



Scottish Information
Commissioner
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Decision Notice 065/2025

Communications relating to Court of Session appeal

Authority: Scottish Ministers
Case Ref: 202400276

Summary

The Applicant asked the Authority for all communications relating to a specified appeal to the Court of Session. The Authority disclosed some information and withheld other information as it considered it was legally privileged or would (if disclosed) cause substantial prejudice to the effective conduct of public affairs. The Commissioner investigated and found that the Authority had not been entitled to withhold the information requested and that it had failed to satisfy him it held no further relevant information. He required the Authority to disclose the wrongly withheld information and to carry out further searches for relevant information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to the effective conduct of public affairs); 36(1) (Confidentiality); 47(1) and (2) (Application for decision by Commissioner).

Background

1. On 7 December 2023, the Applicant made a request for information to the Authority. They asked for:

“all emails, text messages, whatsapps, minutes and other forms of communications of/between Ministers, SPADs, civil servants and other Scottish Government officials regarding/referencing/discussing the court case known as *The Scottish Ministers v The*

Scottish Information Commissioner (case reference number [XA10/23](#)¹) up to and including 6 December 2023.”

2. The Authority responded on 9 January 2024. It disclosed a small amount of redacted correspondence and confirmed that it had otherwise withheld:
 - a small amount of personal information under sections 38(1)(a) and (b) of FOISA (variously)
 - a small amount of information confirming the source of its legal advice under section 30(c) of FOISA
 - other information it considered was subject to legal professional privilege in terms of section 36(1) of FOISA.
3. On 17 January 2024, the Applicant wrote to the Authority requesting a review of its decision. They stated that they were dissatisfied with the decision because they considered:
 - the public interest favoured disclosure of the withheld information
 - the absence of any communication(s) prior to the date the Authority appealed the Commissioner’s Decision 004/2023 to the Court of Session [14 March 2023] was not credible
 - it was implausible that “at no point did anyone within the [Authority] discuss the case through WhatsApp across an 11 month period.”
4. The Authority notified the Applicant of the outcome of its review on 8 February 2024, which fully upheld its original response without modification.
5. On 21 February 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. They stated that they were dissatisfied with the outcome of the Authority’s review because they considered the public interest favoured disclosure of the withheld information and because they did not believe the Authority had identified all information covered by their request.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 12 March 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 withheld under section 30(c) of FOISA but refused to provide the information withheld under section 36(1) as it did not consider it was legally required, under section 50(5), to do so.
8. The case was subsequently allocated to an investigating officer. The Authority was invited to comment on this application and to answer specific questions.

¹ <https://www.scotcourts.gov.uk/media/wzclsnew/court-of-session-judgement-the-scottish-ministers-against-the-scottish-information-commissioner-06-december-2023.pdf>

9. During the investigation, the Commissioner issued [Decision 193/2024](#)² (in response to a separate application from the same Applicant) which required the Authority to disclose the legal advice it had received in relation to its appeal of Decision 004/2023 to the Court of Session. The Authority complied with the Commissioner's decision and [disclosed the legal advice](#)³ on 26 October 2024.
10. That information also fell within the scope of the Applicant's request in this case. During the investigation, the Applicant confirmed that they were content for that information to be excluded from this Decision Notice. The Commissioner will therefore not consider the application of the exemption in section 36(1) of FOISA to that information further in this Decision Notice, or be influenced by the disclosure of that information in his determination of this case (equally, however, this decision can have no practical effect on the fact that the legal advice has been disclosed).

Commissioner's analysis and findings

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

Section 1(1) – General entitlement

12. 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 public 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.
13. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received.
14. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.
15. The Commissioner also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.

The Applicant's submissions

16. The Applicant submitted that their request encompassed the period the Authority took the decision to appeal the Decision 004/2023 of the Commissioner (issued on 31 January 2023) to the Authority's defeat in the Court of Session on 6 December 2023.

² <https://www.foi.scot/sites/default/files/2024-10/Decision193-2024.pdf>

17. The Applicant argued that the public had a right to know what the “reactions and thoughts” of the Authority were in relation to “losing” an appeal to the Scottish Information Commissioner and the Court of Session.
18. The Applicant noted that the earliest communication disclosed in response to their request was dated 16 March 2023. They contended that the absence of communications prior to the Authority’s formal appeal to the Court of Session was not credible. They submitted that the period from January 2023 to March 2023, which followed publication of the Commissioner’s decision, was “the most critical” in terms of the Authority’s reactions to that decision and its preparations for its appeal to the Court of Session.
19. The Applicant further submitted that, given that the Authority was known to use WhatsApp (to the extent that the Commissioner had launched [his own intervention](#)⁴), they did not believe that not a single message referenced or referred to case XA10/23 over an 11-month period.

