



Scottish Information
Commissioner
www.foi.scot

Decision Notice 231/2025

Costs of a specified tribunal

Authority: NHS National Services Scotland
Case Ref: 202500856

Summary

The Applicant asked the Authority for information on the costs of a specific employment tribunal. The Authority withheld this information on the grounds that disclosure would endanger the health and safety of the Authority's staff and those involved in the tribunal. During the investigation, the Authority informed the Applicant that the information was otherwise accessible. The Commissioner investigated and found that the Authority failed to comply with FOISA in responding to the Applicant's request. He required the Authority to disclose most of the withheld information to the Applicant.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (4) and (6) (General entitlement); 25(1) (Information otherwise available); 39(1) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner).

Background

1. On 5 March 2025, the Applicant made a request for information to the Authority regarding a specified employment tribunal. He asked:
 - (1) "Can you provide a breakdown of the cost [of the specified employment tribunal]?"
 - (2) "Can this include the cost of any external counsel?"
2. 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.

3. The Authority responded on 1 April 2025. It withheld the information requested under the exemptions in sections 33(1)(b), 38(1)(b) and 39(1) of FOISA.
4. On 2 April 2025, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision because:
 - In relation to the exemption in section 33(1)(b) of FOISA, he did not accept that the level of detail he was requesting would give rise to any commercial concerns.
 - In relation to the exemption in section 38(1)(b) of FOISA, the information requested primarily related to costs – not personal details. He said that “any personal data elements” could be redacted, legal fees were not inherently personal data and, given the public nature of the specified employment tribunal, much of the personal data had already been disclosed.
 - In relation to the exemption in section 39(1) of FOISA, he did not accept that this exemption could justify “blanket non-disclosure” – especially when the details of the specified employment tribunal were already in the public domain. He considered that there had been a conflation of legitimate media scrutiny with harassment and said there was no evidence that publishing cost figures had led to any threat to safety.
5. The Authority notified the Applicant of the outcome of its review on 23 April 2025. It withdrew its reliance on the exemptions in sections 33(1)(b) and 38(1)(b) of FOISA but maintained its reliance on the exemption in section 39(1) of FOISA.
6. On 28 May 2025, 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 believe that the Authority was entitled to withhold the information requested, particularly in light of [Decision 133/2025](#)¹ of the Commissioner.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 17 June 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.
9. On 24 July 2025, the Authority contacted the Applicant and the Commissioner noting that the total legal costs (up to 31 May 2025) of the specified employment tribunal had been [published by Fife Health Board](#)² on 7 July 2025. The Authority said that it had therefore decided to overturn its reliance on the exemption in section 39(1) of FOISA and instead

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

² <https://www.nhsfife.org/news-updates/latest-news/2025/07/statement-employment-tribunal-legal-costs/#:~:text=NHS%20Fife%20can%20confirm%20that%2C%20as%20of%2031,services%20provided%20by%20NHS%20Scotland%E2%80%99s%20Central%20Legal%20Office.>

wished to rely on the exemption in section 25(1) of FOISA, on the basis that the information requested was otherwise accessible.

10. 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 on this application and to answer specific questions related to its interpretation of the Applicant's request, how it identified the withheld information and the applicability of the exemption in section 25(1) of FOISA.

Commissioner's analysis and findings

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

Section 25(1) – Information otherwise available

13. 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) of FOISA 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.
14. As outlined above, the Authority advised the Applicant during the investigation that it considered the information was now otherwise available as the cost of the specified employment tribunal (up to 31 May 2025) had been published by Fife Health Board on 7 July 2025.
15. The Commissioner has several concerns with the Authority's reliance on the exemption in section 25(1) of FOISA.
16. First, in terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received. The information published by Fife Health Board (costs of the employment tribunal up to 31 May 2025) goes beyond the information held by the Authority at the time it received the Applicant's request (5 March 2025). While there may be value in more up-to-date information, and while the provision of such information to an applicant may go some way to fulfilling section 15(1) of FOISA (Duty to provide advice and assistance), it is not what the Applicant was entitled to receive in response to his request.
17. Second, the costs published by Fife Health Board are the total costs of the employment tribunal (up to 31 May 2025). However, the Applicant's request sought a "breakdown" of the cost and asked that this breakdown "include the cost of any external counsel". The specific information requested by the Applicant cannot readily be derived from the information published by Fife Health Board.
18. (Given the range of levels of detail that "a breakdown of the cost [of the specified employment tribunal]" could embrace, the Commissioner considers that it would have been appropriate for the Authority to have sought clarification of the request to understand precisely what kind of breakdown the Applicant was seeking. He cannot stress enough the importance of ensuring that the terms of any information request received are clear before proceeding to respond.)

19. Third, even if the Applicant's request could be understood as seeking a single aggregate figure (i.e. total cost instead of a breakdown), the total cost withheld by the Authority and the total cost published by Fife Health Board are not the same.
20. The Commissioner therefore cannot accept that the specific information requested by the Applicant is otherwise accessible to him via the information published by Fife Health Board. For the reasons set out above, he must find that the Authority was not entitled to apply the exemption in section 25(1) of FOISA to the information requested.

