



Scottish Information
Commissioner
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Decision Notice 124/2026

Hourly rate charged by a named King's Counsel in relation to a specified employment tribunal

Applicant: Anonymous

Authority: The Common Services Agency for the Scottish Health Service

Case Ref: 202502030

Summary

The Applicant asked the Authority for the hourly rate paid to a named King's Counsel (KC) in relation to a specified employment tribunal. The Authority withheld the information on the basis that it was third-party personal data. The Commissioner investigated and found that the Authority was entitled to withhold the information requested.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(a) and 2(e)(ii) (Effect of exemptions); 38(1)(b), (2A) and (5) (definitions of "data protection principles", "data subject", "personal data" and "processing") and (5A) (personal information); 47(1) and (2) (Application for decision by Commissioner).

United Kingdom General Data Protection Regulation (the UK GDPR) Articles 5(1)(a) (Principles relating to the processing of personal data) and 6(1)(f) (Lawfulness of processing).

Data Protection Act 2018 (the DPA 2018) sections 3(2), (3)(a) & (b), (4)(d), (5), (10) and (14)(a), (c) and (d) (Terms relating to the processing of personal data).

Background

1. On 19 August 2025, the Applicant made a request for information to the Authority in relation to a specified employment tribunal. Among other things, she asked the Authority for the hourly rate charged by Fife Health Board for the KC it instructed.

2. By way of background, the specified employment tribunal related to a formal claim by an employee of Fife Health Board, against both Fife Health Board and a specific employee of Fife Health Board. It was a high-profile case, the details of which are in the public domain, which attracted significant media attention.
3. The Authority responded on 17 September 2025. It withheld the information requested under the exemption in section 38 of FOISA on the basis that it was the KC's personal data.
4. On 18 September 2025, the Applicant wrote to the Authority requesting a review of its decision. She stated that she was dissatisfied with the decision because she had a legitimate interest in obtaining the information requested. While she acknowledged that the KC was entitled to privacy and that they had their rights under data protection law, she argued that the public had the right to receive the information requested and that it was in the public interest to allow the spending of public authorities to be scrutinised.
5. The Authority notified the Applicant of the outcome of its review on 13 October 2025. In response to other elements of the request which are not the focus of the Commissioner's decision notice, the Authority disclosed a breakdown of the total costs incurred in relation to the specified employment tribunal. However, it continued to withhold the KC's hourly rate – this time under the exemption in section 33(1)(b) of FOISA, on the basis that disclosure would, or would be likely to, prejudice the commercial interests of the KC and of the Authority.
6. On 7 November 2025, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. She stated she was dissatisfied with the outcome of the Authority's review because it continued to withhold the KC's hourly rate. While she recognised the importance of commercial interests, she did not agree that the exemption in section 33(1)(b) of FOISA applied in this case.

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 December 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, 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 reasons for withholding the information requested.
10. During the investigation, the Authority confirmed that it was solely relying on the exemption in section 38(1)(b) of FOISA to withhold the information requested and that it had withheld its previous reliance on the exemption in section 33(1)(b).

Commissioner's analysis and findings

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

Section 38(1)(b) – Personal information

12. Section 38(1)(b) of FOISA, read in conjunction with section 38(2A)(a) or (b), exempts information from disclosure if it is “personal data” (as defined in section 3(2) of the DPA 2018) and its disclosure would contravene one or more of the data protection principles set out in Article 5(1) of the UK GDPR or (where relevant) in the DPA 2018.
13. The exemption in section 38(1)(b) of FOISA, applied on the basis set out in the preceding paragraph, is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b).
14. To rely on this exemption, the Authority must show that the withheld information is personal data for the purposes of the DPA 2018 and that disclosure of the information into the public domain (which is the effect of disclosure under FOISA) would contravene one or more of the data protection principles found in Article 5(1) of the UK GDPR.

Is the withheld information personal data?

15. The first question the Commissioner must address is whether the information is personal data for the purposes of section 3(2) of the DPA 2018 i.e. any information relating to an identified or identifiable individual. “Identified living individual” is defined in section 3(3) of the DPA 2018. (This definition reflects the definition of personal data in Article 4(1) of the UK GDPR.)
16. Information will “relate to” a person if it is about them, is linked to them, has biographical significance for them, is used to inform decisions affecting them, or has them as its main focus.
17. The Commissioner is satisfied that the information being withheld under the exemption in section 38(1)(b) of FOISA is personal data: the information identifies a living individual (the Applicant named the KC in her request) and the information (the hourly rate charged by the named KC) clearly relates to the named KC.

