



Scottish Information  
Commissioner  
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# Decision Notice 164/2025

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## Report concerning complaints of bullying

Authority: Orkney Islands Council  
Case Ref: 202500259

### Summary

The Applicant asked the Authority for a specific report concerning complaints of bullying of a named individual. The Authority refused to provide the information on the basis that it had already provided the Applicant with a copy of the report outwith FOISA. Following an investigation, the Commissioner was satisfied that the information was exempt from disclosure under section 25(1) of FOISA as it was otherwise accessible to the Applicant.

### Relevant statutory provisions

[Freedom of Information \(Scotland\) Act 2002](#)<sup>1</sup> (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(a) and (2)(a) and (c) (Effect of exemptions); 21(5) (Review by Scottish public authority); 25(1) (Information otherwise accessible); 36(2) (Confidentiality); 47(1) and (2) (Application for decision by Commissioner).

### Background

1. On 10 September 2024, the Applicant made a request for information to the Authority. He asked for a specific report relating to complaints regarding bullying of a named individual at a named school, and associated complaints relating to that same individual at that same school.
2. The Authority responded on 24 September 2024. It informed the Applicant that, as he had already been provided with the information on 15 July 2024 by the Service Manager (Legal),

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<sup>1</sup> <https://www.legislation.gov.uk/asp/2002/13/contents>

the report was exempt under section 25 of FOISA, which was not subject to the public interest test in FOISA, and it would not be disclosed again.

3. That same date, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he believed he had a legitimate interest in requesting the information which he had been provided with, as it was not publicly available but was held by the Authority. Referring to the Authority's claim [in an email to the Applicant dated 14 August 2024] that the information provided to him on 15 July 2024 was confidential and could not be given to members of the public, he explained that he did not want the information for himself, but wanted it for the purposes of informing the public, which was the purpose of Freedom of Information.
4. The Applicant referred to the [guidance on section 25 of FOISA](#)<sup>2</sup> published by the Commissioner which stated "...information might be reasonably obtainable by the requester (e.g. because they already have a copy of the information), but might not be reasonably obtainable by the public in general", pointing out that the information was not reasonably obtainable by the public in general.
5. The Authority notified the Applicant of the outcome of its review on 22 October 2024, fully upholding its original decision with modification. The Authority informed the Applicant that it continued to rely on section 25 of FOISA, but also now wished to rely on the exemptions in section 34(3) (Investigations), section 36 (Confidentiality) and section 38 (Personal information).
6. The Authority disagreed with the Applicant's interpretation of section 25. It argued that he could already "reasonably obtain" a copy of the information because it had been provided to him, and the fact that he could not share it more widely with the public was not relevant to the application of the exemption. The Authority also disagreed with the Applicant's interpretation of the Commissioner's guidance, noting that the sentence in question referenced the wording of the exemption where it applied in circumstances where an applicant has access to the information, but the general public does not.
7. That same date, the Applicant wrote to the Authority asking it to:
  - explain why the additional three exemptions applied;
  - confirm, with particular regard to section 36, that it was claiming "legal advice privilege";
  - confirm that it had applied the public interest test where relevant, and explain why the balance of public interest favoured non-disclosure;
  - explain why any of that information was not provided in its review outcome, and
  - explain why the information requested was considered confidential under FOISA, when the Authority did not state this when disclosing the information on 15 July 2024 and no claim of confidentiality was included in the covering correspondence [to the report].
8. The Authority responded on 11 November 2024. It considered that section 25 was sufficient to justify refusing the request; however, it explained why it considered that the exemptions in section 34(3), section 36 and section 38 also applied, including consideration of the public interest, where relevant.

