



Scottish Information
Commissioner
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Decision Notice 229/2025

Discussion/analysis of Scottish Government's ability to mitigate or end the two-child cap

Authority: Scottish Ministers
Case Ref: 202500190

Summary

The Applicant asked the Authority for information about its ability to mitigate or end the two-child cap. The Authority refused to provide most of the information on the basis that it related to policy formulation, ministerial communications and personal data. The Commissioner investigated and found that the Authority had interpreted the request too narrowly. He required the Authority to reconsider the request and issue a revised review outcome.

He also found that, where the Authority had identified information falling within the narrower scope of the request, it had correctly withheld this information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 21(1) (Review by Scottish public authority); 29(1)(a) (Formulation of Scottish Government policy) and (b) (Ministerial Communications); 47(1) and (2) (Application for decision by Commissioner).

Background

1. On 4 December 2024, the Applicant made a request for information to the Authority.

He referred to a previous FOI request he had made (https://www.whatdotheyknow.com/request/scrapping_of_the_two_child_cap) and to the Scottish Government budget statement on 4 December 2024, where the Government announced the abolition of the child cap in Scotland and he asked for:

“...any discussion and analysis of the ability of the Scottish Government to abolish, mitigate or end the child cap in Scotland.”

2. The Authority responded on 24 December 2024. It refused to disclose any information and applied exemptions under sections 29(1)(a) and (b) (Formulation of Scottish Administration policy etc.) and 38(1)(b) (Personal data) of FOISA.
3. On 25 December 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because the Authority had provided him with information on the same subject in the past and he disagreed with its application of exemptions.
4. The Authority notified the Applicant of the outcome of its review on 4 February 2025. It continued to withhold most of the information under sections 29(1)(a), 29(1)(b) and 38(1)(b) (Personal data) of FOISA, but it disclosed some information that it had previously withheld under section 29(1)(a).
5. On 4 February 2025, 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 disagreed with its application of section 29(1)(a) and (b) of FOISA. He stated that the Authority had previously provided information on the same subject and he argued that it was inconsistent to suddenly withhold the information under these two exemptions.

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 20 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 allocated to an investigating officer.
8. 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 related to the searches carried out and why the Authority believed that the exemptions in section 29(1)(a) and (b) of FOISA applied to the information.

Commissioner’s analysis and findings

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

Section 1(1) – General entitlement

10. 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 in section 1(6) are not applicable in this case.
11. The information to be given is that held by the authority at the time the request is received, as defined by section 1(4).

Interpretation of the request

12. The Commissioner has considered the wording of the Applicant's information request and the Authority's interpretation of it. The request asked for "any discussion and analysis of the ability of the Scottish Government to abolish, mitigate or end the child cap in Scotland". (In very general terms, the two-child cap limits support in relation to universal credit and child tax credit to two children in a family.)
13. In its submissions to the Commissioner the Authority described its searches for information which fell within the scope of the request. It stated that within the request for information the Applicant referred to a previous request on the same subject which he had submitted on 4 October 2023. The Authority explained that it had therefore considered the scope of the current request to cover the time from 4 October 2023 (when the scope of the previous request ended) to 5 December 2024 (the day after the Scottish budget announcement that the Authority intended to mitigate the two-child cap in Scotland).
14. Furthermore, the Authority stated that it began actively discussing and analysing the potential mitigation of the child cap in November 2024, and that this coincided with the in-scope information. It explained that it had therefore determined the dates to be searched to be (from) 4 October 2023 to 5 December 2024.
15. The Commissioner does not accept the date range put forward by the Authority. While the cut-off point for information will undoubtedly be 5 December 2024, there is nothing within the request that limits the information to be that created after 4 October 2023. The Authority's decision to exclude information prior to 4 October 2023 is not based on the Applicant's wording, but on its own interpretation that it did not have to consider such information in this request as it had considered it previously. The Commissioner does not see any basis for this conclusion.
16. The Commissioner has also considered the wording of the previous request, which related to any discussion or analysis conducted by the Authority on its ability to effect targeted Section 24 increases to universal credit and child tax credit to children affected by the cap.
17. The Commissioner notes that the wording of the earlier request appears to be more specific; that is, it refers to section 24, universal credit and child tax credit while the current request does not. He considers that the scope of the earlier request is potentially narrower than that of the current request because of the difference in wording (i.e. that it is possible that information may be captured by this request which was not captured by the previous one).
18. The Commissioner's view is therefore that the Authority has unduly narrowed the scope of the request in relation to both the dates and wording. While the Authority may have considered the (current) request to be a follow-up, the Commissioner notes that the Applicant did not express the second request in those terms.

