



Scottish Information
Commissioner
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Decision Notice 258/2025

Drafting of the Assisted Dying for Terminally Ill Adults (Scotland) Bill

Authority: Scottish Ministers
Case Ref: 202500946

Summary

The Applicant asked the Authority for correspondence relating to the drafting of the Assisted Dying for Terminally Ill Adults (Scotland) Bill. The Authority stated that it did not hold the information requested for the purposes of FOISA. The Commissioner investigated and agreed that the information was not held by the Authority for the purposes of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (4) and (6) (General entitlement); 3(2)(a) (Scottish public authorities); 47(1) and (2) (Application for decision by Commissioner).

Background

1. On 7 February 2025, the Applicant made a request for information to the Authority. They asked for:
 - (i) Any email communication or other correspondence between the Parliamentary Counsel's Office (PCO) of the [Authority] or any of its staff ... and Liam McArthur MSP, any person working for Liam McArthur MSP ... and/or the Non Government Bills Unit (NGBU) of the Scottish Parliament relating to the drafting of the Assisted Dying for Terminally Ill Adults (Scotland) Bill.

- (ii) Whether or not any person employed in the [PCO] of the [Authority] ... provided advice or any other assistance to Liam McArthur MSP, any of Mr McArthur's staff ... and/or the NGBU of the Scottish Parliament in relation to the drafting of the Assisted Dying for Terminally Ill Adults (Scotland) Bill (including suggesting the name and/or contact details of a Parliamentary Counsel to assist with the drafting process).
- (iii) Whether or not any approach was made by any person employed in the [PCO] of the [Authority] to the UK Government's Office of the Parliamentary Counsel or any of its staff ... to request, seek or suggest that assistance be given to Liam McArthur MSP, his staff ... and/or the NGBU of the Scottish Parliament in drafting of the Assisted Dying for Terminally Ill Adults (Scotland) Bill.

2. By way of background:

- Liam McArthur MSP introduced a Member's Bill (Assisted Dying for Terminally Ill Adults (Scotland) Bill) to allow terminally ill adults in Scotland, who are eligible, to lawfully request, and be provided with, assistance by health professionals to end their own life.
- A Member's Bill is a Bill introduced by an MSP who is not a member of the Scottish Government.
- The NGBU is a clerking team within the Parliament whose main role is to assist individual members seeking to introduce a Member's Bill.
- The PCO is a directorate of the Authority and drafts all bills for the Authority's legislative programmes.

3. The Authority responded on 6 March 2025, in the following terms:

- for parts (i) and (ii) of the Applicant's request, it informed them that it held relevant information but that it was exempt from disclosure under section 36(2) of FOISA.
- for part (iii) of the Applicant's request, it confirmed that it had not received any such approach.

4. On 7 March 2025, the Applicant wrote to the Authority requesting a review of its decision. They stated that they were dissatisfied with the decision because:

- they considered it extremely unlikely that the exemption in section 36(2) of FOISA applied
- the public interest favoured disclosure of the information requested and that the refusal to disclose it unjustifiably inhibited public scrutiny on matters of significant public concern.

5. The Authority notified the Applicant of the outcome of its review on 3 April 2025. It concluded that a different decision should be substituted and informed the Applicant that it did not hold the information requested in parts (i) and (ii) of their request for the purposes of FOISA. It said that this was because it held the information requested, in terms of section 3(2)(a)(i) of FOISA, on behalf of the Scottish Parliamentary Corporate Body (SPCB).

6. The Authority explained that the information requested was covered by a formal agreement on the provision of legislative drafting services to the Scottish Parliament's NGBU by the PCO. Specifically, it noted that the agreement stated that: "All drafting instructions, draft provisions and other information provided to or held by PCO in connection with any Bill instructed by NGBU is held by PCO as SPCB's agent." It suggested that the Applicant contact the Scottish Parliament for further assistance.

7. On 16 June 2025, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. They stated that they were dissatisfied with the outcome of the Authority's review because they considered that the Authority did hold the information requested for the purposes of FOISA.

Investigation

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
9. On 21 July 2025, the Authority was notified in writing that the Applicant had made a valid application. The case was subsequently allocated to an investigating officer.
10. 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 why it did not consider it held the information requested for the purposes of FOISA.

Commissioner's analysis and findings

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

Whether the information is held for the purposes of FOISA

12. 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 are not relevant in this case. The information to be given is that held by the authority at the time the request is received (section 1(4) of FOISA).
13. Section 3(2) of FOISA defines the circumstances in which information is held by a Scottish public authority. Section 3(2)(a)(i) of FOISA states that if a Scottish public authority holds the information on behalf of another person, then the information is not held by that authority for the purposes of FOISA. Consequently, if the information requested in any given case is held on behalf of another person (as the Authority has claimed in this case, i.e. on behalf of the SPCB), the authority must give the applicant notice under section 17(1) of FOISA.

The Applicant's submissions

14. The Applicant suggested that, given that officials are accountable to Ministers for their actions, it is constitutionally improper for them to work on behalf of another without clear supervision from the Ministers.
15. The Applicant also expressed concern about practicalities of this arrangement, including suggesting this could inhibit the ability of officials to seek advice that the Applicant considered they ought to seek.
16. The Applicant submitted that it was evident that the Parliamentary Counsel who drafted the Assisted Dying for Terminally Ill Adults (Scotland) Bill was employed by the Authority. They argued that any work done in the drafting of that Bill must sit with the Authority and therefore be held by the Authority for the purposes of FOISA.

