Scottish Information Commissioner
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# Decision Notice 169/2026

## Legal advice to the Presiding Officer on the legislative competence of the Assisted Dying for Terminally Ill Adults (Scotland) Bill

Authority: Scottish Parliamentary Corporate Body
Case Ref: 202501722

## Summary

The Applicant asked the Authority for legal advice, correspondence and briefing notes given to the Presiding Officer relating to the legislative competence of the Assisted Dying for Terminally Ill Adults (Scotland) Bill. The Authority withheld the information requested as it considered it was legally privileged and that the public interest favoured withholding it. The Commissioner investigated and found that the Authority complied with FOISA in responding to the request.

## Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 36(1) (Confidentiality); 47(1) and (2) (Application for decision by Commissioner).

## Background

1. On 11 March 2025, the Applicant made a request for information to the Authority. They asked for the advice given by the Authority's Legal Services Office to the Presiding Officer relating to the legislative competence of the Assisted Dying for Terminally Ill Adults (Scotland) Bill (the Bill) and all correspondence and briefing notes relating to this matter.

2. The Authority responded on 7 April 2025. It informed the Applicant that it was withholding the information requested under the exemption in section 36(1) of FOISA and that the public interest favoured upholding the exemption.

3. On 30 May 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 that the public interest favoured disclosure.

4. The Authority notified the Applicant of the outcome of its review on 26 June 2025, which fully upheld its original response.

5. On 24 September 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 for the reasons set out in their requirement for review.

## Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

7. On 2 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.

8. 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 requested information and why it did not consider that the public interest favoured disclosure.

## Commissioner's analysis and findings

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

### *Section 36(1) - Confidentiality*

10. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies.

11. The Authority confirmed that it was relying on legal advice privilege to withhold the requested information.

12. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled:

    (i) The information must relate to communications with a professional legal adviser, such as a solicitor or advocate.

    (ii) The legal adviser must be acting in their professional capacity, and

(iii) The communications must occur in the context of the legal adviser's professional relationship with their client.

13. There is a further matter to be considered, before the Commissioner can determine whether, or to the extent to which, section 36(1) is applicable in the circumstances of the case. The information cannot be privileged unless it is also confidential.

14. For the section 36(1) exemption in FOISA to apply, the withheld information must be information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings. The claim must be capable of being sustained at the time the exemption is claimed. The information must possess the quality of confidence at that time, and so cannot have been made public, either in full or in a summary sufficiently detailed to have the effect of disclosing the advice.

15. Where confidentiality has been lost in respect of part or all of the information under consideration, any privilege associated with that information is lost.

*The Applicant's submissions*

16. The Applicant did not dispute that the information requested was legal advice. However, they provided detailed submissions on why the public interest favoured disclosure of the information. These submissions are considered later.

*The Authority's submissions*

17. The Authority explained that the information sought was legal advice provided to assist the Presiding Officer in carrying out their statutory duty under section 31(2) of the Scotland Act 1998[1] of deciding, on or before the introduction of the Bill, whether in their view the provisions of the Bill would be within the legislative competence of the Parliament.

*The Commissioner's view*

18. Having considered the withheld information, the Commissioner is satisfied that it meets the conditions for legal advice privilege to apply.

19. The Commissioner is also satisfied that the confidentiality of the legal advice has not been lost or waived. Consequently, he considers that the information in question was confidential at the time the Authority dealt with the Applicant's information request and requirement for review (and that it remains so now).

20. The Commissioner is therefore satisfied that the exemption in section 36(1) of FOISA is engaged.

21. The exemption in section 36(1) is a qualified exemption, which means that it is subject to the public interest test set out in section 2(1)(b) of FOISA. The exemption can only be upheld if the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

***Public interest test – section 36(1)***

22. The public interest is not defined in FOISA but has been described in previous decisions as "something which is of serious concern and benefit to the public", not merely something of individual interest. It has also been held that the public interest does not mean "of interest to

[1] https://www.legislation.gov.uk/ukpga/1998/46/section/29

the public" but "in the interests of the public", i.e. disclosure must serve the interests of the public.

23. Both parties provided detailed submissions relating to the public interest test. The Commissioner has fully considered these submissions, but he has only summarised the key aspects of these submissions in what follows.