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<sup>2</sup> [https://www.foi.scot/sites/default/files/2023-05/BriefingSection25InformationOtherwiseAccessible\\_25.5.23.pdf](https://www.foi.scot/sites/default/files/2023-05/BriefingSection25InformationOtherwiseAccessible_25.5.23.pdf)

9. On 15 February 2025, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority's review because:
- when initially disclosing the report to him on 15 July 2024 (outwith FOISA), the Authority did not cite any confidentiality restrictions. Having subsequently queried this with the Authority, the Applicant was surprised that, in its email of 14 August 2024, the Authority confirmed that the report was confidential, was prepared on behalf of the Authority and had been shared with the Applicant without waiving confidentiality, and should not be shared on social media or with the press. In light of this, he was primarily dissatisfied with the Authority's reliance on section 36.
  - he wanted the report to show it to his MSP, local councillors, the Parent Council, his GP and CAMHS [Child and Adolescent Mental Health Services], and had no intention of publicising it in the manner described by the Authority;
  - although he already held the report, he could not use it for his intended purpose, given the confidentiality restrictions intimated by the Authority, and so had requested it under FOISA, and
  - he also wished the Commissioner to review whether the other exemptions claimed by the Authority (section 25, section 34(3) and section 38) had been correctly applied, including consideration of the public interest test where relevant.

## Investigation

10. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
11. On 26 February 2025, 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 subsequently allocated to an investigating officer.
12. 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 focused on the Authority's justification for refusing the request under the exemptions in section 25, section 34(3), section 36 and section 38 of FOISA, including consideration of the public interest test where relevant.
13. The Applicant was also invited to provide any further comments he wished to make on the public interest in disclosing the information.
14. During the investigation, the Authority informed the Commissioner that it now wished to withdraw its reliance on section 36(2) for the information requested (but still continued to maintain reliance on the other exemptions claimed, i.e. section 25, section 34(3), section 36(1) and section 38(1)(b)).
15. Both parties provided submissions to the Commissioner.

## Commissioner's analysis and findings

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

### ***Section 25(1) of FOISA – Information otherwise accessible***

17. Information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt from disclosure. This exemption is not subject to the public interest test in section 2(1)(b) of FOISA. Section 25(1) is not intended to prevent or inhibit access to information, but to relieve public authorities of the burden of providing information that an applicant can access readily without asking for it.

### ***The Authority's submissions***

18. In its submissions to the Commissioner, the Authority explained that it had provided the Applicant with an electronic copy of the report by email on 15 July 2024. It therefore considered the report was reasonably accessible to him, he could access the information at any time and the Authority was not aware of any difficulties faced by the Applicant in doing so.
19. The Authority submitted that the section 25(1) exemption was focused on whether the applicant can reasonably obtain the information, and not on whether it was readily available to the public or otherwise published. It recognised that, for section 25(1) to apply, the circumstances of the individual applicant were relevant together with the applicant's ability to access the information. In this case, in providing the report to the Applicant on 15 July 2024, the Authority believed the Applicant could clearly obtain or access the information other than by requesting it under section 1(1) of FOISA.
20. The Authority referred to the Commissioner's guidance on section 25(1) (paragraph 9) which states: "On the other hand, information might be reasonably obtainable by the requester (e.g. because they already have a copy of the information), but might not be reasonably obtainable by the public in general". The Authority confirmed that the report was not in the public domain and was therefore not reasonably obtainable by the public in general; however, it was accessible to the Applicant and the circumstances of this request fell squarely within those identified in the Commissioner's guidance.
21. Referring to Commissioner's [Decision 027/2021](https://www.foi.scot/decision-0272021)<sup>3</sup> [in which section 25(1) was not upheld], the Authority submitted that, in that case, a union representative could access the document requested but his access was limited: he could only access the document during a particular meeting and could not copy it or take it out of that meeting. The Authority confirmed that no such restrictions were applicable in this case, and the Applicant could access and review the report as required.
22. While the Authority's position was that the report was legally privileged and that legal privilege had not been waived by sharing the report with the Applicant, the Authority argued that this had no bearing on section 25(1). The Authority was satisfied that the terms of section 25(1) had been met.

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<sup>3</sup> <https://www.foi.scot/decision-0272021>

23. In the Authority's view, section 25(1) was sufficient for it to refuse to disclose the report to the Applicant. However, at review stage, it considered that additional exemptions were also applicable and determined, on review, to also rely on these in order to provide a full response to the Applicant's request for review.