Section 39(1) – Health, safety and the environment

21. As stated above, the Authority advised the Commissioner on 24 July 2025 that it no longer wished to rely upon the exemption in section 39(1) of FOISA to withhold the information requested. However, the Authority advised the Commissioner on 9 September 2025 that it still considered there to be a risk to the physical and mental health of its staff were further information about the specified employment tribunal to be disclosed.
22. In the circumstances, the Commissioner considers it appropriate to consider the Authority's position at the date of the review outcome (i.e. whether the information requested was appropriately withheld under the exemption in section 39(1) of FOISA).
23. Section 39(1) of FOISA states that information is exempt information if its disclosure under FOISA would, or would be likely to, endanger the physical or mental health or the safety of an individual (which may include a group of people). This is a qualified exemption and is subject to the public interest test required by section 2(1)(b) of FOISA.
24. As the Commissioner notes in his [briefing on the exemption](#)³, section 39(1) of FOISA does not contain the usual harm test. Instead of the "substantial prejudice" test found in many other harm-based exemptions in Part 2 of FOISA, this exemption refers to the "endangerment" of health or safety. "Danger" cannot, however, be regarded as a particularly low threshold.

The Authority's submissions

25. The Authority explained that there was already a significant amount of information relating to the employment tribunal available within the public domain which raised "very real concerns around the mental and physical health" of those involved.
26. The Authority explained that those involved in the employment tribunal had already experienced "large amounts of verbal abuse" at their workplace. As the subject matter of the specified employment tribunal had attracted such a high public interest and media profile, it considered that further disclosure of information relating to the tribunal would increase the exposure of those involved to verbal abuse, which could escalate to physical abuse.
27. For these reasons, the Authority considered that the exemption in section 39(1) of FOISA applied at the date of the review outcome. It said that the mental and physical health of the Authority's employees was paramount and that there was absolutely no public interest in the disclosure of information that would subject employees to any type of mental or physical harm.

³ https://www.foi.scot/sites/default/files/2023-07/BriefingSection39HealthSafetyandtheEnvironment_2023.pdf

28. The Authority provided the Commissioner with a link to a media article which it said demonstrated the harm and adverse effects caused to those involved in the specified employment tribunal.

The Applicant's submissions

29. The Applicant argued that the Authority was conflating legitimate media scrutiny with harassment. He asserted that there was no evidence that publishing cost figures had led to any threat to safety and that details of the specified employment tribunal were already in the public domain.

The Commissioner's view

30. The phrase "endanger" is broad enough to apply where there is a threat, direct or indirect, to the safety of a person. Since the exemption does not specify that any threat should be imminent before it applies, the threat may be either immediate, or one which would foreseeably arise in the future. However, the Commissioner believes that for endangerment to be considered likely, there must be some well-founded apprehension of danger, such that the prospect of harm could be regarded as a distinct possibility.
31. For this exemption to apply disclosure of the information must lead to, or be likely to lead to, this endangerment. This exemption does not cover information that does not itself give rise to any endangerment.
32. The Commissioner recognises the strength of feeling regarding the matters under consideration in the employment tribunal and the significant public interest and media attention it has attracted.
33. The Commissioner also notes the Authority's comments that those involved in the employment tribunal have experienced verbal abuse at their workplace, which could escalate to physical abuse. The Commissioner does not condone abuse of any kind.
34. The central question when considering the application of the exemption in section 39(1) of FOISA is whether disclosure of the specific information in question would, or would be likely to, endanger the physical or mental health or the safety of an individual (or group).
35. The Commissioner cannot envisage that disclosure of the specific information requested (particularly where the Applicant has explicitly said that "any personal data elements" could be redacted) would meaningfully add to whatever risks to the health and safety of any individual (or group of individuals) already exist.
36. The Commissioner is sensitive to the potential impact of the increased attention that may follow from disclosure of the withheld information. However, as stated above, these costs relate to a high-profile and ongoing case, the details of which are in the public domain and have attracted significant media attention. There remains a high level of media and public interest in this case, which he expects will continue until the conclusion of the employment tribunal – and likely beyond.
37. In the circumstances, the Commissioner therefore does not consider that disclosure of the withheld information is likely to significantly increase attention either on the employment tribunal, those involved in the tribunal, the Authority or its employees. He also sees no reason why disclosure of the information requested would be more likely to cause the harm required for the exemption in section 39(1) of FOISA to apply than withholding the information.

38. In all of the circumstances, the Commissioner finds that disclosure would not be likely to endanger the physical or mental health or the safety of any individual (or group). He therefore finds that the exemption in section 39(1) of FOISA has been wrongly applied by the Authority.
39. Given that the exemption in section 39(1) of FOISA was wrongly applied, the Commissioner is not required to consider the public interest test in section 2(1)(b) in relation to section 39(1).

Next steps

40. As stated above, the Applicant stated in his requirement for review that “any personal data elements” could be redacted. Having reviewed the withheld information, the Commissioner is satisfied that there is certain information that meets this description.
41. While the Authority withdrew its reliance on the exemption in section 38(1)(b) of FOISA, the Commissioner accepts that this information – where it relates an individual with a junior role and where disclosure not necessary to understand the costs themselves – can be withheld.
42. When disclosing the information requested to the Applicant, the Commissioner requires the Authority to provide the Applicant with advice and assistance, in line with its duty under section 15 of FOISA, to explain the withheld information to ensure that it can be understood.
43. The Commissioner requires the Authority to:
- specify the elements of the withheld information that relate to internal costs and those that relate to external counsel costs
 - explain why the total costs differ to those published by Fife Health Board
 - advise the Applicant of the VAT position regarding the costs (e.g. whether VAT has been included)
 - inform the Applicant of the actual cost – not the “book cost” (if VAT has not been included).
44. The Commissioner will specify the information to 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, the Commissioner finds that the Authority was not entitled to withhold the information requested under the exemptions in sections 25 and 39(1) of FOISA.

The Commissioner therefore requires the Authority to provide the Applicant with the withheld information (complying with the requirements set out in paragraphs 41-43), by **17 November 2025**.

The Commissioner will specify the information to be disclosed to the Applicant.

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

30 September 2025