



Scottish Information  
Commissioner  
www.foi.scot

# Decision Notice 017/2026

---

## Specified training material on competing rights and trans issues

Applicant: Anonymous  
Authority: NHS National Services Scotland  
Case Ref: 202501030

### Summary

The Applicant asked the Authority for specific training material held by the Authority. The Authority withheld the information in full on the grounds that disclosure would endanger the health and safety of individuals involved in a tribunal and it would be likely to inhibit the free and frank provision of advice. The Commissioner investigated and found that the Authority was not entitled to withhold the information under the exemptions claimed. He required the Authority to disclose the wrongly withheld information to the Applicant (subject to the redaction of the name of one of the presenters of the training material) and to issue a revised review outcome in respect of the name of the other presenter.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 30(b)(i) (Prejudice to effective conduct of public affairs); 39(1) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner).

### Background

1. On 23 April 2025, the Applicant made a request for information to the Authority. She asked for training material relating to the NHS Central Legal Office's (CLO) "Competing Rights: A Focus on Trans Issues" course.
2. For context, the specified employment tribunal referred to in this decision notice 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 case, the details of which are in the public domain, and which has attracted significant media attention.

3. The Authority responded on 22 May 2025. It withheld the information requested under the exemptions in section 30(b)(i) and (ii) of FOISA. Specifically, it explained that:
  - the training material was exclusively for NHS Scotland Health Boards, and it related to a “complex and evolving area of law” and a “controversial subject matter”. As such, the material was not released to or shared with participants, would be kept up-to-date and would regularly change.
  - disclosure of the material would potentially result in out-of-date information and legal analysis being shared with an audience for which it was not intended, and would be very likely to prevent the use of such slides in the future or the training taking place at all.
  - the public interest in disclosure was outweighed by the benefit in maintaining the exemptions, which allowed it to provide advice on such subjects in an open and detailed manner. It argued that this would not be the case if the information was disclosed, and that it was essential that NHS Scotland Health Boards could obtain this sort of training (the audience for whom the training was intended) in order that they could comply with their legal obligations.
4. Later that same day, the Applicant wrote to the Authority requesting a review of its decision. She stated that she was dissatisfied with the decision for the following reasons:
  - the exemptions in section 30(b)(i) and (ii) of FOISA did not apply to the information requested, which was public sector training – the details of which the public had the right to know
  - the information could not be withheld because the training might have been controversial or misleading on a point of law
  - the public interest favoured disclosure.
5. The Authority notified the Applicant of the outcome of its review on 17 June 2025. While it maintained that the exemptions in section 30(b)(i) and (ii) of FOISA applied, it overturned their use in this case. Instead, it applied the exemption in section 39(1) of FOISA to withhold the information requested, on the basis that there was a “direct link” between disclosure of the training material and the tribunal in that there would be “added media attention” in respect of that tribunal that would result in “further adverse effects” to NHS Scotland staff (specifically, those involved in the tribunal).
6. On 1 July 2025, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. She stated that she was dissatisfied with the outcome of the Authority’s review because she disagreed that the exemption in section 39(1) of FOISA applied and she said that the information requested had nothing to do with the individuals involved in the tribunal.

## **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 4 August 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 (comprising a PowerPoint presentation), and the case was subsequently allocated to an investigating officer.
9. 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 justification for withholding the information requested.
10. During the investigation, the Authority informed the Commissioner that, in addition to its reliance on the exemption in section 39(1) of FOISA, it also wished to rely on the exemption in section 30(b)(i) to withhold the information requested.
11. Later during the investigation, the Authority confirmed that it was relying on both of the exemptions in sections 30(b)(i) and 39(1) of FOISA to withhold the information requested. However, at the same time, it said it considered reliance on the former exemption to be "more relevant" and that it could "stand alone". In the circumstances, the Commissioner will consider the application of both exemptions.

## **Commissioner's analysis and findings**

12. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.
13. As stated in previous decisions, in [Scottish Ministers v Scottish Information Commissioner \[2006\] CSIH 8](#)<sup>1</sup>, at paragraph [18], the Court of Session recognised that:

"... in giving reasons for his decision, [the Commissioner] is necessarily restrained by the need to avoid, deliberately or accidentally, disclosing information which ought not to be disclosed."
14. In this decision notice, the Commissioner has endeavoured to give as full account of his reasoning as he can, but, by necessity, in this case the comments of the Court of Session are applicable to some aspects.