#### *The Applicant's submissions*

24. In his submissions to the Commissioner, the Applicant did not believe that the exemption in section 25 applied. In his view, there were grounds for arguing that the information was not "reasonably accessible" under FOISA, even where the applicant physically possessed a copy, if their ability to use it was restricted, such as by a confidentiality clause (as in his case). He believed the flexibility in interpreting the term "reasonably" (which, he argued, introduced nuance) opened up this argument as, in his view, it was not just about possession, but also practical accessibility and usability in a way that aligned with the purpose of FOISA, ensuring public access for transparency and accountability.
25. The Applicant argued that possession [of the information] was not enough. In his case, he was not able to exercise his rights to be able to do anything meaningful with the information due to external constraints (i.e. the confidentiality clause). These legal and practical barriers [imposed by the Authority in disclosing the information to him outwith FOISA] restricted his ability to act on the information e.g. by sharing it, discussing it publicly, analysing it and using it hold to authorities accountable.
26. The Applicant argued that FOISA existed to provide unrestricted access to information, subject to exemptions, and that section 25(1) assumed that an applicant could reasonably obtain and use the information as if it were a disclosure under FOISA. In his view, the copy of the report that he had been furnished with [outwith FOISA] was not equivalent to a disclosure under FOISA because it was shackled by conditions on further sharing, thus defeating the goal of transparency in the legislation.
27. The Applicant submitted that a response under FOISA carried implicit rights, where the information disclosed could be used publicly without restriction. However, where the information disclosed carried restrictions (as in his case), that information did not carry the same freedoms and it lacked the usability provided for under a FOISA disclosure. He believed that his situation reflected an unfair burden which FOISA did not intend.
28. The Applicant disagreed that section 25(1) applied, arguing that it was not the sole intention of FOISA to make information available to the requester, rather it was so the requester could make use of it, otherwise what would be the point of FOISA. He believed that FOISA was about making information publicly available, otherwise it was a complete waste of time. As he did not have information that was publicly available, he believed he should be able to use FOISA to achieve that end.
29. In his further submissions to the Commissioner, the Applicant argued that, in the eyes of the law, everyone was equal and had the same rights as any other citizens. However, in this case, he believed that he was being treated as a different class of person by virtue of simply having a copy of the report he had asked for under FOISA (as it had been previously provided to him outwith FOISA, with restrictions).
30. The Applicant offered the following hypothetical example to highlight his view on this. Should his neighbour request the same report, and the Authority applied one of the other exemptions cited at review (for example, section 36), this had the effect of creating two different legal classes of person. The neighbour would be able to challenge the applicability of the

section 36 exemption and, if the Commissioner were to find that it had been wrongly applied, he would instruct the Authority to release the report. However, in the Applicant's case, as section 25(1) had also been applied, the Applicant would not be able to do so in the event that the Commissioner upheld section 25(1). In this hypothetical situation, the neighbour would hold a copy of the report and would be able to freely share it (through the disclosure under FOISA), but the Applicant would not be able to similarly do so (through the disclosure outwith FOISA). In light of this, the Applicant believed that, in this case, the Commissioner should address the section 36 exemption first to avoid creating two legal classes of person and information.

31. In his later submissions, the Applicant believed that his situation (with regard to section 25(1) in relation to the report) was discriminatory and therefore a violation of his Article 14 rights under the Human Rights Act 1998. He argued that section 25 made explicit mention of "members of the public" (and not just the "applicant") and was intended to save authorities time and effort where the information being requested was already publicly available. In the Applicant's view, the Authority had to prove that the information was reasonably publicly available in the same form, otherwise section 25 did not apply.
32. Referring to [section 21](#)<sup>4</sup> (Information accessible to the applicant by other means) of the Freedom of Information Act 2002 (FOIA) [which is applicable in England, Wales and Northern Ireland], the Applicant argued that this was almost identical to section 25 of FOISA. In this regard, he referred to [guidance](#)<sup>5</sup> issued by the UK Information Commissioner (UK ICO) on section 21 of FOIA, in which the UK ICO advises:

"You cannot rely on section 21 when you believe the requested information engages another exemption in Part II of FOIA. If another exemption applies, that means the information is not accessible. Consequently, section 21 cannot apply."

