



Scottish Information
Commissioner
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Decision Notice 049/2026

Legal and professional costs incurred in connection with a specified employment tribunal

Authority: South Lanarkshire Leisure and Culture
Case Ref: 202300102

Summary

The Applicant asked the Authority for an update regarding the total legal and professional costs incurred in connection with a specified employment tribunal involving a named individual. The Authority withheld the information because it considered it to be commercially sensitive and that disclosure also would, or would be likely to, prejudice substantially the effective conduct of public affairs. The Commissioner investigated and found that the Authority was not entitled to withhold the information requested. He required the Authority to disclose the information to the Applicant.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 30(c) (Prejudice to effective conduct of public affairs); 33(1)(b) (Commercial interests and the economy); 47(1) and (2) (Application for decision by Commissioner).

Background

1. On 6 February 2022, the Applicant made a request for information to the Authority for the total outlay to date incurred by the Authority for all costs associated with the “grievance case” by a specified employee “dating back to the start of involvement of lawyers”.
2. On 7 April 2022, the Authority disclosed the information requested to the Applicant.

3. On 17 November 2022, the Applicant made a new request for information to the Authority. He asked for an update regarding “the total legal and professional costs incurred to date” connected to a specified Employment Tribunal involving a named individual.
4. The Authority responded on 15 December 2022. It withheld the information requested under the exemption in section 33(1)(b) of FOISA.
5. On 16 December 2022, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision because the Authority had previously disclosed similar information to him in response to a previous request and he had simply asked for updated costs.
6. The Authority notified the Applicant of the outcome of its review on 16 January 2023, which fully upheld its original decision.
7. On 25 January 2023 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 disagreed that the exemption in section 33(1)(b) of FOISA applied and, in any event, he argued the public interest favoured disclosure.

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 2 February 2023, and in line with section 49(3)(a) of FOISA, the Commissioner gave the noticing in writing of the application and invited its comments. The Authority provided its comments. In doing so, it confirmed that it wished to also rely on the exemption in section 30(c) of FOISA to withhold the information requested.
10. The Authority was also 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.
11. During the investigation, further comments were sought and obtained from the Authority related to its application of the exemptions in sections 30(c) and 33(1)(b) 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.
13. As stated in previous decisions, in [Scottish Ministers v Scottish Information Commissioner \[2006\] CSIH 8](#)¹, 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.”

¹ https://www.bailii.org/scot/cases/ScotCS/2008/CSIH_08.html

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.
15. Section 45 of FOISA makes it a criminal offence for the Commissioner or a member of his staff to disclose, without lawful authority, information which he has obtained, or which has been furnished to him, under or for the purposes of FOISA if the information is not at the time of the disclosure, and has not previously been, available to the public from another source.
16. The Commissioner is therefore unable to reproduce or summarise fully the Authority's submissions, within this decision notice, without breaching the obligation of confidentiality in section 45 of FOISA.
17. However, the Commissioner is himself obliged to give proper and adequate reasons for his decision in any given case. He must therefore reflect the arguments provided by the Authority, to the extent appropriate, to allow him to fulfil this obligation. He would also note that much of the information the Authority indicated that it wished not to be reproduced in this decision notice is not obviously sensitive. Instead, it describes, in relatively general terms, its reasons for applying the exemptions in sections 30(c) and 33(1)(b) of FOISA to withhold the information requested.