The Authority's submissions

17. The Authority said that it wished to continue to uphold the application of section 3(2)(a)(i) on the basis that it did not hold the information requested for the purposes of FOISA as the information was held on behalf of the SPCB.
18. The Authority noted that the information requested related to the drafting of the Assisted Dying for Terminally Ill Adults (Scotland) Bill – a Member's Bill introduced by Liam McArthur MSP. It said that the information requested was obtained and created in accordance with the formal agreement it referred to in its review outcome for the purposes of the Scottish Parliament's function of supporting and advising MSPs seeking to introduce Members' Bills.
19. The Authority provided the Commissioner with a copy of the formal agreement and indicated that an unsigned copy was available online.
20. The Authority explained that it and the SPCB have a joint interest in ensuring that all Public Bills introduced in the Scottish Parliament are drafted to a high standard and reflect best practice in clear and accessible drafting. This is so that they can be scrutinised on their merits, can effectively deliver the Scottish Parliament's legislative intentions and, if enacted, help secure the Scottish Parliament's reputation for making high quality law which serves the people of Scotland well.
21. The Authority said that the PCO is contracted to draft Bills on the Scottish Parliament's behalf because of this overarching interest in the quality of legislation and because of the PCO's position as centre of legislative excellence, with many years of experience of drafting Bills and a wealth of experience and know-how.
22. However, the Authority explained that it (including the PCO) did not have control over the information requested. Specifically:
 - under the agreement, PCO acts explicitly as an agent of the SPCB. Under the law of agency, the agent is limited in what they can lawfully do or control – it is the principal (in this case the SPCB), on whose behalf the agent acts, who is in ultimate control
 - PCO does not control the information requested in the same way as it would if it held the information in its own right
 - under the agreement, all information is to be treated in confidence by the PCO drafters to whom the work has been assigned, and it is not to be shared with other PCO drafters, or with any other person, without the express permission of the NGBU
 - PCO does not have the power to apply the Authority's own policies and procedures to the information – it is held by PCO as the SPCB's agent, and the information therefore belongs to the SPCB
 - PCO is obliged by the Scottish Parliament to keep the information separate from the Authority's own information
 - access to the information is restricted (with these restrictions set by the Scottish Parliament) so that only a limited number of users can access it
 - PCO drafters deliver drafting work under the agreement under the direction and oversight of NGBU.

23. The Authority acknowledged that the agreement provides that where it receives a request to disclose any information which PCO holds as SPCB's agent, it is to consult the SPCB before making any decision as to disclosure of that information.
24. However, the Authority considered that this provision reinforced the position it had set out above – that in delivering drafting work under the agreement, the Authority is acting as the SPCB's agent and any information held by PCO in connection with that drafting work is held by PCO as the SPCB's agent.
25. The Authority said this provision simply recognised the practical reality that PCO may receive requests to disclose information covered by the agreement and so sets out that PCO must consult the SPCB if that happens. It submitted that this provision did not give authority to PCO to make an independent decision about disclosure of that information, since the SPCB is PCO's principal in these matters. It considered the fact that PCO did not have a "free hand" in deciding what to do with information under the agreement was made clear by the other confidentiality requirements in the agreement.

The Commissioner's view

26. The Commissioner's remit extends only to consideration of whether the Authority complied with Part 1 of FOISA in responding to the Applicant's information request. In other words, he is only considering whether the Authority was entitled to inform the Applicant that it did not hold the information requested for the purposes of FOISA.
27. In considering whether an authority holds information for the purposes of FOISA, the Commissioner will consider a number of factors, including (but not limited to):
 - whether there is an appropriate connection with the authority, meaning that the information is for the purposes of carrying out its functions as a public authority
 - the content of the information
 - the circumstances in which it was created, and
 - how it is held.
28. The Commissioner notes that the agreement between the Non-Government Bills Unit (NGBU) (in the Scottish Parliament) and PCO (in the Authority) sets out that the PCO will act as the SPCB's agents. The agreement states that:

"All drafting instructions, draft provisions and other information provided to or held by PCO in connection with any Bill instructed by NGBU is held by PCO as SPCB's agent. Unless subsequently published all such information is to be treated in confidence by the PCO drafters to whom the work has been assigned and is not to be shared with other PCO drafters, or with any other person, without the express permission of NGBU."
29. The Commissioner therefore accepts that the information requested was created in the context of an agreement, made by senior officials of both organisations, expressly placing full ownership and control of the drafting process with the Scottish Parliament, rather than the Authority. That does not necessarily exclude the possibility that the Authority might still have some appropriate connection with the information, but it is a factor lending considerable weight to it not doing so.
30. The Commissioner recognises that the Authority has an interest in the high-quality drafting of legislation considered by the Scottish Parliament. However, he is not satisfied that this

interest amounts to a sufficient appropriate connection to the specific details of the drafting of a Member's Bill (i.e. the information requested by the Applicant). As stated above, a Member's Bill is a Bill introduced by an MSP who is not a member of the Scottish Government.

31. To the extent that the Authority may have an interest in information about specific Bills being drafted on behalf of the NGBU, the agreement expressly limits the ability of the Authority to make use of any information obtained through this work for its own purposes – including by reiterating the responsibilities of confidentiality upon drafters.
32. As stated above, the agreement contains a provision that where the Authority receives a request to disclose any information which PCO holds as SPCB's agent, it is to consult the SPCB before making any decision as to disclosure of that information. In the circumstances, the Commissioner accepts it does not follow from this this provision (when it is read in the full context of the remainder of the agreement) that the specific information requested by the Applicant is held by the Authority for the purposes of FOISA.
33. In all the circumstances, therefore, the Commissioner is satisfied that the Authority does not hold (and has not held) the requested information for its own purposes and instead holds the information on behalf of the SPCB. He therefore finds that the information requested was not held by the Authority in terms of section 3(2) of FOISA.

Decision

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

Euan McCulloch
Head of Enforcement

24 October 2025