19. Moreover, the Commissioner considers that the Applicant's reference to a previous information request was made in order to highlight what the Applicant considered to be an inconsistency within the Authority's different responses, rather than an indication that the Applicant considered his request to be a follow-up (i.e. in terms of excluding the time period covered by the earlier request).
20. The Commissioner also notes the Authority's position that it began actively discussing potential mitigation of the cap in November 2024. In his view, this does not rule out further information which is potentially within scope being held before this date.
21. Given the Commissioner's view that the scope of the request was unduly narrowed, he considers that further information which might fall within scope of the Applicant's request could be held.
22. Overall, the Commissioner is not satisfied that the Authority has interpreted the request reasonably. For this reason, he finds that the Authority failed to comply with Part 1 of FOISA by providing the Applicant with an incomplete response. The Commissioner requires the Authority to reconsider the request and to provide the Applicant with a revised review outcome.
23. In cases where an authority is unsure what is being asked (or where it opts for a narrower, or wider, interpretation of a request) the Commissioner would remind authorities that they can, and should, under section 1(3) of FOISA and, in line with paragraph 5.3.3 of the [Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA](#)¹, (the Section 60 code) obtain clarification from the applicant.
24. While the Commissioner is not satisfied that the Authority has interpreted the request reasonably, the Authority did identify information falling within scope of the request which it withheld from the Applicant under section 29(1)(a) and (b) of FOISA. The Commissioner will now consider whether that information has been correctly withheld.
25. The Applicant did not express dissatisfaction with the Authority's decision to withhold information under section 38(1)(b) (Personal information) of FOISA, so the Commissioner will not consider that exemption further in this decision.

Section 29(1)(a) – Formulation of Scottish Administration policy etc.

26. Under section 29(1)(a) of FOISA, information held by the Scottish Administration is exempt information if it relates to the formulation or development of government policy. "Scottish Administration" is defined in section 126 of the Scotland Act 1998 as Members of the Scottish Executive and junior Scottish Ministers and their staff; and non-ministerial office holders of the Scottish Administration and their staff. In terms of section 29(4) of FOISA, and bearing in mind the timeframe of the request, "government policy" means the policy of the Scottish Administration.
27. For information to fall under this exemption, it need only "relate" to the formulation or development of government policy, i.e. to the consideration or development of options and priorities for Scottish Ministers, who will subsequently determine which of these should be translated into political action and/or legislation, and when.

¹ <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2016/12/foi-eir-section-60-code-of-practice/documents/foi-section-60-code-practice-pdf/foi-section-60-code-practice-pdf/govscot%3Adocument/FOI%2B-%2Bsection%2B60%2Bcode%2Bof%2Bpractice.pdf>

28. "Formulation" of government policy suggests the early stages of the policy process, where options are identified and considered, risks are identified, consultation takes place and recommendations and submissions are presented to the Ministers. "Development" suggests the processes involved in reviewing, improving upon or amending existing policy: it can involve piloting, monitoring, analysing, reviewing or recording the effects of existing policy.

The Authority's comments

29. The Authority stated that at the time the previous request was received, it was not exploring the possibility of mitigating the two-child cap. However, it added that it subsequently started to explore potential policies which might mitigate the two-child cap, a policy which was introduced by the UK Government and is reserved to Westminster. The Authority submitted that it was now actively pursuing options and it considered the sensitivity of the topic to have increased. Given that it was (at the time of making its submissions) in the early stages of policy development it considered that the exemptions at section 29(1)(a) and (b) of FOISA applied to the requested information.
30. The Authority submitted that it considered the information to be formulation of the policy to mitigate the effects of the two-child cap. It argued that the withheld information consisted of draft options that were being considered by Ministers and discussions between officials on options.
31. The Authority stated that the information related to its policy team making assessments and ongoing recommendations which would ultimately be presented in submissions to Ministers on the impacts of potential options. The Authority explained that although there had been a budget announcement on the funding for the policy, how that was to be delivered had still to be decided. It noted that the options were still being worked through to understand the range of policy, legal, financial, technical and financial considerations involved. The Authority explained that statistical information had been used to create projected costs of mitigation and those costs were presented in the submissions to Ministers to help to inform decisions but, as the policy was still being formulated, no final decisions had yet been taken.
32. The Authority concluded that the information related to the formulation of policy where it was considering options, identifying risks and making recommendations and submissions to Ministers.