### ***Section 39(1) of FOISA (Health, safety and the environment)***

15. 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. This is a qualified exemption and is subject to the public interest test required by section 2(1)(b) of FOISA.
16. As the Commissioner notes in his [briefing on the exemption](#)<sup>2</sup>, 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.

---

<sup>1</sup> [https://www.bailii.org/scot/cases/ScotCS/2008/CSIH\\_08.html](https://www.bailii.org/scot/cases/ScotCS/2008/CSIH_08.html)

<sup>2</sup> [BriefingSection39HealthSafetyandtheEnvironment\\_2023.pdf](#)

### *The Applicant's submissions*

17. The Applicant disagreed that the exemption in section 39(1) of FOISA applied. She noted that the information requested was NHS training material and that this material had nothing to do with the individuals involved in the tribunal. She said that this was an "extrapolation" that the Authority had made, and that her request had not mentioned the tribunal or those involved in it.

### *The Authority's submissions*

18. The Authority said that there was evidence of a "negative impact" on members of staff at NHS Fife related to the tribunal. It provided examples of this impact and explained that there had been "widespread social media abuse" as well as "online abuse and intimidation" of CLO staff (i.e. its own employees) relating to the tribunal. It argued that disclosure of the information requested would lead to "more commentary by the press" and to more abuse and intimidation of staff within the NHS in Scotland, which would have a resultant detrimental effect to their physical or mental health or safety.
19. The Authority submitted that there had been "significant misreporting" of matters in the press associated with the tribunal, with details taken out of context and sensationalised. It considered that the exemption in section 39(1) of FOISA to be available to avoid the possibility of the abuse and other negative impacts arising as well as the "inevitable adverse comment" about the training material, which was not drafted for wider public consumption.
20. The Authority further explained that the nature of the issues considered in the training material and the positions taken in the media in relation to them meant that it was likely there would be "significant comment and action" taken in relation to any reporting of training provided on these issues by CLO. It argued that the nature of the exemption in section 39(1) of FOISA is to avoid a scenario where individuals may actually be harmed by disclosure of information.
21. The Authority explained that the training material was a presentation given by a solicitor or solicitors from the CLO to NHS Health Boards in Scotland (specifically, to HR professionals at these Health Boards, to assist their understanding of the legal position in relation to "complex issues regarding gender / gender critical beliefs / trans issues").
22. The Authority said that the training material was, given its "confidential" nature, candid and open about the difficulties faced by NHS Health Boards in Scotland. It also noted that the training material pre-dated decisions and changes in the law and, if disclosed, might result in misrepresentation by the media of its current position. It argued that this ran the risk of inflaming matters and resulting in more risk to NHS Scotland staff and submitted that these risks were not superficial or remote.
23. By way of background, and in response to questions from the Commissioner, the Authority confirmed that the information requested dated from June 2024 and that it had been presented on 20 occasions between June 2024 and December 2024 to various Health Boards in Scotland.

### *The Commissioner's view*

24. The Commissioner has carefully considered all of the arguments he has received, together with the withheld information.
25. 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.

26. 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.
27. As he did in [Decision 231/2025](#)<sup>3</sup> (at paragraph 32), the Commissioner recognises the strength of feeling regarding the matters under consideration in the tribunal and the significant public interest and media attention it has attracted.
28. The Commissioner also notes the Authority's comments that those involved in the tribunal have experienced abuse, and its concerns that disclosure of the information requested would result in "more abuse and intimidation" of staff within the NHS in Scotland. The Commissioner does not condone abuse or intimidation of any kind.
29. 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).
30. The Commissioner has carefully considered the Authority's submissions. Having done so, he is not persuaded that disclosure of the specified information requested would meaningfully add to whatever risks to the health and safety of any individual (or group of individuals) already exist.
31. This is particularly so given the information requested does not explicitly relate to the tribunal or to the individuals involved in that tribunal – nor was the request framed in such terms. Instead, as stated above, the information requested comprises a PowerPoint presentation delivered by the CLO to NHS Scotland Health Boards (specifically, to HR professionals at these Health Boards to assist their understanding of the legal position in relation to "complex issues regarding gender / gender critical beliefs / trans issues").
32. 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, the information requested does not explicitly relate to the tribunal or to the individuals involved in that tribunal – nor was the request framed in those terms. In any event, there remains a high level of media and public interest in the tribunal (and matters adjacent to it) which he expects will continue.
33. The Commissioner accepts that disclosure of any information relating to (or perceived to be relating to) the tribunal topic may result in increased attention on particular individuals (or groups of individuals), some which may be negative. However, this cannot mean that all such information must necessarily be withheld. The Commissioner must therefore consider the central question set out above: 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).
34. In all of the circumstances, the Commissioner does not consider that disclosure of the withheld information would be likely to significantly increase attention on the employment tribunal or those involved in the tribunal. He also sees no reason why disclosure of the