The Authority’s submissions

20. The Authority explained that it had received a number of related requests for information from the Applicant on this topic. In this instance, however, it noted that the Applicant had explicitly requested information relating to case XA10/23 – the case’s official designation at the Court of Session – which only existed upon the lodging of the Authority’s appeal with the Court on 14 March 2023.
21. The Authority stated that it had, therefore, interpreted the request as seeking all communications referencing, regarding and discussing the court case known as XA10/23 from the point that it was live in court (on 14 March 2023) to the date of the request (on 7 December 2023).
22. The Authority confirmed that, given the terms of the Applicant’s request (and the specific reference to XA10/23), it did not consider any communications prior to 14 March 2023 fell within the scope of the request.
23. The Authority explained that to identify information falling within the scope of the request it had reviewed the case file for the original request for information from which Decision 004/2023 and court case XA10/23 had ultimately resulted. It stated that information relating to its appeal to the Court of Session would have been saved in this case folder.
24. The Authority further explained that it had conducted searches of Outlook folders held by its Freedom of Information Unit and undertaken a manual review of files held by its Digital and Information Law and Litigation teams.
25. The Authority submitted that, given the sensitivities in relation to this matter, relevant information would not have been shared widely. It explained that only a small number of officials (which it identified) might have held further information in relation to the request and provided evidence that these individuals had been asked to undertake searches (and evidence of the results of these searches).
26. The Authority also provided evidence to the Commissioner that these key officials had been asked to check mobile devices for relevant information. It submitted that no WhatsApp group had been set up to connect these officials.

⁴ <https://www.foi.scot/commissioner-launches-new-intervention>

27. The Authority stated that, as decision making and advice was limited to these individuals and teams that it had identified in submissions to the Commissioner, it was satisfied all relevant information had been identified by the searches it had undertaken.

The Commissioner's view

28. The Applicant's request relates to communications in respect of the Court of Session case with the reference XA10/23, which the Applicant considered included "reactions and thoughts" of those within the Authority in relation to "losing" an appeal to the Commissioner and to the Court of Session.
29. The Commissioner acknowledges that the Applicant identified the case by that reference in their request. That was the reference given to the case by the Court and it appears to the Commissioner that reference in those terms would be a reasonable way of identifying the case readily and concisely, whatever timeframe the requester intended to attach to the request. In fact, the Applicant specified no starting point for the timeframe in this case – but clearly, in seeking a review and applying to the Commissioner, expected that their request would have been interpreted to cover the Authority's deliberations prior to an appeal being formally lodged with the Court.
30. While this question does not appear to have been addressed by the Authority when it carried out a review, it would have been surprising if the Applicant's views on the timeframe were formulated afresh after they received the Authority's initial response to the request. In any case, as suggested in the preceding paragraph, the Commissioner considers this to be an entirely reasonable interpretation of the request. It is clear that the Applicant was interested in the whole of the Authority's consideration and decision-making in relation to an appeal to the Court of Session, a crucial part of which would – of course – be communications in the period after Decision 004/2023 was issued and before the appeal was actually lodged. Any interpretation focusing solely on the period after an appeal with that reference existed would, in the Commissioner's view, be unduly legalistic and limit unreasonably what an ordinary requester would expect in relation to this subject matter.
31. The Commissioner is not, therefore, satisfied that the Authority's interpretation of the scope (and, in particular, the timeframe) of the request was reasonable
32. That said, the Commissioner does accept that the teams and individuals encompassed by the Authority's searches would – being directly involved in matters relating to Decision 004/2023 and the Authority's subsequent appeal of that decision – be most likely to hold communications falling within the scope of the Applicant's request.
33. However, while acknowledging that – broadly – the Authority appears to have searched in the right places, the Commissioner must note the Applicant's concern that the information disclosed (or identified) in this case did not include WhatsApp messages. It is, as the Applicant submitted, a matter of public record that the Authority has made use of informal communications channels such as WhatsApp.
34. In all cases, it falls to an authority to persuade the Commissioner, with reference to adequate, relevant descriptions and evidence, that it does not hold the information (or holds no more information than it has identified and located in response to the request).
35. In this case, the Commissioner considers that, notwithstanding the opportunity given to the Authority to provide comments on, and provide evidence of, WhatsApp searches, he cannot be satisfied that adequate searches in this respect were undertaken by those tasked with doing so.

