



Scottish Information
Commissioner
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Decision Notice 221/2025

Minutes from Primary Care Strategic Oversight Group meetings

Authority: Fife Health Board
Case Ref: 202300850

Summary

The Applicant asked the Authority for a list of, and copy minutes from, all Primary Care Strategic Oversight Group (the Group) meetings for specific dates. The Authority disclosed some information, but it withheld the remainder under various exemptions in FOISA. The Commissioner did not accept that the Authority was entitled to withhold the information and required the information to be disclosed to the Applicant.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(b)(i) and (ii) (Prejudice to effective conduct of public affairs); 33(1)(b) (Commercial interests and the economy); 47(1) and (2) (Application for decision by Commissioner).

Background

1. On 24 March 2023, the Applicant made a request for information to the Authority. He asked the following:

“A list of all Primary Care Governance and Strategy Oversight Group meetings and copy of the minute from each meeting that has taken place between 22nd October to 22nd March 2023.”

2. The Authority responded on 6 June 2023. It disclosed some information to the Applicant and withheld other information. However, it did not specify on what basis it had withheld information.
3. On 22 June 2023, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision because the Authority had withheld information from him without explaining why.
4. The Authority notified the Applicant of the outcome of its review on 3 July 2023. It informed the Applicant that it was relying (variously) on the exemptions in sections 30(b)(i), 30(b)(ii) and 33(1)(b) of FOISA to withhold some of the information requested.
5. On 5 July 2023, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. He stated that he was dissatisfied with the outcome of the Authority's review because he did not agree that the exemptions applied, and he considered that the public interest favoured disclosure.

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 13 July 2023, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments. The Authority was also asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and said that it had no further comments to make.
8. The case was subsequently allocated to an investigating officer.
9. During the investigation, the Authority was again invited to comment on this application: this time to answer specific questions. These related to its justification for applying the claimed exemptions and its consideration of the public interest test.

Commissioner's analysis and findings

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

The withheld information

11. In this case, the Authority withheld some information within the minutes of the Group meetings on 10 January 2023 and 13 March 2023. It did so on the following grounds:
 - it withheld some information solely under the exemptions in section 30(b)(i) and (ii) of FOISA
 - it withheld some information solely under the exemption in section 33(1)(b) of FOISA
 - it withheld some information under all of the exemptions in sections 30(b)(i) and (ii) and 33(1)(b) of FOISA.
12. In his decision, the Commissioner must be careful not to disclose the withheld information in his reasoning. This restriction limits the level of detail he can give to justify his conclusion.

(This factor has been acknowledged by the courts. In the case of [Scottish Ministers v Scottish Information Commissioner \[2007\] CSIH 8](#)¹, the Court of Session commented that, in giving reasons, the Commissioner is necessarily restrained by the need to avoid disclosing information which ought not to be disclosed.)

Section 30(b)(i) and (ii) of FOISA – Prejudice to the effective conduct of public affairs

13. In order for the Authority to rely on these exemptions, it must show that disclosure of the information would (or would be likely to) inhibit substantially the free and frank provision of advice (section 30(b)(i)) or the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)). These exemptions are subject to the public interest test in section 2(1)(b) of FOISA.
14. In applying the exemptions, the chief consideration is not whether the information constitutes advice or opinion, but whether the disclosure of that information would, or would be likely to, inhibit substantially (as the case may be) the provision of advice or the exchange of views. The inhibition in question must be substantial and therefore of real and demonstrable significance.

The Applicant's submissions on section 30(b)(i) and (ii)

15. The Applicant submitted that the Authority had wrongly withheld information in response to a previous request he had made and said that he was concerned that it had taken the same approach in this case.
16. The Applicant stated that he did not trust the Authority to provide information that may be deemed “negative” for the Authority. He disagreed that the exemptions claimed by the Authority applied and said that, if it was the case that the withheld information contained information that was not “good news” for Authority, then that information should be disclosed and that the public interest would favour the disclosure of such information.

