



Scottish Information
Commissioner
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Decision Notice 222/2025

Correspondence between the Lord Advocate and the Scottish Government

Authority: Scottish Ministers
Case Ref: 202201065

Summary

The Applicant asked the Authority for any correspondence between the Authority and the office of the Lord Advocate about the Lord Advocate's reference to the Supreme Court between specified dates. The Authority withheld most of the information under a number of exemptions. During the investigation the Authority changed its position in relation to some of the exemptions. The Commissioner required the Authority to provide the Applicant with a new review outcome.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 21(4)(b) (Review by Scottish Public authority); 16 (Refusal of request); 47(1) and (2) (Application for decision by Commissioner).

Background

1. On 21 July 2022, the Applicant made a request for information to the Authority. He asked for:
 - 1) Any correspondence, including meetings, notes, memos, agendas, ministerial briefings and minutes, between the Scottish Government and the office of the Lord Advocate on the topic of the Lord Advocate's reference to the Supreme Court between 1 January 2022 and 28 June 2022.

This should include any emails, letters, WhatsApp or Signal messages, OneNote memos or texts between officials, special advisers, ministers, ministerial private offices, and civil servants.

2) Any attachments to this internal correspondence.

2. The Authority responded on 18 August 2022. It disclosed some information but withheld the remainder under a number of exemptions, namely; sections 25(1) (Information already reasonably accessible), 30(b)(i) (Free and frank provision of advice) and (ii) (Free and frank exchange of views), 36(1) (Confidentiality), and 38(1)(b) (Personal information) of FOISA. Where information was withheld under section 25(1) of FOISA, the Authority provided the Applicant with a link to that information.
3. On 19 August 2022, the Applicant wrote to the Authority requiring a review of its response. The Applicant stated that he was dissatisfied with the response because he believed some of the exemptions did not apply but even if they did, the significant public interest in a second independence referendum and the decision to make a reference to the Supreme Court favoured disclosure of the information.
4. The Authority notified the Applicant of the outcome of its review on 15 September 2022. It confirmed its original response and stated that it believed the public interest favoured withholding the information.
5. On 26 September 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review because he believed either that the exemptions did not apply or that the public interest overwhelmingly favoured disclosure of the information.

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 17 October, 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.
8. The Authority was also asked to send the Commissioner the information withheld from the Applicant.
9. The Authority provided the information and the case was subsequently allocated to an investigating officer.

Commissioner's analysis and findings

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

Authority's change of position

11. During the investigation, the Authority withdrew its reliance on the exemptions in sections 30(b)(i) (Free and frank provision of advice) and 30(b) (ii) (Free and frank exchange of views) of FOISA, because it considered the information previously withheld under those exemptions was subject to legal professional privilege and it applied section 36(1) (Confidentiality) of FOISA to that information.
12. Furthermore, the Authority also indicated that it was retrospectively relying on section 30(c) (Prejudice to effective conduct of public affairs) of FOISA to withhold a small amount of information in two documents.
13. The Authority stated that it had informed the Applicant of its updated position; however, neither the Authority nor the Applicant (who could not access emails from a previous job) were able to provide a copy of this communication to the Commissioner.
14. It is clear that the Authority intended to notify the Applicant of its updated position, but it is equally clear that it has been unable to find any record that such a communication took place. In the absence of any evidence, the Commissioner must conclude that no update was provided.
15. The Commissioner notes that the Authority's change of position came after the Applicant made his application to the Commissioner. This means that, at the time he made his application to the Commissioner, the Applicant had not had an opportunity to challenge the new application of exemptions.
16. Given the Authority's change of position, the Commissioner now requires the Authority to provide the Applicant with a revised review outcome, which lists all of the exemptions that the Authority is now seeking to apply and specifies the information that is being withheld under each exemption. This review outcome should also explain, in detail, why the Authority considers these exemptions to be relevant. This will enable the Applicant to challenge the Authority's reasons for withholding information in a new application, if necessary.
17. As part of this revised review outcome, and given the passage of time since the date of the original request (July 2022), the Commissioner requires the Authority to also consider whether any of the information it originally withheld, could now be 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, he finds that the Authority failed to comply with section 16(1)(c) of FOISA, in failing to notify the Applicant of all the exemptions it was relying on to withhold information.

The Commissioner therefore requires the Authority to issue the Applicant with a revised review outcome, in terms of section 21(4)(b) of FOISA, ensuring it complies with the requirements of paragraphs 16 and 17, 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