36. In all the circumstances, therefore, the Commissioner cannot (based on the submissions he has received) uphold the Authority's claim that it does not hold any further information than that disclosed to (or withheld from) the Applicant in response to their request. He must therefore find that the Authority failed to comply with section 1(1) of FOISA, when it responded to the Applicant's request and requirement for review.
37. The Commissioner requires the Authority to carry out fresh searches for information relevant to the Applicant's request within the mobile devices and associated cloud accounts of those individuals and offices specified within its submissions to the Commissioner. These searches must encompass WhatsApp (including personal devices and associated accounts, and business devices/accounts where used in any way for a business purpose) and cover the whole period from receipt of the Decision 004/2023 up to and including 6 December 2023.
38. The Commissioner additionally requires the Authority to carry out further searches for relevant information within the locations (and of those individuals and offices) specified within its submissions, for the period **31 January 2023 up to and including 14 March 2023**, (i.e. where the Commissioner **has** accepted that the Authority's searches encompassed relevant locations, individuals and offices (e.g. Outlook, eRDM and personal storage) he requires the Authority to carry out further searches for relevant information spanning the time period above, which was not addressed in its original searches).
39. Evidence of these searches, which should be robust, should be retained in case of a further appeal to the Commissioner.

Section 30(c) – the effective conduct of public affairs

40. In this case, the Authority withheld a small amount of information under the exemption in section 30(c) of FOISA within the redacted documentation provided to the Applicant which, if disclosed, would reveal the source of its legal advice in relation to its appeal of Decision 004/2023.
41. 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 sections 30(a) and (b).
42. Section 30(c) of FOISA 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 disclosure 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.
43. The standard to be met in applying the tests contained in section 30(c) is high: 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 Applicant's submissions

44. The Applicant did not consider that the exemption at section 30(c) of FOISA was engaged as disclosure of the information would not, in their view, prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

The Authority's submissions

45. The Authority submitted that disclosure of the identity of the source of its legal advice would be likely to prejudice substantially the effective conduct of public affairs.
46. Specifically, the Authority explained that disclosure of the source of the legal advice would be likely to lead to conclusions being drawn from the fact that any particular lawyer had (or had not) been asked for advice on a particular matter. It submitted that this would in turn be likely to impair its ability to fully consider the terms of decisions received from the Commissioner and, where appropriate, commence litigation proceedings, as was its right to do under section 56(b)(ii) FOISA.

The Commissioner's view

47. Information can only be exempt under section 30(c) of FOISA if its disclosure would prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. As rehearsed earlier, the Commissioner takes the view that that it is important for public authorities to treat each request for information on a case by case basis. Release of information in one case should not be taken to imply that information of a particular type will routinely be released in future.
48. The Commissioner has considered the withheld information, together with the submissions made by both parties.
49. Having done so, he cannot agree that the withheld information reveals the definitive source of the Authority's legal advice in relation to its appeal to the Court of Session. While it indicates one source of legal support, it does not make clear whether other sources of legal advice had, or had not, been drawn upon previously (or would not be consulted in future).
50. As the Commissioner is not persuaded that the information would reveal the totality of the sources of the Authority's legal advice in respect of appeal XA10/23, he cannot accept the substantial prejudice the Authority has described would, or would be likely to, result from disclosure of the information withheld under section 30(c) in this case. He does not believe that such a conclusion can be reached from the arguments provided for this information.
51. Given that the Commissioner does not accept the application of the exemption for the information withheld under section 30(c) of FOISA, he is not required to consider the public interest test in section 2(1)(b) for that information. As no other exemption has been claimed by the Authority to justify the withholding of that information, the Commissioner requires the Authority to disclose it to the Applicant and he must find that it failed to comply with section 1(1) of FOISA by withholding it.