#### *The Commissioner's view*

33. The first matter on which the Commissioner must reach a decision here is whether the report can reasonably be obtained by the Applicant, other than by requesting it under section 1 of FOISA. If he finds that the information cannot reasonably be obtained by the Applicant and that section 25 has been wrongly applied, he must then go on to consider whether any of the other exemptions cited by the Authority have been correctly applied in this case.
34. The Commissioner notes that section 25 is one of the few exemptions in FOISA where the identity of an applicant is relevant. This is in relation to the circumstances of the applicant with regard to their ability to reasonably access the information requested, other than by requesting it under FOISA.
35. As set out in his guidance, the exemption in section 25 exists to remove information, which a requester can access via another route, from the general right of access under section 1 of FOISA. It has a different focus from most other exemptions. It is not about withholding information from the public, it recognises that where information is already available, there is no need for an alternative right of access to be provided to it through FOISA. When applying section 25(1) of FOISA, an authority needs to assess whether the requested information is reasonably accessible to the applicant. This means accessible other than through a request under section 1 of FOISA.

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<sup>4</sup> <https://www.legislation.gov.uk/ukpga/2000/36/section/21>

<sup>5</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-21-information-accessible-to-the-applicant-by-other-means/>

36. The exemption applies if the information requested is already accessible to the requester, so it can be applied where an authority knows that the requester already has reasonable access to the information by other means. The use of the term “the applicant” in the wording of the exemption sets it apart from the other exemptions in Part 1 of FOISA and the applicant’s ability to obtain the information is qualified by the term “reasonably”. This means that an authority must take into account the applicant’s specific circumstances (including their identity).
37. The Commissioner agrees with the Applicant that this can, indeed, create a difference in how an authority might respond to two identical requests, made by two separate individuals, where the circumstances of one requester (in relation to their ability to reasonably access the information requested through other means) are different to that of the other requester (although it does not necessarily follow that the other requester will be placed in a more privileged position with regard to access: other exemptions may still apply if they ask for the information).
38. It is clear to the Commissioner that, at the time he made his information request, the Applicant had unrestricted access to the report, by virtue of it having been provided to him by the Authority, albeit outwith FOISA, on 15 July 2024.
39. The Commissioner notes that, in disclosing the report to the Applicant outwith FOISA, the Authority had placed specific restrictions on the further sharing of information in that report, and had informed the Applicant that, in disclosing it to him, outwith FOISA, it had not waived confidentiality.
40. He also notes the Applicant’s reasons for wishing to access the report under FOISA, so that he can use it to inform the public (as stated in his request for review), share it with the parties specified in his application, discuss it publicly and use it to hold authorities to account (which, he claims, he is unable to do with regards to the report which has been disclosed to him outwith FOISA).
41. The wording of the section 25(1) exemption in FOISA states: “Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information”. The explicit use of the term “the applicant” here clearly confirms that this exemption is concerned with the ability of the applicant, and not that of the wider public, to reasonably access the information requested.
42. The Commissioner notes that there is nothing in section 25 of FOISA that makes provision for the wider sharing of any information which is otherwise reasonably obtainable by an applicant. As such, it is clear that this exemption is not concerned with the wider sharing of any such information. The Commissioner therefore considers the arguments, from both parties, in relation to usage restrictions and wider sharing are somewhat irrelevant to the Commissioner’s consideration of the section 25(1) exemption, given that the Applicant has full, unrestricted access to the report.
43. It is a matter of fact that the Applicant has a copy of the report and his access to the information in that report is unrestricted. This was the case at the time he made his information request, under FOISA, to the Authority.
44. The Commissioner therefore finds that the Authority was entitled to refuse the Applicant’s request, under FOISA, in terms of section 25(1) and that the Authority was not obliged to provide the information requested, to the Applicant, in response to his information request under FOISA.

45. Turning to the Applicant's view that the Commissioner ought to consider the section 36 exemption first in order to create a level playing field (i.e. should a third party make an identical information request and be refused under that exemption), the Commissioner can see no value in taking such an approach. If he were to consider other exemptions first, and find they could not be upheld, he would still need to consider the Authority's adherence to section 25(1) before the information could be disclosed. The fact remains that the Applicant already has full access to the information requested and therefore the Commissioner has no choice other than to find that section 25(1) was properly applied by the Authority in this case. In the Commissioner's view, the consideration of any further exemptions applied by the Authority is unnecessary, given that section 25(1) has been found to properly apply in this case.
46. In relation to the guidance on section 21 of FOIA issued by the UK ICO, referred to by the Applicant in his submissions, the Commissioner does not necessarily agree with this view. The Commissioner considers information that is reasonably accessible to an applicant by other means (for example, through having been provided to them as a party to a particular matter, and subject to restrictions on wider sharing and usage) may well still be exempt from disclosure under FOISA by way of a different exemption.
47. The Commissioner recognises that there are, and will continue to be, occasions where it is necessary for an authority to share sensitive or personal information with a particular party for a specific purpose, where there would be no expectation of that same information being disclosed into the wider public domain as a result of a disclosure under FOISA (and disclosure under FOISA is, by definition, general public disclosure: situations where more limited sharing than to the public at large is envisaged would not be situations where disclosure under FOISA would be appropriate). Were that not the case, such parties would likely be excluded from gaining access to important (to them) information in the event that it was found to have been properly prevented from being placed into the public domain, by virtue of an exemption in FOISA.