---

<sup>3</sup> <https://www.foi.scot/decision-2312025>

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.

35. Taking account of the submissions received from the Authority in relation to the actual information being withheld in this case, the Commissioner is not persuaded that the Authority has evidenced the required "endangerment" of health or safety for the exemption in section 39(1) of FOISA to be engaged.
36. 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.
37. 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). However, he will now go on to consider whether the Authority was entitled to withhold the information requested under the exemption in section 30(b)(i) of FOISA.

***Section 30(b)(i) – substantial inhibition to free and frank provision of advice***

38. Section 30(b)(i) of FOISA provides that that information is exempt if its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
39. In applying the exemption in section 30(b)(i) of FOISA, the chief consideration is not whether the information constitutes advice, but whether the disclosure of that information would, or would be likely to, inhibit substantially the provision of advice. The inhibition in question must be substantial and therefore of real and demonstrable significance.

*The Applicant's submissions*

40. The Applicant disagreed that the exemption in section 30(b)(i) of FOISA applied for the reasons stated in her requirement for review (as set out above in paragraph 3).

*The Authority's submissions*

41. The Authority noted that it had initially relied on the exemptions in section 30(b) of FOISA, particularly section 30(b)(i). It said that it had upheld their application at review stage, but that it had considered the exemption in section 39(1) of FOISA important to rely on. In response to the questions asked by the Commissioner regarding its justification for applying the exemption in section 39(1) of FOISA, it invited him to also consider the application of the exemption in section 30(b)(i).
42. The Authority submitted that if the information requested (which it described as a presentation by solicitors to the staff of their clients) were disclosed, it would no longer be possible for it to prepared "extensive" slides due to the risk that legal advice would be released and lose privilege. It said that it would also mean that commentary by CLO could not be included in such slides as this would not usually be intended for an audience other than those in attendance.
43. The Authority explained that it was important that such presentations, which include discussion, that the slides and commentary can be free and frank and not impinged by the risk of disclosure to the general public "via the media". It argued that this was particularly the case in relation to controversial topics with polarising viewpoints (on which legal advice and

guidance is required to avoid risk and litigation) such as the treatment of “transgender issues” by NHS Health Boards in Scotland.

44. The Authority said that it was important that such training material effectively covered the issues and achieved its purpose, otherwise the ability of the CLO to fulfil its role to NHS Health Boards in Scotland (and the legal function of these Health Boards) would be adversely impacted. It also noted that in the areas addressed in the training material the law can “change rapidly”, with the material becoming out-of-date, which meant that disclosure of the material could be misleading as it would represent the analysis at a particular point of time that might have since changed.

