



Scottish Information
Commissioner
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Decision Notice 304/2025

St Fittick's Park Judicial Review - Affidavit

Applicant: The Applicant
Authority: Aberdeen City Council
Case Ref: 202501217

Summary

The Applicant asked the Authority for a copy of the Authority's affidavit referred to in a judgment of the Court of Session. The Authority withheld the affidavit under the absolute exemption covering court records. The Commissioner investigated and found that the Authority complied with FOISA in responding to the Applicant's request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 20 (Requirement for review of refusal etc.); 37(1)(a)(i) (Court records, etc); 47(1) and (2) (Application for decision by Commissioner).

Background

1. On 20 May 2025, the Applicant made a request for information to the Authority. She asked for a copy of the affidavit by the Chief Officer of Corporate Landlord referred to in paragraph 8 of the judgment of [Simon McLean v. Aberdeen City Council \[2024\] CSOH 77](#)¹.
2. The Authority responded on 18 June 2025. It refused to provide the affidavit as it considered it was exempt from disclosure under the exemption in section 37(1)(a)(i) of FOISA.

¹ <https://www.scotcourts.gov.uk/media/er3llupz/2024csoh77-petition-of-simon-mclean-for-judicial-review.pdf>

3. Later that day, the Applicant wrote to the Authority requesting a review of its decision. She stated that she was dissatisfied with the decision because the affidavit in question was not held solely for court proceedings and, accordingly, the exemption in section 37(1)(a)(i) of FOISA did not apply.
4. The Authority responded on 24 June 2025. It said that it was unable to process the Applicant's requirement for review request under FOISA as she had not provided her full name.
5. On 30 June 2025, the Applicant again wrote to the Authority requesting a review of its decision (for the same reasons as in her original requirement for review) and provided her full name.
6. The Authority notified the Applicant of the outcome of its review on 24 July 2025, which fully upheld its original decision.
7. Later that day, 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 for the same reasons given in her requirement for review. She added that, to her knowledge, judgments had been issued by both the Outer and Inner Houses of the Court of Session and that if the Authority wished to maintain that legal proceedings were ongoing then it should provide evidence of the appeal to the Supreme Court.

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 8 September 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 considered the exemption in section 37(1)(a)(i) of FOISA applied to the information requested.

Commissioner's analysis and findings

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

Section 37 – court records etc.

12. Under section 37 of FOISA, information is exempt from disclosure if it is contained in a document:
 - (i) lodged with, or otherwise placed in the custody of, a court for the purposes of proceedings in a cause or matter (section 37(1)(a)(i))
 - (ii) served on, or by, a Scottish public authority for the purposes of such proceedings (section 37(1)(a)(ii))

- (iii) created by a court or member of its administrative staff for the purposes of, or in the course of, such proceedings (section 37(1)(a)(iii))
- 13. Section 37(1) of FOISA also provides that the exemption will only be engaged if the authority holds the information solely because it is contained in such a document.
- 14. This exemption is not subject to the public interest test in section 2(1)(b) of FOISA. This means that the Commissioner is not required to (and, indeed, cannot) go on to consider whether the public interest in disclosing the information is outweighed by that in maintaining the exemption. So, provided the information falls into one of the categories listed in section 37 of FOISA, it will be exempt from disclosure.

The Applicant's submissions

- 15. The Applicant submitted that the affidavit in question was a record of how the Chief Officer Corporate Landlord interpreted specific resolutions of the Authority, and the Chief Officer would require to refer to this affidavit in future as a memory aid and for guidance as to his formal instructions.
- 16. The Applicant said that the same consultation of the affidavit would be required by the Chief Officer's successors in that office and current and future officers whom the Chief Officer delegates his functions to. Without doing so, she argued that any or all of these parties could be acting outwith their delegated authority. She therefore submitted that the Authority held the affidavit for additional purposes, not solely for court proceedings, and the exemption in section 37(1)(a)(i) of FOISA therefore did not apply.
- 17. The Applicant considered it unusual, given the reported content of the affidavit and the transparency and openness claims of the Authority, that the Authority would seek to withhold a document showing how a Chief Officer had informed a court how he interpreted his mandate.
- 18. As stated above, the Applicant also said that, to her knowledge, judgments had been issued by both the Outer and Inner Houses of the Court of Session and that if the Authority wished to maintain that legal proceedings were ongoing then it should provide evidence of the appeal to the Supreme Court.

The Authority's submissions

- 19. The Authority explained that the affidavit in question was lodged as part of judicial review proceedings in the Court of Session. It was prepared and lodged by the respondent (i.e. the Authority) as part of its defence to the judicial review proceedings and was used as documentary evidence to support the Authority's position in the proceedings.
- 20. The Authority submitted that an affidavit is a "document" within the meaning of the exemption in section 37(1)(a)(i) of FOISA and that it had been received by and accepted as part of the court process by the Court of Session and was, therefore, "lodged" within the meaning of the exemption. It said that the judicial review proceedings to which the affidavit related had commenced by the time the request was made by the Applicant and that the requirements of the exemption in section 37(1)(a)(i) were, therefore, clearly satisfied and the affidavit was exempt from disclosure.
- 21. The Authority stated that the affidavit was lodged as part of the judicial review proceedings and that it did not hold "any policy or administrative value as far as delegated authority within [the Authority] was concerned". It said that the affidavit was prepared solely as evidence supportive of the Authority's written pleadings in response to the judicial review proceedings

and as documentary evidence at the substantive hearing. It noted that publicly available documents already exist which provide information as to delegated authority of the Authority's officers.