The Authority's submissions on section 30(b)(i) and (ii)

17. The Authority provided combined submissions for the exemptions in section 30(b)(i) and (ii) of FOISA.
18. The Authority described the information withheld under these exemptions as “discussions, views and concerns reported in relation to difficulties facing GP practices and dental practices at that time”. It also said that opinions and views were given around priorities of services, which it argued, if disclosed, “could cause detrimental effect to GP practices”.
19. The Authority explained that the information was redacted as “free and frank conversations were had at the meetings” and said that staff attending the meetings were voicing their own opinions on the topics discussed, which were not for “external disclosure”. It argued that disclosure of the views of those attending (which, as stated above, related to difficulties facing GP practices and dental practices at that time) may have a detrimental effect on patient confidence in the Authority and GP and dental practices.
20. The Authority explained that that the discussions held during these meetings were the views and opinions of the members of the Group only and not views of the Authority as a whole. It said that the members of this Group had a professional stake in Primary Care and their concerns related to this. It also said that GP practices are independent businesses operating

¹ https://www.bailii.org/scot/cases/ScotCS/2007/CSIH_8.html

under a contractual arrangement with the Authority and that information that was specific to GP practices “would not be appropriate to be shared wider”.

The Commissioner’s view on section 30(b)(i) and (ii)

21. The Commissioner has taken account of all the relevant submissions, together with the information that was withheld under the exemptions in section 30(b)(i) and (ii) of FOISA.
22. As with other exemptions imparting a similar test, the Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near (certainly the foreseeable) future, not simply that inhibition is a remote or hypothetical possibility. For inhibition to be likely, there would need to be at least a significant probability of it occurring.
23. Having considered the withheld information, the Commissioner acknowledges that the withheld information does contain advice and views, some of which are expressed freely and frankly. However, as noted above, the primary consideration is not whether the information contains advice, but whether its disclosure would have, or would be likely to have, the substantially inhibiting effect specified in section 30(b)(i) and (ii) of FOISA.
24. The Commissioner accepts that an awareness of the possibility of disclosure might lead members of the Group to take care in recording their advice and pay more attention to the manner of expression. The issue, however, is whether the effect of disclosure would be adverse by way of causing, or being likely to cause, members of the Group to be substantially inhibited in the provision of advice or the exchange of views.
25. Having carefully considered the withheld information, the Commissioner considers that most of it is expressed in a relatively measured and objective manner, is generic in nature or relates to risks or concerns either already in the public domain or that are well understood by the public.
26. The Commissioner is not persuaded, therefore, from the submissions he has received and the content of the information itself, that disclosure of most of this information, withheld under section 30(b)(i) and (ii), would result in the harm claimed by the Authority.
27. In the absence of any submissions persuading him otherwise, the Commissioner does not accept that disclosure of most of this information would, or would be likely to, inhibit substantially the free and frank provision of advice or exchange of views. He does not believe such a conclusion can be reached on the basis of the arguments provided.
28. The Commissioner does not, therefore, accept that the exemptions in section 30(b)(i) and (ii) of FOISA should be upheld in respect of most of the information being withheld under this exemption.
29. Given that the Commissioner does not accept the application of these exemptions for most of the information withheld under section 30(b)(i) and (ii) of FOISA, he is not required to consider the public interest test in section 2(1)(b) for that information.
30. However, the Commissioner, accepts, on balance, that the exemptions in sections 30(b)(i) and (ii) of FOISA can be upheld in relation to a small amount of information in the 10 January 2023 minutes of the Group. This is because that information is expressed in a more free and frank fashion than the other information withheld under these exemptions and because it is more specific and sensitive in nature. He accepts that disclosure of that information would, or would be likely to, have the substantially inhibiting effect specified in section 30(b)(i) and (ii) of FOISA.

31. Given that the Commissioner accepts the application of the exemptions in section 30(b)(i) and (ii) to that information, he is required to consider the public interest test in section 2(1)(b) for that information.

The public interest test – section 30(b)(i) and (ii)

32. The exemptions in section 30(b)(i) and (ii) are subject to the public interest test in section 2(1)(b) of FOISA. Where these exemptions are correctly applied, the Commissioner must consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemptions.
33. The “public interest” is not defined in FOISA but has been described as “something which is of serious concern and benefit to the public”, not merely something of individual interest. The public interest does not mean “of interest to the public” but “in the interest of the public”, i.e. disclosure must serve the interests of the public.

The Applicant's submissions about the public interest test

34. As stated above, the Applicant considered the public interest favoured disclosure of the withheld information. Specifically, he considered that if it was in the public interest that any information relating to “issues” being experienced by the Authority then that information should be disclosed into the public domain.

The Authority's submissions about the public interest test

35. The Authority did not specifically address the public interest test in either its initial response or in its review outcome.
36. During the investigation, the Authority was specifically asked to address the public interest test required by section 2(1)(b) of FOISA. In particular, the Authority was asked to state the reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information and to specify:
- the reasons in favour of disclosing the information
 - the reasons in favour of maintaining the exemption.
37. The Authority did not provide specific comments in response to these questions and instead simply relied on the arguments it provided for why it had applied the exemptions in question.
38. However, the Authority stated that it had considered the public interest in disclosing the information requested but that it felt that the interests it had identified when considering the applicability of the exemptions in question outweighed any public interest in disclosing the redacted information within the Strategic Oversight Group minutes.

