



Scottish Information
Commissioner
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Decision Notice 171/2025

Costs relating to a specified employment tribunal

Authority: NHS Fife

Case Ref: 202500619

Summary

The Applicant asked the Authority for information on the cost of a specific aspect of a specified tribunal. The Authority advised the Applicant that it did not hold the information requested. The Commissioner investigated and found that the Authority had failed to satisfy him that it did not hold the information requested. He required the Authority to carry out adequate, proportionate searches for the information requested and to provide the Applicant with a revised review outcome.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (4) and (6) (General entitlement); 17(1) (Notice that information is not held); 47(1) and (2) (Application for decision by Commissioner).

Background

1. On 4 February 2025, the Applicant made a request for information to the Authority regarding a specified employment tribunal. Among other questions, she asked the Authority the following:
 - 1) Why and on what basis did the Authority seek a Rule 50 order to have the employment tribunal heard in private?
 - 2) Who made the decision to pursue that action?
 - 3) How much did that action cost the Authority?

2. The other questions asked by the Applicant (which related to the cost of the specified employment tribunal itself) were considered in [Decision 133/2025](#)¹. These questions will not be considered in this decision notice.
3. By way of background, the specified employment tribunal relates to a formal claim by an employee of the Authority, against both the Authority and a specific employee of the Authority. It is a high-profile and ongoing case, the details of which are in the public domain, which has attracted significant media attention.
4. The Authority responded on 13 February 2025. It advised the Applicant that the Rule 50 order was “made in conjunction with the Central Legal Office” [CLO] and invited her to redirect her request. It also advised the Applicant that it considered the information requested relating to the Rule 50 order to be personal information, which it would therefore not disclose.
5. On 14 February 2025, the Applicant wrote to the Authority and advised that she would redirect her three questions set out in paragraph 1 to the CLO as the Authority suggested. She also requested a review of the Authority’s responses to the questions that were considered in Decision 133/2025, which the Authority responded to on 4 March 2025 with the outcome of its review.
6. On 19 March 2025, the Applicant wrote to the Authority requesting a review of its decision regarding the costs relating to the Rule 50 order (i.e. the third question in paragraph 1). She said that she had now received a response from the CLO, and she considered it unlikely that the Authority did not hold information regarding the costs relating to the Rule 50 order. She noted that it was unclear whether the Authority was saying it did not hold this information or whether it was exempting it from disclosure under section 38(1)(b) of FOISA. She asked the Authority to consider that it had carried out all necessary searches to establish whether it held the information requested.
7. The Authority responded on 27 March 2025. It advised the Applicant that it had already provided her with a review outcome and that she was entitled to appeal to the Commissioner if she was dissatisfied with it. The Applicant asked the Authority again to conduct a review of its decision regarding the costs relating to the Rule 50 order, and the Authority reiterated that it had already provided her with a review outcome.
8. On 23 April 2025, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. She stated that she was dissatisfied with the outcome of the Authority’s review because she did not believe that the Authority did not hold information on the costs of the Rule 50 order.

Investigation

9. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
10. On 24 April 2025, the Authority was notified in writing that the Applicant had made a valid application. The case was subsequently allocated to an investigating officer.
11. 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

¹ <https://www.foi.scot/decision-1332025>

on this application and to answer specific questions relating to how it established it held no information falling within the scope of the request.

12. The Commissioner's investigation is limited to the third question in the Applicant's request (i.e. the costs of the Rule 50 order). This is because it was the only aspect of the Applicant's request (as outlined in paragraph 1) that the Applicant specifically challenged in her requirement for review and subsequent application to the Commissioner.

Commissioner's analysis and findings

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

Information held

14. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.
15. The information to be given is that held by the authority at the time the request is received, as defined by section 1(4). This is not necessarily to be equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
16. 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.
17. The Authority advised the Commissioner that it did not hold the information requested in relation to the Rule 50 order. All searches had therefore been carried out by the CLO. However, the Authority explained that the application for the Rule 50 order was "dealt with as part of the conduct of the Tribunal proceedings" and that it was "not possible" to advise on the precise costs that only related to the Rule 50 order.
18. Where an authority has told a requester that it does not hold information, evidence of the authority's searches will usually be a key consideration during the Commissioner's investigation. As a minimum, authorities should be able to provide the Commissioner with the following information:
 - (i) details of the records or locations which were searched.
 - (ii) why these were the relevant records and locations;
 - (iii) the keywords used;
 - (iv) which staff were involved and why they were considered relevant;
 - (v) the outcome of the searches;
 - (vi) evidence that the searches have been carried out, including the outcome of the searches.

19. Based on the submissions provided, it does not appear that the Authority has undertaken any searches of its own in response to the Applicant's request. While the Authority may not anticipate holding the information requested, the Commissioner considers that adequate, proportionate searches would be required to confirm whether this was the case. He observes that unless the Authority had lost all financial control and accountability for its own legal case, that it is difficult to accept that the Authority holds no information relating to the applicant's request.
20. In the circumstances, the Commissioner cannot uphold the Authority's claim that it holds no information falling within the scope of the request. He therefore requires the Authority to reconsider the Applicant's request, carry out adequate, proportionate searches for the information requested, reach a decision on the basis of those searches and notify the Applicant of the outcome (all in terms of section 21 of FOISA).
21. The Commissioner must note his disappointment at the inadequacy of the submissions provided by the Authority, particularly given these submissions were made after Decision 133/2025 (which considered related requests) was issued. The Authority's continuing inability to evidence reasonable searches and demonstrate a holistic approach to such requests is a growing concern.
22. The Commissioner was clear in that decision (at paragraphs 24 and 25) that the Authority should have undertaken adequate and proportionate searches to ascertain what information it held relevant to the requests. Even allowing for whatever relevant arrangements it may have with the CLO, he could not accept the Authority reaching a conclusion on what it held, in the circumstances, wholly without recourse to its own records.
23. The Commissioner expects the Authority to ensure in all cases that it takes adequate and proportionate steps to establish what information is (and is not) held. As stated above (at paragraph 18), evidence of searches will usually be a key consideration during the Commissioner's investigation, and he expects authorities to be able to provide him with certain basic information.

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 requests made by the Applicant.

Specifically, the Authority has failed to satisfy the Commissioner that it does not hold any information relevant to the Applicant's request. As a result, he finds that the Authority failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the Authority to carry out adequate, proportionate searches for the information, reach a decision on the basis of those searches and notify the Applicant of the outcome (all in terms of section 21 of FOISA), by **25 August 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

9 July 2025