was entitled to withhold the information in question under section 35(1)(g) of FOISA, he is not required to consider whether that information is also exempt from disclosure under section 38(1)(b).

Decision

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

The Commissioner finds that by correctly withholding information under the exemptions in sections 26(c) and 35(1)(g), the Authority complied with Part 1 of FOISA.

However, by failing to fully respond to part two of the Applicant's request, the Commissioner finds that the Authority failed to comply with section 1(1) of Part 1 of FOISA.

Given that the information requested in part two of the request is otherwise apparent to the Applicant, the Commissioner does not require the Authority to take any action in response to this failure.

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.

David Hamilton
Scottish Information Commissioner

11 February 2025