The Commissioner's view on the public interest - section 30(b)(i) and (ii)

39. The Commissioner has considered the submissions from both parties, together with the withheld information and considers that the Authority has not undertaken a meaningful public interest test.
40. The [Commissioner's guidance](#)² in relation to the public interest test is clear that there is a two-step process in considering whether a qualified exemption can be applied:

² https://www.foi.scot/sites/default/files/2023-07/PublicInterestTestFOISA_2023.pdf

- (i) The first step is to determine whether the exemption actually applies
 - (ii) The second step is to go on to apply the public interest test to determine whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.
41. This means that, even though the information is exempt from disclosure (i.e. it is subject to a qualified exemption), it still must be disclosed if the public interest in disclosure outweighs the public interest in maintaining the exemption.
 42. The authority must therefore identify and set out the competing arguments as to why the public interest would be served by disclosure of the exempt information and by withholding the exempt information. Having identified the public interest arguments on each side, the authority must then carry out a balancing exercise to determine where the public interest lies.
 43. It is not enough for a public authority simply to tell the requester that the public interest lies in maintaining the exemption. The authority must set out the competing public interest arguments and explain why it has concluded that the public interest lies in maintaining the exemption as opposed to releasing it. Without this information, authorities are likely to find it difficult to justify their decision on the public interest if an appeal is subsequently made to the Commissioner as in this case.
 44. The Commissioner recognises that there is a strong public interest in those attending such meeting being in a position to discuss issues in a free and frank manner. Conversely, he considers that there is a clear public interest in transparency of public authorities, especially regarding discussions surrounding difficulties facing the NHS.
 45. There may be a strong public interest in maintaining this exemption, but the public interest test must be applied to the particular circumstances of the case under consideration and not in the abstract. It is a real, practical test, not an academic exercise, and the content of the withheld information should always factor in that process: the onus is on the public authority to justify its conclusions on the public interest, with reference to evidence where appropriate.
 46. In this case, the Commissioner is not satisfied that the Authority has meaningfully applied the public interest test. Neither the Authority's initial response, nor its review outcome, made any specific reference to the public interest test and the submissions it provided to the Commissioner on this point were very short and general in nature. As stated above, the Authority simply responded "not applicable" when asked to specify the issues which favoured of disclosure of the withheld information.
 47. Having considered the relevant submissions, the Commissioner therefore cannot conclude, in all the circumstances of this particular case, that the Authority has demonstrated that the public interest in maintaining the exemptions in section 30(b)(i) and (ii) of FOISA outweighs that in disclosure of the withheld information.
 48. The Commissioner will now go on to consider the information withheld by the Authority under the exemption in section 33(1)(b) of FOISA.

Section 33(1)(b) – Commercial interests and the economy

49. Section 33(1)(b) of FOISA provides that information is exempt information if its disclosure would, or would be likely to, prejudice substantially the commercial interests of any person

(including, without prejudice to that generality, a Scottish public authority). This exemption is subject to the public interest test in section 2(1)(b) of FOISA.

50. There are several elements a Scottish public authority needs to demonstrate are present when relying on this exemption. It needs to establish:

- (i) whose commercial interests would (or would be likely to) be harmed by disclosure
- (ii) the nature of those commercial interests, and
- (iii) how those interests would (or would be likely to) be prejudiced substantially by disclosure.

51. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to) be harmed, it must make this clear. Generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.

The Applicant's submissions about the exemption

52. As stated above, the Applicant did not consider that any of the exemptions claimed by the Authority applied.

The Authority's submissions about the exemption

53. The Authority confirmed that the parties whose commercial interests were of concern were the Authority's own interests, together with GP and dental practices.

54. The Authority said that its own concerns for commercial interests included "service risks, service backlogs, financial uncertainty and [a] Scottish government business case". In terms of GP and dental practices, it said that their commercial interests would include "service backlogs, funding and financial uncertainty" and concerns related to "2C tender processes".

55. The Authority said that disclosure of the information requested could prejudice the interests of the Authority and the GP and dental practices concerned as the information could be used by the individual to make informed decisions about the Authority and these practices (e.g. through disclosure of the current/forecasted issues being worked through and the potential resolution of these matters).