*The Applicant's submissions*

24. The Applicant noted that significant concerns had been raised that the Bill, in part or in full, was not legislatively competent. After the Presiding Officer certified the Bill as legislatively competent, these concerns were raised both by the Scottish Government and by academic witnesses who gave evidence to the Health, Social Care and Sport Committee.

25. The Applicant considered that there was a clear public interest in MSPs being fully aware of all the facts and nuances relating to the legislative competence of the Bill prior to being asked to vote on proposed legislation. This information was not available to MSPs prior to the Stage 1 vote and there was no indication that it would be available prior to the Stage 3 vote, unless the information they had requested was disclosed.

26. The Applicant noted that the Authority acknowledged that the exemption protecting legal professional privilege was not absolute, and indeed, in other cases, it has deemed professional privilege to be outweighed by other considerations.

27. In this case, the Applicant submitted that the Bill sought to "make an exception to the law of homicide, by setting up a system of medical regulation, to enable health professionals to assist in the suicides of their patients". They considered it difficult to think of a context in which the public interest in transparency and the need for full public confidence in parliamentary processes was more strongly engaged.

28. In addition, the Applicant considered that very significant constitutional and reputational issues were raised by the prospect of the Authority purporting to legislate on matters which were likely (according to legal experts and the Scottish Government) to be reserved to Westminster. In their view, there should be "no doubt" that these factors outweigh the interest in protecting professional privilege.

29. According to the Applicant, the Bill was also likely to engage Articles 2, 9, 11 and 14 of the European Convention on Human Rights[2]. They noted that section 29(d) of the Scotland Act 1998[3] requires that every Act of the Parliament be Convention compliant. They considered that there was "no higher public interest" than protecting the right to life of tens of thousands of Scots who will be included in the provisions of the Bill.

30. The Applicant added that the risk of any law enacted being successfully challenged in the courts (with all of the public expense and reputational damage to the Parliament that would accompany that outcome) would be heightened if MSPs voting on the Bill did not have all relevant information relating to its competence. They submitted that this, too, was a matter of significant public interest.

31. The Applicant noted that the Presiding Officer stated that in their view the Bill was legislatively competent. However, the Policy Memorandum accompanying the Bill stated:

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[2] https://www.echr.coe.int/documents/d/echr/convention_eng

[3] https://www.legislation.gov.uk/ukpga/1998/46/contents

- "The Member acknowledges that, in order to achieve a truly comprehensive assisted dying scheme, something else would likely need to happen. This could be if for example the use of certain regulated medicines or controlled drugs were to be brought within the executive competence of the Scottish Ministers, or by way of a transfer of legislative power through amendment of Schedule 5 (or Schedule 4) of the Scotland Act 1998."
- "The Member believes that, should the Scottish Parliament support the general principles of the Bill at Stage 1 (that eligible terminally ill mentally competent adults in Scotland should have access to a legal, safe and humane assisted death) that, given it would be Parliament's will for the Bill to proceed, the Scottish Government should work with the UK Government to ensure that powers are made available to the Scottish Parliament, or to the Scottish Ministers, as soon as possible."

32. The Applicant considered it evident from the Policy Memorandum that the Presiding Officer and the Authority's Legal Services Office should have been aware that aspects of the Bill were not legislatively competent.

33. The Applicant noted that in Decision 209/2007[4], the Commissioner set out the public interest arguments favouring release of legal advice. They argued that all of those arguments were relevant in this case, including:

    - Enhancing scrutiny of the legality of the actions of a public body and, by extension, effective oversight of expenditure of public funds and obtaining value for money;
    - Disclosure of the advice would make a significant contribution to debate on a matter of public interest;
    - There could be said to be a general public interest in this Bill; and
    - There is no method of legal challenge of the Presiding Officer's duty: the 1998 Act provides no mechanism for the Presiding Officer's views on legislative competence to be challenged in the courts or to be debated in the Parliament.

34. The Applicant commented that it appeared that only the Presiding Officer and (possibly) the Authority's Legal Services Office were of the view that the Bill was fully legislatively competent. They submitted that the Presiding Officer was under an obligation to set out what provisions they considered related to powers reserved to the UK Parliament, but the Presiding Officer had failed to discharge that obligation.