Section 36(1) – Confidentiality

52. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings.
53. The Authority explained that it considered all the withheld information to be either:

- (a) communications subject to legal advice privilege between a lawyer and client about obligations under FOISA, or
 - (b) communications created by legal advisers or officials in contemplation of litigation proceedings under FOISA.
54. Legal advice privilege applies to communications in which legal advice is sought or provided. For legal advice privilege to apply, certain conditions must be fulfilled:
- (i) The information must relate to communications with a professional legal adviser, such as a solicitor or advocate
 - (ii) The legal adviser must be acting in their professional capacity, and
 - (iii) The communications must occur in the context of the legal adviser's professional relationship with their client.
55. Litigation privilege is different and covers documents created in contemplation of litigation (also known as communications post litem motam).
56. Communications post litem motam are granted confidentiality to ensure that any person or organisation involved in or contemplating a court action can prepare their case as fully as possible, without the risk that their opponent, or prospective opponent, will gain access to the material generated by their preparations. The privilege covers communications at the stage when litigation is pending or in contemplation.
57. Whether a particular document was prepared in contemplation of litigation will be a question of fact, the key question generally being whether litigation was actually in contemplation at a particular time.
58. Litigation privilege will apply to documents created by the party to the potential litigation, expert reports prepared on their behalf and legal advice given (and sought) in relation to the potential litigation. However, the communication need not involve a lawyer and the litigation contemplated need never actually happen for the privilege to apply. It will continue to apply after any litigation has been concluded.
59. There is a further matter to be considered, however, before the Commissioner can determine whether, or the extent to which, the section 36(1) exemption in FOISA is applicable in the circumstances of this case.
60. The information cannot be privileged unless it is also confidential. For the section 36(1) exemption in FOISA to apply, the withheld information must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. In other words, the claim must have been capable of being sustained at the time the exemption is claimed.
61. A claim of confidentiality cannot be maintained where, prior to a public authority's consideration of an information request or conducting a review, information has been made public, either in full or in a summary sufficiently detailed to have the effect of disclosing the advice. Where the confidentiality has been lost in respect of part or all of the information under consideration, any privilege associated with that information is also effectively lost.

The Applicant's submissions

62. The Applicant submitted that it was for the Commissioner to decide whether the legal privilege exemption applied to the withheld information. However, they considered it did not.

63. The Applicant noted that the legal privilege exemption is not absolute and pointed to the [Scottish Ministerial Code](#)⁵, which recognises that there are exceptions to the convention of not disclosing legal advice.

The Authority's submissions

64. The Authority stated that 11 documents disclosed in response to Decision 193/2024 fell within the scope of the Applicant's request for information in this case. It confirmed that the broader scope of the Applicant's request in this case also meant that further information was held (and was being withheld) in this case than comprised the legal advice disclosed in response to Decision 193/2024.
65. As indicated above, the Commissioner is not considering the legal advice itself in this case (and therefore will not consider submissions relating solely to that legal advice).
66. The Authority explained that the information withheld under section 36(1) of FOISA that was not the legal advice disclosed in response to Decision 193/2024 "comprised standard official level correspondence of a type expected when preparing for litigation".
67. The Authority submitted that section 36(1) of FOISA applied to the withheld information as it was either communications subject to legal advice privilege between a lawyer and client about obligations under FOISA or communications created by legal advisers or officials in contemplation of litigation proceedings under FOISA (i.e. the appeal of Decision 004/2023 to the Court of Session).
68. The Authority stated that it considered the relevant applicable period for contemplation of proceedings began when it received notification of Decision 004/2023 on 31 January 2023 and lasted until it took a final decision on 20 December 2023 on whether to appeal the decision of the Court of Session to the Supreme Court.
69. The Authority submitted that the withheld information had not at any time been shared with anyone beyond the Authority and as such it remained confidential at the time it responded to the request and requirement for review (and it remained so at the time of the submissions). Accordingly, it considered that legal professional privilege had not been waived and that all of the necessary conditions for litigation privilege to apply were satisfied. Whilst the litigation in question had concluded, it considered that litigation privilege continued to apply to the withheld information.
70. The Authority further considered that legal advice privilege applied to some of the withheld information because it related to communications with, or references to communications with, in-house legal advisers acting in their professional capacity and the Authority as their client, in which it sought, and was provided with, legal advice.
71. The Authority submitted that all of this information was either made, or effected for, the principal or dominant purpose of seeking or giving legal advice or evidenced by those communications. It considered that disclosure of this information would breach legal professional privilege by divulging information about the points being considered by lawyers, the extent of their comments and the issues being flagged for further consideration. It confirmed that all of the necessary conditions for legal advice privilege to apply were satisfied.