The Applicant's comments

33. The Applicant did not accept that the exemption applied. He noted that when he had originally asked the Authority for information about this topic, in 2018, he had been given a policy discussion paper on the mitigation of the child cap in Scotland. He argued that the Authority's arguments that it could not provide the information (in this request) were wrong, as they had disclosed policy discussions previously.

The Commissioner's view

34. The Commissioner has considered the submissions from both parties and the information being withheld under section 29(1)(a). He must consider the withheld information with regard to the circumstances at the time of the Authority's review outcome.
35. The exemption in section 29(1)(a) only requires the information to "relate" to the formulation or development of government policy, for the information to fall within the scope of the exemption.

36. Paragraphs 10 and 11 of [the Commissioner's guidance on section 29\(1\)\(a\)](#)² state:

"The formulation of government policy suggests the early stages of the policy process where options are identified and considered, risks are identified, consultation takes place and recommendations and submissions are presented to Scottish Ministers.

"Development" suggests the processes involved in reviewing, improving or amending already existing policy. It could involve piloting, monitoring, analysing, reviewing or recording the effects of existing policy."

37. The Commissioner accepts the Authority's arguments that when it had previously disclosed information to the Applicant, it was not, at that juncture, actively exploring the possibility of mitigating the two-child cap, but this had changed by the time this current request was made. Overall, he is satisfied that the information which has been withheld clearly relates to either the formulation, or the development, of Scottish Government policy, in relation to mitigating the two-child cap, and that section 29(1)(a) of FOISA therefore applies.

The public interest test – section 29(1)(a)

38. Section 29(1)(a) of FOISA is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner is therefore required to 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 exemption.

The Applicant's comments on the public interest

39. The Applicant stated that the Authority had changed its position from being that it could not mitigate the child cap to being that it could, and that its position on providing information to him had correspondingly changed from being that it could provide that information, to being that it was unable to do so.
40. The Applicant viewed this as inconsistent and he argued that the public had a right to know why the Authority's position had radically changed from being that it could not mitigate the child cap to being that it was going to do so. The Applicant argued there had clearly been a change of position within the Authority which rendered previous FOI responses either wrong or deceitful.
41. The Applicant also provided examples of the Authority's publicly stated position in relation to the two-child cap in the past. He provided a link to an extract from a 2018 interview with former Scottish Government finance secretary Derek Mackay, in which Mr Mackay was quoted as saying in relation to the two-child cap that the UK Government was not going to give the Scottish Government access to people's data to allow the Scottish Government to supplement the payment.
42. The Applicant also provided a link to an information request and response made after the publication of the above interview for evidence of discussions or analysis between the UK and Scottish governments in relation to measures to mitigate the two-child cap in Scotland, a link to Scottish finance secretary Shona Robison's ministerial budget statement, and an interview by Deputy First Minister Kate Forbes, to evidence his view that the Authority's position on whether it could mitigate the two-child cap was inconsistent.

² <https://www.foi.scot/sites/default/files/2022-04/BriefingSection29FormulationofScottishAdministrationPolicy.pdf>

43. The Applicant referred to a further request he had made to the Authority (which is the subject of a separate appeal to the Commissioner) and argued that he had been provided with information relating to policy discussion in response to that request.
44. The Applicant stated that, given the Authority had previously provided him with information on the same subject, suddenly changing its position to withhold the information could not be reasonably justified. He commented that the Authority's review outcome was supposed to be a modification of its initial response, but that no effective information was provided, and argued that this was effectively the same as refusing his request, although the Authority had engaged with him repeatedly on the question in the past. The Applicant stated that, in his view, it was clear that the Authority had changed its interpretation of the rules.