The specified Employment Tribunal

18. In the circumstances, the Commissioner considers it would be useful to provide some background information relating to the specified Employment Tribunal and to clarify the circumstances he is required to consider when assessing the applicability of the exemptions claimed by the Authority to withhold the information requested.
19. On 14 January 2022, the Employment Tribunal issued its unanimous judgment that:
 - the claimant's claims under sections 15, 20 and 21 of the Equality Act 2010 were well founded
 - the claimant's claim for unfair dismissal succeeded
 - the claimant's claim for breach of contract succeeded.
20. Media reporting stated that the Authority subsequently agreed a settlement of £804,000 in April 2023, which included a £130,000 reimbursement of legal fees, £615,000 for damages resulting from the claimant's unfair dismissal and £44,000 over disability discrimination at work.
21. When determining whether information was properly withheld, the Commissioner must make his assessment in relation to the specific circumstances of the case on each occasion and, as recognised by the Court of Session in [Scottish Ministers v Scottish Information Commissioner \[2006\] CSIH 8](#)² (at paragraph [31]), at the time of the review (at the latest).
22. In this case, the Authority issued its review outcome on 16 January 2023 (i.e. after the Employment Tribunal unanimously found in the claimant's favour, but prior to settlement). In what follows, the Commissioner will therefore consider whether the Authority was entitled to withhold the information requested in relation to the specific circumstances on 16 January 2023.

² <https://webarchive.nrscotland.gov.uk/20240713015729/https://scotcourts.gov.uk/search-judgments/judgment?id=a94886a6-8980-69d2-b500-ff0000d74aa7>

Section 33(1)(b) – Commercial interests and the economy

23. Section 33(1)(b) of FOISA provides that information is exempt information if its disclosure would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority). This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
24. There are several elements a Scottish public authority needs to demonstrate are present when relying on this exemption. It needs to establish:
 - (i) whose commercial interests would (or would be likely to) be harmed by disclosure
 - (ii) the nature of those commercial interests, and
 - (iii) how those interests would (or would be likely to) be prejudiced substantially by disclosure.

The Applicant's submissions

25. The Applicant disagreed that the Authority was entitled to withhold the information as it had previously disclosed similar information in response to his earlier request dated 6 February 2022.
26. The Applicant said that he was simply seeking an update on the total costs as the Authority had continued to spend public money on legal fees.
27. The Applicant explained that he was unhappy with the “evasive, secretive, delayed lack of response” to his request. He argued that “considerable unnecessary expense was paid out in legal fees to try and defend the indefensible” and said that he considered the Authority was involved in “maladministration based on a witch hunt”.

The Authority's submissions

28. The Authority provided submissions that it considered applied to both of the exemptions in sections 30(c) and 33(1)(b) of FOISA as well as submissions on the latter exemption only.
29. The Authority noted (as stated at paragraphs 1 and 2 above) that it had complied with a previous information request from the Applicant for the total outlay for all costs associated with the “grievance case” by a specified employee “dating back to the start of involvement of lawyers.
30. The Authority explained that the information requested in the present case covered additional fees incurred between February 2022 and the date of the request (17 November 2022). It confirmed that these fees were not limited to legal advice and representation for the specified Employment Tribunal.
31. The Authority said that (at the date of the review outcome) the withheld information related to an ongoing matter which was potentially subject to settlement discussions prior to the remedy hearing at the Employment Tribunal. It argued that it needed to be able to properly conduct any such negotiations without external factors compromising its ability to negotiate. It considered that disclosure of the withheld information (at the date of the review outcome) would have alerted the claimant as to how much the Authority had spent on legal fees, which could prejudice its ability to negotiate a fair settlement.
32. In view of the information previously disclosed, the Authority said that disclosure of the withheld information would allow the figure already provided to be deducted from the total. which would disclose the fees incurred between February 2022 and 17 November 2022. It

argued that disclosure of the withheld information would therefore be likely to substantially prejudice its ability to conduct its affairs and to operate in the best interests of its stakeholders and the public. It also submitted that disclosure would be likely to negatively impact its ability to negotiate freely and achieve a fair settlement, which it said would be likely to substantially prejudice its commercial interests.