#### *The Commissioner’s view*

45. The Commissioner has carefully considered all of the arguments he has received, together with the withheld information.
46. As a starting point, the Commissioner notes that the Authority has not sought at any stage to rely on the exemption in section 36(1) of FOISA. He will therefore not consider further the Authority’s argument that disclosure of the information requested would result in the loss of legal privilege.
47. While the Commissioner cannot reveal the content of the withheld information, he does not accept that disclosure would inhibit, to the extent that the exemption in section 30(b)(i) of FOISA would be engaged, other employees of the Authority from providing similar such advice in future.
48. The Authority argued that it was important for training material to effectively cover issues to allow it to fulfil its role to NHS Health Boards in Scotland and to allow these Health Boards to fulfil their legal functions. The Commissioner agrees. He considers it would be contrary to the professional responsibilities of employees of the Authority not to provide and record similar such advice as part of similar training material in future.
49. The Commissioner does not accept that the disclosure of advice in one case will automatically have a substantially inhibiting effect in all others. He is satisfied that those responsible for providing the professional advice which would inform and comprise training material delivered by CLO have developed a nuanced understanding of the way in which FOI legislation works and may impact on how they discharge their responsibilities. He is also satisfied that it is generally understood that the risk of inhibition must always be assessed on a case-by-case basis and with regard to the specific information requested.
50. The Commissioner notes the Authority’s concern that disclosure of the training material could be misleading as it may not necessarily represent its up-to-date position or legal analysis of the issues in question. However, recorded information must be considered for disclosure – whatever its status. It is open to the Authority to choose to provide a commentary which places the information in context or explains its limitations.
51. In all the circumstances, the Commissioner is not persuaded, from the submissions he has received and the content of the information itself, that disclosure of the information, withheld under the exemption in section 30(b)(i) of FOISA, would result in the harm claimed by the Authority.
52. The Commissioner does not, therefore, accept the application of the exemption in section 30(b)(i) of FOISA should be upheld in respect of the information being withheld under this exemption.

53. Given that the Commissioner does not accept the application of the exemption for the information withheld under section 30(b)(i) of FOISA, he is not required to consider the public interest in section 2(1)(b) for that information.
54. The Commissioner therefore requires the Authority to disclose to the Applicant the information he has found it was not entitled to withhold under the exemption in section 30(b)(i) of FOISA (subject to a caveat regarding the names of the presenters of the withheld training material, which he will discuss below).

### ***Names of the presenters of the withheld training material***

55. The withheld information includes a slide that contains the names of two individuals. In response to a question from the Commissioner, the Authority confirmed that these individuals were solicitors employed by the CLO and that they had presented the particular set of slides provided to the Commissioner as the withheld information in this case. However, it noted that various solicitors from CLO had presented these slides.
56. The Authority said that, even if the slides themselves were disclosed, the names of these solicitors should be redacted. However, it did not rely on any additional exemptions in FOISA to withhold this information (e.g. section 38(1)(b) of FOISA).
57. The Commissioner has considered the seniority, job titles and public profiles of the two solicitors. He accepts that the name of one of the solicitors could, on the face of it, legitimately be withheld under the exemption in section 38(1)(b) of FOISA, given their more junior role. He therefore does not require the name of this solicitor (whom he will specify to the Authority) to be disclosed in response to his decision notice. However, he is not persuaded that it would be appropriate to accept, on the face of it, that the name of the other solicitor could similarly be legitimately withheld.
58. In the circumstances, the Commissioner therefore requires the Authority to issue a revised review outcome (in terms of section 21 of FOISA and otherwise than in terms of sections 30(b)(i) and 39(1)) in respect of the name of this solicitor (whom he will specify to the Authority). Doing so would allow the Applicant – if the Authority were to withhold this solicitor’s name (e.g. under section 38(1)(b) of FOISA) – to appeal any such refusal to the Commissioner and allow him to reach a decision based on full submissions provided by both parties.

### **Handling**

59. In paragraph 43 above, the Commissioner notes from the Authority’s submissions that it referenced disclosure to the general public “via the media”. A separate submission stated that the request was being made “exactly because of an employment tribunal”. The Authority is reminded that FOI law is ‘applicant blind’, meaning that *who* makes a request must not influence *how* it is handled. Guidance makes clear that the requester’s identity should never affect the authority’s response, and that FOI should be processed as if it could have been submitted by anyone. This handling error has been noted by the Commissioner.

## 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.

The Commissioner finds that the Authority wrongly withheld information under the exemptions in sections 30(b)(i) and 39(1) of FOISA.

The Commissioner therefore requires the Authority to:

- disclose to the Applicant the information he has found to have been wrongly withheld (subject to the redaction of the name of one of the solicitors who presented the withheld training material in question)
- issue a revised review outcome to the Applicant (in terms of section 21 of FOISA and otherwise than in terms of sections 30(b)(i) and 39(1)) in respect of the name of the other solicitor who presented the withheld training material in question.

The Commissioner requires the Authority to take the above steps by **19 March 2026**

## 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**

**2 February 2026**