22. In response to the Applicant's argument that the Authority withholding the affidavit under the exemption in section 37(1)(a)(i) of FOISA ran counter to its claims of openness and transparency, the Authority said that this appeared to be a "public interest" argument. It noted that the exemption is an absolute exemption and, therefore, not subject to the public interest test.
23. The Authority also said that it understood that, at the time of the Applicant's request, it remained open to the petitioner in the judicial review proceedings to appeal the judgment of the Inner House of the Court of Session to the Supreme Court.

The Commissioner's view

24. The Commissioner notes that, in essence, section 37(1)(a)(i) of FOISA provides an absolute exemption in respect of all documents lodged with, or otherwise placed in the custody of, a court for the purposes of court proceedings.
25. Having considered the nature of the information requested and the Authority's submissions, the Commissioner is satisfied that the affidavit in question is a document lodged with, or otherwise placed in the custody of, a court for the purposes of court proceedings. The Court of Session is self-evidently a court for the purposes of this exemption and the affidavit in question is clearly a document lodged with the Court of Session for the purposes of the judicial review in question.
26. The Commissioner is also satisfied that the information is held by the Authority solely because it is contained in documents falling within the category described above.
27. The Commissioner has considered the Applicant's submission that legal proceedings had concluded. However, it is not a requirement that legal proceedings be ongoing for the exemption in section 37(1)(a)(i) of FOISA to apply.
28. The Commissioner's guidance on the exemption is clear that it continued to apply even when proceedings are at an end – a position informed by the Supreme Court in [Kennedy v The Charity Commission \[2014\] UKSC 20](#)² in relation to section 32 of the Freedom of Information Act 2002 (the equivalent to section 37 under FOISA), where Lord Mance stated:

“... as a matter of ordinary common law construction, the construction is clear: section 32 was intended to provide an absolute exemption which would not cease abruptly at the end of the court, arbitration or inquiry proceedings, but would continue until the relevant documents became historical records...”
29. The Commissioner has also considered the Applicant's argument that the affidavit is not held by the Authority solely for court proceedings, but also for additional purposes. The Authority denied this. However, whether the affidavit is used for additional purposes or not has no bearing on the application of the exemption in section 37(1)(a) of FOISA: it remains a document lodged with, or otherwise placed in the custody of, a court for the purposes of court proceedings and, as such, is exempt information.

² https://supremecourt.uk/uploads/uksc_2012_0122_judgment_75234ec4c4.pdf

30. The Commissioner is therefore satisfied that the affidavit requested by the Applicant is exempt from disclosure by virtue of section 37(1)(a)(i) of FOISA.
31. As stated above, this is an absolute exemption which is not subject to the public interest test contained in section 2(1)(b) of FOISA. The Commissioner is therefore not required to go on to consider whether the public interest in disclosing the information is outweighed by that in maintaining the exemption.

Handling matters

32. The Applicant expressed dissatisfaction in her application to the Commissioner at how the Authority had handled her original requirement for review. She submitted that her full name was provided in the email to the Authority requesting a review and thus complied with both FOISA and the guidance issued by the Commissioner.
33. As the Applicant did not raise this as a matter of dissatisfaction in her requirement for review, the Commissioner cannot issue a formal finding on this. However, in the circumstances, he considers it would be useful to comment on his approach to the requirement under FOISA for information requests and requirement for reviews to contain the name of the person making the request and the requirement for review.
34. In this case, the Commissioner considers that the Authority was technically entitled to require the Applicant to state her full name as part of her requirement for review (as required by section 20(3)(b) of FOISA). While the Applicant included her first name as part of her original requirement for review, her full name was not stated as part of her requirement for review (though it was present in the Authority's initial response, which the Applicant's requirement for review responded to). In other words, the Applicant's requirement for review comprised a chain of two emails – the first of which included the Applicant's full name (as stated by the Authority).
35. As a matter of prudence and to strictly comply with the requirements of FOISA, the Commissioner would urge requesters to state their full name as part of their information request and their requirement for review. However, he would also encourage public authorities to take a common-sense approach in situations where, for example, only a first name has been provided and where the public authority is certain of the identity of the requester.
36. The Commissioner has recently updated his Investigations Handbook to provide that where public authority can satisfy him that it understood who the requester was from the name provided in the request (or requirement for review), he is likely to accept the request (or requirement for review) – and any related application – as valid.
37. In other words, the Commissioner will not invalidate an application on the basis that only a first name was provided as part of the request (or requirement for review) where the public authority complied with the request and subsequently confirms to him that it is satisfied that it knows the identity of the requester.

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.

David Hamilton

Scottish Information Commissioner

15 December 2025