56. In addition, the Authority claimed that wider prejudice would result to the Authority and to GP and dental practices in relation to financial uncertainty, business cases and the status of contracts as, if disclosed, commercial law firms could seek to use the information "in relation to competing for work or in the event of tendering for work".

57. The Authority confirmed that it considered all the redacted information to be sensitive. As the information contained details on how it operates, internal correspondence and process and financial implications, the Authority considered that disclosure of this information would "cause a damaging effect" to it.

58. The Authority set out the following specific reasons why it withheld information under the exemption in section 33(1)(b) of FOISA:

- it considered 2C GP practices tenders progressing through procurement process to be commercially sensitive

- there might be information discussed at the Primary Care Strategic Oversight Group that could be deemed as “business sensitive”
- there might be a potential reputational risk with sensitive or confidential information being shared more widely
- information and data within the Primary Care Strategic Oversight Group being managed confidentially, in line with the Terms of Reference of the Group.

59. The Authority also confirmed that it had not had any correspondence with any third parties in relation to their view on disclosure of the information requested.

The Commissioner’s view

60. The Commissioner has carefully considered all the arguments put forward, along with the withheld information.
61. Taking account of all of the Authority’s submissions in relation to the application of section 33(1)(b) of FOISA, and having taken a broad view, the Commissioner accepts that the information in question is commercial in nature.
62. As mentioned above, in order to rely on this exemption, an authority has to evidence why disclosure would, or would be likely to, prejudice substantially the commercial interests of any person.
63. On the question of harm, the Authority failed to evidence how the disclosure of the requested information would have had or would have been likely to have (at the time the Authority responded to the Applicant’s request or his requirement for review), a substantially prejudicial impact on the Authority’s commercial interests or the commercial interests of GP and dental practices.
64. In relation to the information being withheld in this case, the Commissioner considers the submissions provided by the Authority to be largely speculative and generic in nature. He is also satisfied, having conducted his own searches of information available in news articles, that much of the information withheld was either in the public domain at the time the Authority responded to the Applicant’s requirement for review or that it related to risks faced by both individual NHS Health Boards and the NHS in Scotland as a whole that were public knowledge.
65. In terms of the Authority’s submissions relating to commercial law firms using the withheld information to compete or tender for work, although the Commissioner cannot divulge details of the withheld information, he is not satisfied that the Authority has evidenced how disclosure of this information would be likely to allow an unfair advantage to be gained in terms of competing or tendering for work.
66. In summary, the Commissioner does not consider that the Authority has provided adequate submissions to evidence how of the withheld information would, or would be likely to, result in the substantial prejudice required for the exemption to apply. There must be at least a significant probability that substantial prejudice would occur in order for the exemption to be properly applied. There must also be a genuine link between disclosure and the harm: it cannot simply be a remote or hypothetical possibility.
67. It is for the Authority to provide the required evidence of harm, not for the Commissioner to go out and find it or make the case on behalf of the Authority. Consequently, the Commissioner does not accept that the Authority has demonstrated substantial prejudice in

this case, and he must find that section 33(1)(b) was not correctly applied to the withheld information.

68. In light of this finding, the Commissioner need not go on to consider the public interest test in section 2(1)(b) of FOISA.

Next steps

69. As the Commissioner has either found that the exemptions in sections 30(b)(i) and (ii) and 33(1)(b) of FOISA do not apply, or that the Authority's submissions on the public interest test were insufficient to justify maintaining the exemptions in sections 30(b)(i) and (ii) (to the limited extent that he found they applied), he requires the Authority to disclose all of the withheld information to the Applicant.
70. As stated above, the Commissioner did not find that the exemptions in sections 30(b)(i) and (ii) applied to the majority of the withheld information or that the exemption in section 33(1)(b) applied at all. This meant that he was not required to go on to consider the public interest for that information.
71. However, had he found that these exemptions applied to that information and therefore been required to consider the public interest test, the Commissioner would have encountered the same difficulties he set out above in relation to the small amount of information to which he found the exemptions in section 30(b)(i) and (ii) applied. That is, the Authority fundamentally failed to undertake a meaningful assessment of the public interest test.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 (and, in particular, section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant. In all the circumstances, he is not satisfied that it was entitled to withhold the requested information under the exemptions in sections 30(b)(i) and (ii) and 33(1)(b) of FOISA.

The Commissioner therefore requires the Authority to disclose to the Applicant the wrongly withheld information, by 3 November 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.

Euan McCulloch
Head of Enforcement

18 September 2025