### ***Section 36(2) – Confidentiality***

48. At review stage, the Authority relied on the exemption in section 36(2) to withhold the information requested. Section 36(2) provides that information is exempt from disclosure under FOISA if (a) it was obtained by a Scottish public authority from another person (including another such authority); and (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.
49. As stated above, during the investigation, the Authority withdrew its reliance on section 36(2) of FOISA to withhold the information requested.
50. While the Commissioner has no locus to issue a finding on the application of this exemption, given that he has found that section 25(1) was properly applied, he would urge the Authority, and indeed all Scottish public authorities, to ensure that, when responding to information requests and requests for review, thorough consideration is given to whether any applicable tests can actually be met in the circumstances, when considering whether to apply an exemption.

51. Given that the Commissioner has not found it necessary to consider the other exemptions claimed by the Authority, he can offer no view on their application. Specifically, he does not consider it appropriate to offer any view on the restrictions on use alluded to by the Authority in its responses to the Applicant. If the Applicant wishes to explore these restrictions further, the Commissioner can only suggest that he seeks independent legal advice.

### ***Handling of request for review***

52. As rehearsed above, at review stage, the Authority informed the Applicant that, in addition to maintaining reliance on section 25 of FOISA, it now also wished to rely on an additional three exemptions.
53. The Commissioner notes that the Authority's review outcome of 22 October 2024 did not explain, for each of these three additional exemptions, why they were considered to apply. He notes that it was only after the Applicant had subsequently raised this with the Authority, and had asked it to explain why the additional exemptions applied (including any public interest test, where relevant), that the Authority provided this explanation.
54. In its submissions to the Commissioner, the Authority accepted that it ought to have provided further detail in its review outcome of 22 October 2024 as to why it considered that the additional three exemptions applied. It submitted, however, that this was set out in its further response of 11 November 2024 and apologised for the delay in providing that information. The Authority considered that its review outcome of 22 October 2024 should be read alongside its further response of 11 November 2024 as constituting its response to the request for review.
55. Section 21(4) (Review by Scottish public authority) of FOISA provides that an authority may, as respects the information request to which the request for review relates, (a) confirm a decision complained of, with or without such modifications as it considers appropriate; (b) substitute for any such decision a different decision; or (c) reach a decision, where the complaint is that no decision has been reached. Section 21(5) provides that, within the statutory timescales for responding to a request for review, an authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.
56. The Commissioner does not agree with the Authority's view that its further response of 11 November 2024 could be taken to be part of its original review outcome. In his view, the reasons for applying the additional exemptions, and any necessary consideration of the public interest test, ought to have been included in the original review outcome. In addition, the further response was also issued outwith the 20 working day period allowed for responding to a requirement for review. By failing to fully explain why these additional exemptions now applied when it issued its review outcome (or, for that matter, within the timescales allowed for issuing a review outcome), the Commissioner finds that the Authority's review outcome failed to comply with the requirements of section 21(5) of FOISA.

## **Decision**

The Commissioner finds that the Authority partially 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 the Authority correctly relied on the exemption in section 25(1) of FOISA to withhold the information requested, and so complied with Part 1 in that respect.

However, he also finds that, by failing to explain why the additional exemptions being relied on at review stage now applied, the Authority's review outcome failed to comply with the requirements of section 21(5) of FOISA.

For the reasons set out in this Decision Notice (no further action being required, in the circumstances), the Commissioner does not require the Authority to take any action in respect of this failure, in response to the Applicant's application.

## **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 June 2025**