⁵ <https://www.gov.scot/publications/scottish-ministerial-code-2023-edition/>

72. The Authority also explained that it did not consider it appropriate to confirm the source of its legal advice, but confirmed that the individuals who provided advice were acting in their professional capacity as legal advisers when taking forward work for the Authority in relation to its appeal to the Court of Session.
73. The Authority submitted that a claim to confidentiality in legal proceedings could be maintained because the withheld information was only shared between the Authority and its legal advisers. The information remained confidential at the time the Authority responded to the Applicant's request and requirement for review (and it remained so at the time of the submissions). Accordingly, legal professional privilege had not been waived.
74. The Authority further explained that it had refused to provide the information withheld under the exemption in section 36(1) of FOISA on the basis that the Commissioner was the opposing party in case XA10/23 and sections 50(5)(a) and (b) of FOISA made clear that it was not in those circumstances obliged to do so.
75. The Authority submitted that where a request covered information falling within the scope of section 50(5), FOISA envisaged that the Commissioner may be required to issue a decision – including giving consideration to the public interest assessment – without having sight of the withheld information in question. It referred the Commissioner to both relevant case law and decisions issued by the UK Information Commissioner, which it considered supported its position.
76. The Authority argued that, where authorities exercised their right under section 50(5) of FOISA to withhold information, it should not be considered unreasonable, nor a shortcoming, given that section 50(5) recognised the importance of not providing the Commissioner with an unfair advantage.

The Commissioner's view

77. As rehearsed earlier, the Authority refused to provide the withheld information to the Commissioner as it did not consider it was legally required, under section 50(5) of FOISA, to do so.
78. Section 50(5) of FOISA provides that a Scottish public authority is not obliged, in response to receiving an information notice, to give the Commissioner information in respect of:
 - a) a communication between professional legal adviser and client in connection with the giving of legal advice to the client with respect to that client's obligations under this Act; or
 - b) a communication between professional legal adviser and client, or between such adviser or client and another person, made in connection with or in contemplation of proceedings under or arising out of this Act and for the purpose of such proceedings.
79. Not being provided the withheld information places obvious limitations on the Commissioner's ability to comment on it. However, the Commissioner accepts that, in view of the nature of the information requested and the circumstances in which it was created, the Authority would not have been obliged under section 50(5) of FOISA to provide the withheld information to him, had he issued an information notice (which, in this case, he did not do).
80. While the Authority was not obliged under section 50(5) of FOISA to provide the withheld information to him, the Commissioner does not consider that the Authority was legally prevented from providing the withheld information to him. He considers that public authorities have a choice – which should be informed by the specific circumstances and risks

(which will vary in each case). As the independent public official responsible for enforcing FOI law in Scotland, the Commissioner considers it entirely appropriate to ask for withheld information when considering an appeal in respect of that information – even in the (rare) situation where the public authority is not obliged to provide it.

81. In all of the circumstances, and having considered the Authority's submissions, the Commissioner accepts that the exemption in section 36(1) of FOISA applies to the withheld information.
82. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. The exemption can only be upheld if the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

The public interest test

83. The Commissioner has not fully reproduced the submissions of the Applicant or the Authority on the public interest, where they relate solely to the legal advice disclosed in response to Decision 193/2024. This is because, as rehearsed earlier, this legal advice has been excluded from consideration in this Decision Notice.

The Applicant's submissions on the public interest

84. The Applicant submitted that understanding the Authority's preparations, what officials were discussing and their reactions to the case being appealed (and to the Authority's subsequent "defeat") was vital for transparency and scrutiny on the following grounds:
 - the novelty of the appeal to the Court of Session, given the rarity of the Authority appealing a decision of its own independent Commissioner
 - the significant cost to the public purse
 - the speed at which the Court of Session reached its decision and that it did so without avizandum
 - had the Authority's appeal been successful it would have enabled public authorities to block FOISA requests on similar grounds, which would have affected a large number of people.

The Authority's submissions on the public interest

85. The Authority recognised a public interest in disclosing the withheld information to promote openness and transparency. It also acknowledged that disclosure could enhance public understanding of its decision to appeal Decision 004/2023 of the Commissioner.
86. However, the Authority considered there was a very strong interest in maintaining the exemption relating to legal professional privilege to ensure confidentiality of communications, for the following reasons:
 - to ensure that any person or organisation involved in court action can take legal advice, consider options and prepare their case as fully as possible without the risk that their opponent will gain access to the material generated by their preparations
 - to protect the confidentiality of the withheld information, to ensure that the Authority can discuss and take policy decisions in full possession of thorough and candid legal

advice. This ensures that the Authority can take decisions in a fully informed legal context, having received legal advice in confidence as any other client would.