35. In the Applicant's view, the concerns raised about the integrity of the process added weight to the view that the overwhelming public interest lay in disclosure of the advice given to the Presiding Officer by the Authority's Legal Services Office. This would ensure full transparency and accountability and facilitate the investigation of any negligence or inappropriate behaviour on the part of any of those involved in the process. Disclosure was also necessary to protect the reputation and integrity of the Parliament and to ensure the highest standards of public administration and legislative process.

36. The Applicant stated that, prior to finalisation and publication of the Committee's report, three academics wrote to the Committee and highlighted their view that the Bill was not legislatively competent given that it related to medical regulation. Although these academics requested that their views be included in the Committee's report, the Applicant believed that

[4] https://www.foi.scot/sites/default/files/Decision209-2007.pdf

the Committee made no effort to consider these views, and they were not mentioned in the report on the scrutiny of the Bill.

37. The Applicant submitted that it was important to know exactly how robust the legal advice was which was received by the Presiding Officer prior to them issuing a statement on the legislative competence of the Bill. They stated that failure to disclose that information would continue to call into question the rigour of the scrutiny process and the legality of the Bill, further damage the reputation of the Authority and undermine public confidence in the democratic process at Holyrood with implications for the constitution of the UK and the devolution settlement.

38. The Applicant also commented that section 40 of the Scotland Act 1998 prevents the Court of Session from issuing an interdict against the SPCB regarding a decision by the Presiding Officer to issue a statement of legislative competence, which made the argument for disclosure of the legal advice in this case more compelling.

39. If the legal advice was not disclosed, the Applicant submitted that similar legal advice may be given in future, leaving MSPs and the public with no way to satisfy themselves regarding the robustness or the appropriateness of a future Presiding Officer's view, or to correct any misconceptions arising from the Presiding Officer's incorrect statement about a future Bill's legislative competence before a Stage 3 vote.

*The Authority's submissions*

40. The Authority recognised that there is a strong public interest in the subject matter and policy of the Bill and in the legislative competence of the Bill. Accordingly, it accepted that there is a public interest in the disclosure of legal advice which informed the Presiding Officer's view on the legislative competence of the Bill.

41. The Authority noted that the Applicant's requirement for review made reference to the Scottish Government as having reached the view that the Bill was not legislatively competent and that the Policy Memorandum accompanying the Bill states: "The Member acknowledges that, in order to achieve a truly comprehensive assisted dying scheme, something else would likely need to happen…"

42. The Authority acknowledged that a divergence of views on legislative competence may be a matter of public interest. However, it considered that for areas which (as stated in the Stage 1 committee report) border "on the limits of the legislative competences of the Scottish Parliament", it was essential that issues can be discussed and advice given in a confidential manner.

43. The Authority submitted that the Presiding Officer must be able to receive confidential legal advice as to what may or may not be within the legislative competence of the Parliament and that the disclosure of such advice, so directly connected to the Presiding Officer's function, would have a restraining and suppressive effect.

44. The Authority noted that there will be areas in some cases, which may include those in relation to this Bill, where the arguments are finely balanced. It argued that it was essential that these issues can be discussed and debated in a confidential manner. Disclosure of this advice could inhibit candour and hamper the quality and comprehensiveness of future legal advice to the Presiding Officer. This could, in turn, affect the effective delivery of a core function of the Parliament and the scheme for devolution as set out in the Scotland Act 1998.

45. The Authority reiterated that the Presiding Officer's statement on legislative competence is made at the very start of a Bill's legislative journey. It is a statement of the Presiding Officer's view at introduction; it is neither a certificate nor determinative of legislative competence. The Presiding Officer's function in relation to legislative competence expires at this point and they have no substantive input in the parliamentary process once the statement has been issued.

46. The Authority added that the Presiding Officer has no veto over the introduction of a Bill. Had the Presiding Officer come to a different view on the Bill, they could not (as set out in the Explanatory Notes to the Scotland Act 1998) have prevented its introduction in Parliament for scrutiny of its provisions in a public forum.