Which of the data protection principles would be contravened by disclosure?

18. The Authority argued that disclosure would breach the data protection principle in Article 5(1)(a) of the UK GDPR. Article 5(1)(a) states that personal data shall be processed “lawfully, fairly and in a transparent manner in relation to the data subject.”
19. “Processing” of personal data is defined in section 3(4) of the DPA 2018. It includes (section 3(4)(d)) disclosure by transmission, dissemination or otherwise making available personal data. The definition therefore covers disclosing information into the public domain in response to a FOISA request.
20. The Commissioner must consider whether disclosure of the personal data would be lawful. In considering lawfulness, he must consider whether any of the conditions in Article 6 of the UK GDPR would allow the data to be disclosed.
21. The Commissioner considers that condition (f) in Article 6(1) is the only condition which could potentially apply in the circumstances of this case.

Condition (f): legitimate interests

22. Condition (f) states that the processing shall be lawful if it is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data.
23. Although Article 6 states that this condition cannot apply to processing carried out by a public authority in the performance of their tasks, section 38(5A) of FOISA makes it clear that public authorities can rely on Article 6(1)(f) when responding to requests under FOISA.
24. The tests which must be met before Article 6(1)(f) can be met are as follows:
 - (i) Does the Applicant have a legitimate interest in obtaining the personal data?
 - (ii) If so, would the disclosure of the personal data be necessary to achieve that legitimate interest?
 - (iii) Even if the processing would be necessary to achieve that legitimate interest, would that be overridden by the interests or fundamental rights and freedoms of the data subjects?

Does the Applicant have a legitimate interest in obtaining the personal data?

25. The Applicant submitted that it was right – and in the public interest – for the withheld personal data to be disclosed. She noted that the monies paid to the named KC were ultimately covered by the taxpayer and, while the named KC had their own privacy and data protection rights, the public had the right to know what their money was being spent on.
26. The Applicant stated that she therefore had a legitimate interest in obtaining the personal data and that it was in the public interest to enable the scrutiny of public authorities and public spending in this way.
27. The Authority did not consider that the Applicant had a legitimate interest in obtaining the personal data. It accepted that there may be a legitimate interest in obtaining information relating to money spent by public authorities in connection with the specified employment tribunal but commented that it had already disclosed a breakdown of costs to the Applicant. It considered that this information provided a comprehensive overview of the public purse spend and to be more informative than disclosure of the hourly rate of the named KC.
28. The Commissioner considers that there is a general public interest in scrutinising how public funds are spent and whether public authorities are obtaining the best value for money. He accepts that the breakdown of costs that the Authority already disclosed to the Applicant went a significant way towards satisfying the Applicant's legitimate interest in that regard.
29. However, the Commissioner accepts that the Applicant nevertheless has a legitimate interest in obtaining the personal data. He is satisfied that disclosure of the personal data would offer a different insight to the information already disclosed. For example, it would allow scrutiny of whether value for money was achieved, through consideration of whether the named KC was paid at a particularly high hourly rate.

Is disclosure of the personal data necessary?

30. The Commissioner must now consider whether disclosure of the personal data would be necessary to meet the Applicant's legitimate interest.

31. Here, “necessary” means “reasonably” rather than absolutely or strictly necessary. The Commissioner must consider whether the disclosure is proportionate as a means and fairly balanced as to the aims to be achieved, or whether the Applicant’s legitimate interests can be met by means which interfere less with the privacy of individuals.
32. The Authority submitted that disclosure of the personal data would not be necessary to meet any legitimate interest in scrutinising whether the taxpayer was achieving value for money. It argued that providing one rate of pay, when there were other Counsel involved, was not a fair and reasonable way to scrutinise the public funds spent.
33. The Commissioner has taken account of the Applicant’s submissions on her legitimate interest, to the extent that these submissions are also relevant to whether disclosure of the personal data would be necessary to meet her legitimate interest.
34. As stated above, the Commissioner considers that disclosure of the personal data would offer a different insight to the information already disclosed. For example, it would allow scrutiny of whether value for money was achieved through consideration of whether the named KC was paid at a particularly high hourly rate. He acknowledges the Authority’s point that the Applicant has requested the hourly rate of only the named KC. However, he would note that the named KC was the primary counsel of the respondents in the specified employment tribunal.
35. The Commissioner therefore accepts that disclosure of the personal data is necessary to achieve the Applicant’s legitimate interest. He can identify no viable means of fully meeting the Applicant’s legitimate interest which would interfere less with the privacy of the named KC than disclosing the withheld information. In all the circumstances, therefore, the Commissioner is satisfied that disclosure of the information is necessary for the purposes of the Applicant’s legitimate interest.
36. The Commissioner will now consider whether the Applicant’s legitimate interest in obtaining the withheld information outweighs the rights and freedoms of the named KC.