87. The Authority also noted the unusual circumstances of this case, notably that the opposing party in the appeal in question was the Commissioner. As rehearsed earlier, it did not consider it appropriate, or envisaged by the legislation, that material relating to an appeal against the Commissioner's decision should be shared with the Commissioner in relation to an application for a decision made by a requester under section 47 of FOISA.
88. The Authority explained that it did not consider it to be in the public interest that a public authority should be required to share information with the Commissioner where the information in question related to legal advice about litigation in which the Commissioner was the opposing party.
89. The Authority also stated that it did not consider it to be in the public interest for the Commissioner to order disclosure of such material, as the effect of that order would be to enable access to the information not only to the requester but to the Commissioner. It submitted that this would be at odds with the intention of section 50(5) of FOISA.
90. The Authority noted that the substantive arguments in support of its appeal were part of the oral submissions made by Counsel in the public hearing in the Court of Session on 6 December 2023, which were further outlined as part of the publicly available written judgment of the Court of Session. It explained that it considered its reasons for pursuing the appeal were made public via the court action, the hearing and the written judgment, with the Authority's position having been publicly debated and the matter conclusively resolved in the Commissioner's favour.
91. While the Authority accepted that it was important for Government to be open and transparent in relation to the use of public resources, it submitted that litigation and determination of points of law were fundamental features of a democratic society.
92. The Authority also addressed the Applicant's specific arguments in the following terms:
 - the rarity of an authority's appeals against the Commissioner should not weigh on the public interest – it being perverse if choosing to litigate (a right protected in FOISA) diminished an authority's litigation privilege on the basis that such an event was perceived as "exceptional"
 - the speed of the Court's determination should not be a factor in assessing the public interest in the legal advice/communications in this case – the practical implication being that the faster a decision, the weaker a party's litigation privilege
 - the Court made no criticism of the Authority's decision to appeal Decision 004/2023 and described the case as raising a "sharp and important question of statutory interpretation"
 - it understood the Court's practice was to give decisions "at the time" whenever possible, and the lack of recourse to avizandum was not an exceptional factor indicating it had acted contrary to legal advice, nor that its prospects of success were intrinsically low
 - its appeal was a legitimate use of public resource, properly informed by detailed legal advice (which had advised of a reasonable prospect of success) and the Court's

judgement offered valuable technical guidance on FOISA of ongoing assistance to both parties and Scottish public authorities generally

- the cost of the litigation should not weigh in favour of disclosure in the public interest – parties being unsuccessful in litigation being a feature of the court system and not an indication that anything improper had occurred
- it was inappropriate to construct public interest arguments on the hypothetical scenario that had its appeal had been successful it would have affected other public authorities (and so a large number of people)
- where an authority is advised that it has reasonable prospects of success, it is fully entitled to take the matter to Court, and that it was ultimately unsuccessful cannot be weighed as a factor in deciding whether to override legal professional privilege.

93. The Authority argued that the public interest must, in line with [Montague v Information Commissioner \[2023\] 1 WLR 1565](#)⁶, be assessed at the time the request was originally refused (i.e. on 9 January 2024), not the date of any subsequent review.
94. More broadly, the Authority considered that there was a strong public interest in authorities that are subject to regulation by the Commissioner having confidence that the privilege attached to legal advice in respect of their rights and obligations under FOISA, and in respect of litigation involving the Commissioner, will be respected.
95. The Authority argued that the Commissioner is not a “one-off” litigant but a regulator in a permanent and continuing relationship with the Authority and other public authorities, who might rule upon, or become party to, many future disputes concerning the disclosure of information by the Authority and in particular cases which include legal advice about FOISA.
96. The Authority submitted that the legal advice given in relation to any appeal decision or subsequent litigation could give the Commissioner an unfair advantage in future analogous cases involving the Authority or other public authorities.
97. The Authority further submitted that where information fell within the “special class” of documents covered by section 50(5) FOISA “exceptionally compelling” reasons were required to order disclosure given disclosure would, in effect, secure the Commissioner the unfair advantage Parliament sought to protect against when drafting section 50(5).
98. On balance, the Authority concluded that the public interest in maintaining the exemption outweighed that in disclosing the withheld information, given the overriding public interest in maintaining the confidentiality of communications between lawyers and their clients and the public interest in allowing for full and detailed internal consideration of the Commissioner’s decision and, in particular, the Authority’s right to appeal a decision where it considered it appropriate to do so.

The Commissioner’s view on the public interest

99. As the Commissioner has noted in several previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client, on administration of justice grounds.

