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Commissioner  
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# Decision Notice 041/2025

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## Legal advice relating to the Scottish Public Services Ombudsman Act 2002

Authority: The Scottish Public Services Ombudsman  
Case Ref: 202401422

### Summary

The Applicant asked the Authority for specific legal advice it had received in relation to the Scottish Public Services Ombudsman Act 2002 (the SPSO Act). The Authority responded that the information was exempt from disclosure. The Commissioner investigated and found that the information requested was exempt from disclosure.

### Relevant statutory provisions

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

Scottish Public Services Ombudsman Act 2002 (the SPSO Act) section 19 (Confidentiality on disclosure)

### Background

1. On 11 April 2024, the Applicant made a request for information to the Authority. He asked for all information held the Authority in relation to the legal advice obtained and guidance provided to SPSO staff in relation to the SPSO Act 2002 and the interpretation and evaluation of "Injustice".

2. The Authority responded on 10 May 2024. It withheld the information requested under the exemptions in sections 26(a) and 36(1) of FOISA.
3. On 11 May 2024, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with its decision to apply the exemption in section 36(1) FOISA.
4. The Authority notified the Applicant of the outcome of its review on 31 May 2024, which fully upheld its original decision.
5. On 11 September 2024, following correspondence with the Commissioner, the Authority accepted a late requirement for a review from the Applicant where he also challenged its application of the exemption in section 26(a) of FOISA.
6. The Authority notified the Applicant of the outcome of its further review on 27 September 2024, which fully upheld its original decision to apply the exemptions in sections 26(a) and 36(1) of FOISA to withhold the information requested.
7. On 22 October 2024, 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 disagreed that the cited exemptions applied and because the public interest favoured disclosure.

## **Investigation**

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
9. On 26 November 2024, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information, and the case was allocated to an investigating officer.
10. 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 related to why it applied the exemptions in sections 26(a) and 36(1) of FOISA to withhold the information requested.

## **Commissioner's analysis and findings**

11. In coming to a decision on this matter, the Commissioner considered all the withheld information, and the relevant submissions made to him by both the Applicant and the Authority. He is satisfied that no matter of relevance has been overlooked.

### ***Section 26(a) – Prohibitions on disclosure***

12. The Commissioner will firstly consider the Authority's application of section 26(a) of FOISA.
13. Section 26(a) of FOISA exempts information from disclosure under FOISA, where disclosure of the information is prohibited by or under an enactment. This is an absolute exemption; in that it is not subject to the public interest test set down in section 2(1)(b) of FOISA. In this

case, the Authority argued that such a prohibition was created by sections 12 and 19 of the SPSO Act.

14. Section 19(1) of the SPSO Act provides that information obtained by the Authority, or any of the Authority's advisers, in connection with any matter in respect of which a complaint or a request has been made, must not be disclosed except for a limited range of purposes specified elsewhere in section 19. These purposes do not include disclosure of information under FOISA.
15. The Authority explained that it had identified three documents falling within the scope of the request, all of which constituted legal advice. It confirmed that this information had been obtained in connection with specific complaints that had been made to the Authority. It provided evidence of the searches it had carried out and explained that it held no further information falling within the scope of the request.
16. The Applicant submitted that he had requested the general legal advice the Authority stated it had received in relation to the SPSO Act – not information in relation to a specific complaint. He noted that the Authority's response stated that:

"You are correct that the SPSO Act 2002 does not define what constitutes injustice or hardship. However, we have taken legal advice on this."
17. The Applicant argued that the above response clearly stated that the Authority had taken legal advice in relation to the SPSO Act not defining what constituted injustice or hardship – the interpretation of which was essential to understanding what the Authority can legally investigate.
18. The Applicant stated that he was therefore dissatisfied with the Authority's response that the information requested was exempt from disclosure under section 26(a) of FOISA and that he disagreed that sections 12 and 19 of the SPSO Act were applicable.
19. In the circumstances, and having carefully reviewed the withheld information, the Commissioner accepts that the information requested is of a description covered by section 19(1) of the SPSO Act. He also accepts, as he has in a number of previous decisions, that section 19(1) of the SPSO Act creates a prohibition on the disclosure of information that engages section 26(a) of FOISA. He is satisfied that the searches carried out by the Authority were likely to have identified all the information it held falling within the scope of the request.
20. The Commissioner therefore accepts that the SPSO was entitled to apply the exemption in section 26(a) of FOISA to withhold the information requested. In reaching this conclusion, he has not found it necessary to consider section 12 of the SPSO Act as well as section 19.
21. As the Commissioner has found that the withheld information was correctly withheld under section 26(a) of FOISA, there is no requirement for him to consider the application of section 36(1) of FOISA, also applied by the Authority in this case.

## 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.

**Cal Richardson**  
**Deputy Head of Enforcement**

**19 February 2025**