The data subject’s interests or fundamental rights and freedoms (and balancing exercise)

37. The Commissioner has concluded that the disclosure of the information would be necessary to achieve the Applicant’s legitimate interests. However, this must be balanced against the fundamental rights and freedoms of the data subject (i.e. the named KC). Only if the legitimate interests of the Applicant outweighed those of the named KC could the information be disclosed without breaching the first data protection principle.
38. The Commissioner’s [guidance on section 38 of FOISA](https://www.foi.scot/sites/default/files/2022-04/BriefingSection38PersonalInformationGDPR.pdf)¹ list certain factors that should be taken into account in balancing the interests of the parties. He makes it clear that, in line with Recital (47) of the UK GDPR, much will depend on the reasonable expectations of the data subject and that these are some of the factors public authorities should consider:
 - (i) Does the information relate to an individual’s public life (i.e. their work as a public official or employee) or to their private life (i.e. their home, family, social life or finances)?
 - (ii) Has the individual objected to the disclosure?
 - (iii) Would the disclosure cause harm or distress?

¹ <https://www.foi.scot/sites/default/files/2022-04/BriefingSection38PersonalInformationGDPR.pdf>

39. The Commissioner acknowledges that the withheld information relates to the named individual's public life, in that it identifies them as the KC representing Fife Health Board at the specified employment tribunal (and relates to their hourly rate for that role). However, he also acknowledges that, by association, the information relates to the named KC's private life.
40. In the circumstances, the Commissioner concludes that the withheld information relates to both the private and public life of the named KC.
41. While the Authority withdrew its reliance on the exemption in section 33(1)(b) of FOISA, it stated that Counsel had a reasonable expectation that their hourly rates would not be disclosed in response to a FOISA request. Given that Counsel negotiate their hourly rates, it submitted that disclosure of the named KC's hourly rate would disadvantage their position in rate negotiations for future cases.
42. The Commissioner has considered the harm or distress that might be caused by disclosure of the information. Disclosure, under FOISA, is a public disclosure. He accepts that the named KC would have no realistic expectation that their hourly rate would be disclosed, under FOISA, to the world at large and that, if this were to happen, it would be likely to negatively impact upon their commercial interests and, consequently, both their private and public life.
43. As stated above, the Commissioner has accepted that the Applicant has a legitimate interest in disclosure of the KC's hourly rate and that disclosure would be necessary to achieve that legitimate interest. However, he considers that the Applicant's legitimate interest in scrutinising how public funds are spent has already been met, to a large extent, by the breakdown of costs that the Authority has already disclosed to her.
44. The Commissioner accepts that disclosure of the KC's hourly rate would add to the information already in the public domain and allow scrutiny of whether value for money was achieved (through consideration of whether, for example, the named KC was paid at a particularly high hourly rate).
45. However, the Commissioner is not persuaded that disclosure would add significantly to what is already in the public domain, while disclosure would undoubtedly (for the reasons set out in paragraphs 41 and 42) impact on the rights and freedoms or legitimate interests of the named KC.
46. After carefully balancing the legitimate interest of the Applicant against the interests or fundamental rights or freedoms of the data subject, the Commissioner finds that the legitimate interest served by disclosure of any information held would be outweighed by the unwarranted prejudice that would result to the rights and freedoms or legitimate interests of the data subject.
47. Having found that the legitimate interest served by disclosure of the personal data is outweighed by the unwarranted prejudice that would result to the rights and freedoms or legitimate interests of the data subject, the Commissioner finds that condition (f) in Article 6(1) of the UK GDPR cannot be met in this case and that disclosure of the information in question would be unlawful.
48. Given that the Commissioner has concluded that the processing of the personal data would be unlawful, he is not required to go on to consider whether disclosure of the personal data would otherwise be fair and transparent in relation to the data subject.

49. The Commissioner is satisfied, in the absence of a condition in Article 6 of the UK GDPR which would allow the data to be disclosed, that disclosure would be unlawful. He therefore finds that the withheld personal data is therefore exempt from disclosure (and properly withheld) under section 38(1)(b) 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.

David Hamilton
Scottish Information Commissioner
21 May 2026