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https://assets.publishing.service.gov.uk/media/6273a6ec8fa8f57a41d53ee9/UA_2020_000324_000325_GIA.pdf

100. In a freedom of information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of [Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien \[2009\] EWHC164 \(QB\)](#)⁷. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
101. The Commissioner accepts that there is a considerable, in-built, public interest in maintaining the ability of the Authority to receive full, unhindered legal advice. However, he also acknowledges that there will be occasions where the significant in-built public interest in favour of withholding legally privileged communications may be outweighed by the public interest in disclosing the information.
102. As rehearsed earlier, the Commissioner is not considering in this decision notice the legal advice disclosed in response to Decision 193/2024. His assessment of the public interest is restricted to the remaining information withheld under section 36(1) of FOISA, which he has not seen, and which the Authority has described as "standard official level correspondence of a type expected when preparing for litigation".
103. The Commissioner's [guidance on the exemption in section 36\(1\)](#) of FOISA⁸ provides that legally privileged information (beyond legal advice) should be treated broadly and may include:
- advice about how best to present evidence
 - communications where legal advice is sought
 - notes made by a legal adviser
 - precognitions (notes of an interview with someone who may be called to give evidence at trial or hearing)
 - documents created in contemplation of legal action (by the party contemplating the action)
 - communications when litigation is pending or being considered
 - expert reports created on behalf of the party contemplating the action.
104. From the general description offered by the Authority in this case, the Commissioner presumes the withheld information includes nothing particularly unusual or unexpected.
105. It is in this context that the Commissioner has considered the competing public interest arguments as they apply to the withheld information in this case, which the Authority described as comprising "standard official level correspondence".
106. The Commissioner has fully considered the Authority's submissions on the public interest, though his assessment of the public interest has not, of course, been helped by his inability to consider the withheld information. He cannot agree with the Authority's assertion that information falling within the scope of section 50(5) of FOISA is automatically subject to some form of higher bar, where "exceptionally compelling reasons" are required for

⁷ [https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=\(title:\(+o%27brien+\)\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=(title:(+o%27brien+)))

⁸ https://www.foi.scot/sites/default/files/2023-07/BriefingSection36Confidentiality_2023.pdf

disclosure. He can see no provision in FOISA (and has been offered no authority, there or elsewhere) that supports such a conclusion.

107. The Commissioner would also observe, given the description of the information offered by the Authority, that the arguments for maintaining confidentiality of communications for this information in isolation may be somewhat less compelling than if it were being considered as part of the full set of communications relating to the appeal case.
108. The Commissioner considers it important to note that the exemption in section 36(1) of FOISA is a qualified exemption. While he accepts that the public interest in maintaining confidentiality of communications is strong, it must be fully considered in each case – a consideration always fully open to the possibility that there may be relevant, and sufficiently weighty, countervailing arguments. When determining where the public interest lies, the Commissioner must make his assessment in relation to the specific circumstances of the case on each occasion and, as recognised by the Court of Session in [Scottish Ministers v Scottish Information Commissioner \[2006\] CSIH 8](#)⁹ (at paragraph [31]), at the time of the review (at the latest) (the Court has never taken a contrary view on this timing and decisions of the Upper Tribunal in relation to the Freedom of Information Act 2000 are not binding in relation to the application of FOISA).
109. The Authority issued its review outcome on 8 February 2024. By this point, proceedings had been conclusively resolved in the Commissioner's favour – and it was clear that the Court's decision would not be appealed further. He acknowledges that the circumstances are unusual, but he is concerned with whether disclosure of the withheld information would serve the interests of the public, not himself. In any case, he cannot see what practical value the information would have offered him in the actual circumstances of the case – particularly given the Authority's description of the information.
110. The Commissioner accepts in this case that the public interest in the reasons why the Authority appealed Decision 004/2023 has been met, to some extent, by information already in the public domain (as a result of the Court of Session hearing and subsequent decision). However, the Applicant has expressed a specific interest in the communications of the Authority in relation to its appeal of the Commissioner's Decision 004/2023 to the Court of Session. This is information that is not in the public domain.
111. The question the Commissioner must consider is whether the public interest favours disclosure of the withheld information in this case. His guidance on the exemption in section 36(1) of FOISA provides that whether disclosure would contribute to a debate on a matter of public interest is a factor which may be considered when weighing the public interest.
112. In the Commissioner's view, the subject matter of the request – which is well known and has been the subject of sustained and extensive discussion in the legal, media and political landscape for several years – remains a matter in which there is a clear public interest. (The Commissioner has published [information on his website](#)¹⁰¹¹ regarding these matters.) The withheld information is information that is not in the public domain, in relation to which there is a clear public interest, which can only be satisfied by disclosure of the withheld information.