The Authority's comments on the public interest

45. In its submissions to the Commissioner, the Authority acknowledged that there was a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. It stated that it was undertaking a public consultation to gather views on certain issues which would inform final decisions.
46. However, it argued that there was a greater public interest in high-quality policy and decision-making, and in the properly considered formulation and development of policies and decisions. The Authority submitted that this meant Ministers and officials needed to be able to consider all available options and to debate those rigorously to fully understand their possible implications. The Authority stated that their candour in doing so would be affected if provisional options, and relevant discussions and information in relation to them, were released as release would discourage officials from openly discussing the merits of possible options, which would have a negative impact on the ongoing formulation of the policy.
47. The Authority stated that its officials needed to be able to discuss such matters freely to arrive at appropriate, robust advice for Ministers and enable them in turn to make decisions for which they would be held to account. It argued that if the provisional options were released it would potentially lead the public to believe that those were the options which would be chosen, when there was still much to discuss and plan.
48. The Authority submitted that it would not be in the public interest to release information that did not reflect the final decisions taken. It stated that the documents it wished to withhold contained preliminary high level options that allowed officials to move towards final detailed policy options which, in time, would be recommended to Ministers but, at that stage of development, would not provide clear insight into the execution and/or potential effects of the final policy.
49. Furthermore, the Authority argued, protecting the space to explore potential options would lead to better policy decisions and more effective government, both of which would be negatively impacted if the information were to be released. Moreover, release of the information would also allow stakeholders to know the Authority's views before they were fully formed, which could impact delivery of vital public services.
50. The Authority maintained that the public interest lay in upholding the exemption.

The Commissioner's view on the public interest

51. The Commissioner has carefully considered the public interest arguments made by the Applicant and the Authority.

52. He agrees that there is a general public interest in transparency and accountability and accepts that disclosure of the information could offer the public further insight into the Authority's thinking about mitigation of the two-child cap, a UK Government policy which has attracted significant comment and debate.
53. The Commissioner notes that the Applicant made his request on 4 December 2024, the same day the policy was announced in the Scottish budget and that it appears that the development process does appear to have been at a relatively early stage (whatever headline policy decisions may have been made). He considers that policy development is potentially an ongoing process, which can continue after a headline announcement is made – for example, in relation to working out details of how best to deliver or implement a particular policy. Given the date of the review outcome, and given that the policy development is ongoing, the Commissioner considers that there is a strong public interest in allowing Ministers and officials a private space to discuss and develop policy options and fully consider risks.
54. While he acknowledges the Applicant's dissatisfaction that the Authority previously disclosed information on this topic but has now withheld it, the Commissioner does not agree that this is necessarily inconsistent.
55. The Commissioner's view is that circumstances change and that authorities in general (and governments in particular) may correspondingly need to alter their position on a particular issue or act on a specific matter, despite previously considering no action was necessary (or possible).
56. The Commissioner considers that just because a past information request on a particular topic resulted in the disclosure of information does not mean that should always be the case for future responses on the same topic, when circumstances have changed. This reflects the Commissioner's own approach, which is to consider every appeal on a case by case basis, having regard to the particular circumstances of each. He also notes that while this approach means accepting that an authority is entitled to change its position and to withhold particular information which may previously have been disclosed, the argument also works in reverse, meaning information previously withheld can be disclosed if circumstances change.
57. Furthermore, the Commissioner notes that the material submitted by the Applicant with his application included an extract of a podcast episode in which the Deputy First Minister, Kate Forbes, stated that, in the new (UK) Labour Government, the Authority for the first time had a Westminster Government which was willing to work with it to provide the data and systems it had always needed to put in place any mitigation to the two-child cap. Without taking a view on the substance of Ms Forbes' comments, it is clear that the Authority's position was that a change of circumstances had prompted a change in its approach to mitigating the cap.
58. The Commissioner also notes the Applicant's argument that the Authority's change in position renders previous answers to information requests either wrong or deceitful. However, it should be noted that it does not fall within the Commissioner's remit to assess the accuracy of information which is held by a Scottish public authority. Provided an authority appropriately interprets an information request and subsequently provides all the information it holds which falls within scope of the request (or correctly withholds it under an exemption), the authority will be deemed to have complied with Part 1 of FOISA.
59. In all the circumstances of this particular case, the Commissioner finds that the Authority was correct to withhold the information located in response to the narrower request under section 29(1)(a) of FOISA.

60. The Authority also applied section 29(1)(b) (Ministerial communications) of FOISA to some of the information. Given the Commissioner's conclusion that section 29(1)(a) applies to all of the information, he does not need to consider the Authority's application of section 29(1)(b).

Decision

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

The Commissioner finds that by relying on the exemption in section 29(1)(a) of FOISA to withhold information, the Authority complied with Part 1 of FOISA.

However, the Commissioner finds that the Authority failed to comply with Part 1 (and in particular section 1(1)) of FOISA, by failing to reasonably interpret the Applicant's request.

The Commissioner therefore requires the Authority to provide the Applicant with a revised review outcome, in compliance with section 21 of FOISA. This should include the information previously identified, in order that the Applicant has one complete response.

The above action should be carried out by **10 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

26 September 2025