33. The Authority claimed that disclosure of the withheld information would also give future potential claimants or litigants knowledge of how much it was willing to pay for legal advice of this nature. It therefore considered that disclosure could adversely affect its ability to reach a fair and reasonable settlement in such cases, which would be likely to substantially prejudice both its ability to conduct its affairs and its commercial interests. It explained how it believed this harm could arise.
34. The Authority explained that it is a small organisation with charitable status and very limited reserves. It considered that any potential impact on these reserves would be likely to have a significant commercial impact on, and to prejudice substantially, its commercial interests.
35. More specifically, the Authority said that any unbudgeted costs would have a significant impact on its ability to deliver leisure and culture facilities and services. It submitted that this would be likely to have an adverse impact on its ability to generate commercial revenue and therefore prejudice substantially its commercial interests.

The Commissioner's view

36. The Commissioner has carefully considered all the arguments submitted by the Applicant and the Authority, along with the withheld information.
37. "Commercial interests" are not defined in FOISA, but the Commissioner's [guidance](#)³ on the exemption in section 33(1)(b) states that an organisation's commercial interests will usually (but not always) relate to the commercial trading activity they undertake.
38. Given the nature of the withheld information, the Commissioner is not wholly persuaded that it relates to the Authority's commercial interests as opposed to its financial interests. Irrespective of the impact that expenditure on these costs might have on the Authority's reserves, legal and professional costs incurred in connection with an employment tribunal do not obviously relate to a commercial trading activity undertaken by the Authority (and any impact on its ability to generate commercial revenue does not appear to be sufficiently direct to be relevant). However, in the circumstances, the Commissioner will nonetheless go on to consider the applicability of the exemption in section 33(1)(b) of FOISA.
39. To rely on this exemption, an authority must also evidence why disclosure would, or would be likely to, substantially prejudice the commercial interests of any person (including its own commercial interests).
40. On the question of harm, the Commissioner must be persuaded by the submissions he has received from the Authority. In his view, these do not adequately explain how disclosure of the information requested (at the time the Authority responded to the Applicant's requirement for review) would have had, or would have been likely to have had, a substantially prejudicial impact on the Authority's commercial interests (assuming they had commercial interests in relation to the withheld information).

³ <https://www.foi.scot/sites/default/files/2023-06/BriefingSection33CommercialInterestsandtheEconomy.pdf>

41. The Commissioner would emphasise that he can only consider the information actually sought by the Applicant, and whether disclosure of that would be the catalyst to cause the harm claimed. The question to answer is how disclosure of the information being withheld in this case would lead to the substantial prejudice required for this exemption to be engaged.
42. In relation the actual information being withheld in this case, the Commissioner considers the submissions provided by the Authority to be speculative in nature. As stated above, the Commissioner must consider circumstances at the date of the review outcome (16 January 2023) at the latest. At this date, the Employment Tribunal had unanimously found in the claimant's favour, although settlement had yet to be made.
43. In these circumstances, the Commissioner does not accept that disclosure of the withheld information would have had, or would have been likely to have had, a substantially prejudicial impact on the Authority's ability to negotiate a fair settlement. Whatever the specific content of the withheld information, the claimant's negotiating position was – by virtue of the Employment Tribunal's unanimous judgment – strong and the Authority's position weak. He does not consider it credible that disclosure of the withheld information would have had, or would have been likely to have had, the effect of worsening the Authority's position in settlement negotiations.
44. While the Commissioner cannot reveal the content of the withheld information, he can confirm that it comprises the total (i.e. combined and non-itemised) legal and professional costs incurred in connection with the specified Employment Tribunal. Taking this into consideration, he does not accept that disclosure would enable even a determined and motivated party to deduce with any accuracy how much money the Authority specifically spent on legal advice (including when the costs the Authority disclosed in response to the Applicant's previous request are taken into account).
45. The Commissioner also does not agree that disclosure of the costs associated with the specified Employment Tribunal in this case would necessarily reveal anything about the costs the Authority would be willing, or likely, to bear in relation to future potential cases (or anything about the Authority's approach to such cases). Too much would depend on the specific circumstances of any future cases.
46. Taking account of the submissions received from the Authority in relation to the specific information being withheld in this case, the Commissioner considers that the Authority has not evidenced the required substantial prejudice for section 33(1)(b) of FOISA to be engaged.
47. Having reached that conclusion, the Commissioner is not required to consider the public interest test in section 2(1)(b) of FOISA.
48. The Commissioner will now consider whether the Authority was entitled to withhold this information under the exemption in section 30(c) of FOISA.