⁹ <https://webarchive.nrscotland.gov.uk/20240713015729/https://scotcourts.gov.uk/search-judgments/judgment?id=a94886a6-8980-69d2-b500-ff0000d74aa7>

¹⁰ <https://www.foi.scot/foi-appeals-summary-james-hamilton-report-and-investigation>

¹¹ <https://www.foi.scot/further-clarification-following-disclosure-legal-advice>

113. Given the Authority's description of the withheld information, the Commissioner acknowledges that disclosure would be unlikely to enlighten the public to the same extent as disclosure of the legal advice disclosed in response to Decision 193/2024. However, he must consider the position at the time of the review (at the latest) – which predates the disclosure of the legal advice. In any event, the Commissioner considers that disclosure of the withheld information in this case would nevertheless cast further light on subject matter (and its handling by the Authority) that is, as set out earlier, of clear and sustained interest to the public.
114. The Commissioner has also noted the Authority's comprehensive rebuttal of the Applicant's public interest arguments. Consideration of the public interest in disclosure in this case is not an examination of the merits of the Authority's legal case, or of its claims to privilege in relation to the material held. It is not for the Commissioner to question the sincerity of the Authority's belief in the legal merits of its case. The Commissioner does, however, have to consider the relevance of the public interest arguments offered by the Applicant and he does not, even if they may not all bear the same weight, consider any of them can be dismissed. In particular, it does not follow from the right to legal challenge – or even merit in doing so – that the relevant decision-making or public expense should be exempt from scrutiny.
115. As indicated above, the exemption in section 36(1) is a qualified one, subject to the public interest test in the same way as any other qualified exemption. There may be a strong public interest in maintaining this exemption, but the public interest test must still be applied with the same rigour as any other qualified exemption, in the particular circumstances of the case under consideration.
116. Having considered all relevant submissions, therefore, and given (while acknowledging that it is entitled to do so) that the Authority has refused to provide him with the withheld information, the Commissioner cannot conclude, in all the circumstances of this particular case, that the Authority has demonstrated that the public interest in maintaining the exemption in section 36(1) of FOISA outweighs that in disclosure of the withheld information.
117. For the reasons set out above, and having regard to the submissions of the parties in this case, the Commissioner has concluded, on balance in all the circumstances, that the public interest in disclosure of the information under consideration in this decision should be considered of sufficient substance to outweigh the in-built public interest in maintaining the exemption in section 36(1) of FOISA.
118. That said, the Commissioner acknowledges that there may, within the withheld information, be elements which should not be disclosed, specifically personal data (where it can legitimately be withheld under section 38 of FOISA) and (bearing in mind the subject matter of the original information request considered in Decision 004/2023) information the disclosure of which would constitute, or be punishable as, a contempt of court (and which could, therefore, be withheld under section 26(c) of FOISA). Information of both descriptions may be redacted from what is disclosed to the Applicant.

Decision

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

Specifically, the Commissioner finds that the Authority failed to comply with section 1(1) of FOISA in the following respects:

- the Authority was not entitled to withhold the requested information under sections 36(1) and 30(c) of FOISA
- the Authority has failed to satisfy him that it does not hold any further information relevant to the request.

The Commissioner therefore requires the Authority to:

- disclose to the Applicant the information withheld under sections 36(1) and 30(c) of FOISA (subject to such redaction as is permitted by paragraph 118 of this decision notice).
- carry out adequate, proportionate searches which must:
 - include WhatsApp and cover the whole period specified in paragraph 37 of this Decision Notice) for information falling within the scope of the Applicant's request, within both personal and official mobile devices (and related cloud storage accounts) of the individuals and offices specified within its submissions (including all individuals within those offices during the period covered by the request),
 - include information falling within the scope of the Applicant's request within eRDM, Outlook and personal storage locations of the individuals and offices specified within its submissions (including all individuals within those offices during the period covered by the request) for the whole period specified in paragraph 38,
 - reach a decision on the basis of these searches and notify the Applicant of the outcome (all in terms of section 21 of FOISA).

The Authority is required to comply by **2 May 2025**.

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.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

David Hamilton
Scottish Information Commissioner

18 March 2025