Section 30(c) – Substantial prejudice to the effective conduct of public affairs

49. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
50. The word "otherwise" distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b) of FOISA. This is a broad exemption, and the Commissioner expects any public authority applying it to show what specific harm would (or would be likely

to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure.

51. There is no definition of "substantial prejudice" in FOISA, but the Commissioner considers the harm in question would require to be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur: therefore, the authority needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.

The Authority's submissions

52. As stated above, the Authority provided submissions that it considered applies to both the exemptions in section 30(c) and 33(1)(b) of FOISA as well as specific submissions on the latter exemption only.
53. The relevant submissions from the Authority in respect of the exemption in section 30(c) of FOISA are set out in paragraphs 31 to 33 above. The Commissioner will therefore not repeat these submissions under this heading, but he has fully considered them in what follows.

The Applicant's submissions

54. During the investigation, the Applicant was informed by the Commissioner that the Authority was also relying on the exemption in section 30(c) of FOISA. He confirmed that he still required a decision from the Commissioner in respect of his application and that the public interest favoured disclosure of the withheld information.
55. To the extent that they are also relevant to the application of the exemption in section 30(c) of FOISA, the Commissioner has fully considered the submissions made by the Applicant (set out in paragraphs 25 to 27 above) in relation to the exemption in section 33(1)(b) of FOISA.

The Commissioner's view

56. The Commissioner has again carefully considered all the arguments submitted by the Applicant and the Authority, along with the withheld information.
57. While the Commissioner has considered the application of the exemption in section 30(c) of FOISA separately to the exemption in section 33(1)(b), he is satisfied that the former exemption does not apply, for largely the same reasons that he found that the latter exemption did not apply.
58. The Commissioner's [guidance](#)⁴ on section 30(c) of FOISA sets out the factors which must be considered by authorities when seeking to apply the exemption. These factors are, basically, the sensitivity of the information and the passage of time.
59. As stated above, the Commissioner must consider circumstances at the date of the review outcome (16 January 2023) at the latest. At this date, the Employment Tribunal had unanimously found in the claimant's favour, but settlement had yet to be made.

⁴ <https://www.foi.scot/sites/default/files/2022-04/BriefingSection30PrejudicetotheEffectiveConductofPublicAffairs.pdf>

60. With this in mind, and having reviewed the withheld information, the Commissioner does not consider the information to be particularly sensitive (for the reasons set out in paragraphs 42 to 46 above).
61. The Commissioner expects any public authority applying the exemption in section 30(c) of FOISA to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information and how that harm would be expected to follow from disclosure. In this case, he does not consider that the Authority has provided sufficient evidence to demonstrate the above. As indicated above in relation to section 33(1)(b), he considers the submissions provided to be too speculative and lacking in sufficient specification to either the information under consideration or the circumstances in question.
62. In the specific circumstances of this case, the Commissioner therefore finds that the Authority was not entitled to rely on the exemption in section 30(c) of FOISA to withhold the information requested.
63. Having reached that conclusion, the Commissioner is not required to consider the public interest test in section 2(1)(b) of FOISA.
64. As the Commissioner is satisfied that neither of the exemptions in sections 30(c) or 33(1)(b) of FOISA apply to the withheld information, he requires the Authority to disclose that information 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 failed to comply with Part 1 of FOISA by wrongly withholding the information requested under the exemptions in sections 30(c) and 33(1)(b) of FOISA.

The Commissioner therefore requires the Authority to provide the Applicant with the information wrongly withheld, by 1 May 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.

Euan McCulloch
Head of Enforcement

17 March 2026