47. The Authority noted that when a Bill is passed, section 33 of the Scotland Act 1998 enables the Advocate General, the Lord Advocate or the Attorney General to refer a question of whether a Bill or any provision of a Bill would be within the legislative competence of the Parliament to the Supreme Court. However, it is the Bill as passed that is subject to review by the Supreme Court – the Presiding Officer's statement is not the subject of that review.

48. The Authority submitted that the value of the Presiding Officer's statement lay in the nature of the Presiding Officer's role, which has no political affiliation and therefore is guaranteed to be distinct from the member in charge of the Bill. It commented that it was clear from the debates on the Scotland Bill that a decision was taken not to include a mechanism for challenge to the Presiding Officer's statement in order to protect the independence and integrity of that advisory function.

49. The Authority also noted that during the passage of the Bill there was an opportunity for public scrutiny of the competence of its provisions in a public forum, by members of the public and committees, which can commission their own confidential legal advice and appoint legal and policy experts as advisers. Once a Bill is enacted, a member of the public may challenge the competence of a provision in an Act through the courts if adversely affected by it. Parliamentary processes therefore ensure that the public are afforded opportunities to engage in and observe scrutiny of the legislative process and competence in a way as determined by committees, a mechanism which the Authority considered best served the public interest.

50. The Authority referred to the fact that the Commissioner had previously issued Decision 020/2017[5] and Decision 209/2007, both of which considered legal advice given to the then Presiding Officer on the legislative competence of Bills. It noted that, in both cases, the Commissioner found that the public interest in ensuring the Presiding Officer can receive full unhindered legal advice outweighed the public interest in disclosure of that advice.

51. The Authority understood that the subject matter of the Bill was emotive and could affect many people if it was passed. However, it considered that the public interest lay in the policy of the Bill, which continued to be subject to scrutiny, amendment and debate. It commented that the Presiding Officer's statement was "a snapshot in time, it is not determinative of legislative competence, and it carries no legal weight in court should legislative competence be challenged".

52. The Authority considered that if the Presiding Officer or their advisers were bound to consider the impact of disclosure of legal advice provided, then the quality of the exercise of the Presiding Officer's function could be adversely affected. It did not consider that this

[5] https://www.foi.scot/decision-0202017

would be in the public interest. On the contrary, it would run counter to the public interest in the Presiding Officer receiving the best advice on which to come to an informed view on matters of legislative competence.

53. In conclusion, having balanced the competing factors, the Authority was of the view that the public interest in withholding the legal advice outweighed the public interest in disclosing it. In reaching this view, particular weight was given to the public interest in ensuring that the Presiding Officer can, in confidence, receive full, free and frank legal advice to assist in carrying out the Presiding Officer's statutory function of giving an informed and impartial view on the legislative competence of a Bill.

*The Commissioner's view*

54. The Commissioner acknowledges the public interest in the transparency and accountability expected of all authorities and that disclosure of the information requested would go some way towards satisfying that interest.

55. However, the Commissioner also acknowledges that there is a strong inherent public interest, recognised by the courts, in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds.

56. In a freedom of information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of [Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien [2009] EWHC 164 (QB)](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=(title:(+o%27brien+)))[6]. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.

57. The Commissioner accepts that there is a considerable, in-built, public interest in maintaining the ability of the Authority to receive full, unhindered legal advice. However, he also acknowledges that there will be occasions where the significant public interest in favour of withholding legally privileged communications may be outweighed by a public interest in disclosing the information. For example, disclosure may be appropriate where (the list is not exhaustive):

- the privileged material discloses wrongdoing by/within an authority
- the material discloses a misrepresentation to the public of advice received
- the material discloses an apparently irresponsible and wilful disregard of advice
- the passage of time is so great that disclosure cannot cause harm.

58. While the Commissioner accepts, having considered the nature of the request and the Bill to which it relates, that the legal advice would be of interest to the Applicant and the general public, he does not consider that any of the above categories would apply (or that the information would contribute materially to any other compelling public interest in disclosure).

59. The Commissioner recognises that there is a very strong interest in the Bill itself and the implications that would follow were it to become law. However, he considers it important to distinguish between the very strong public interest in these matters and the public interest in

[6] https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=(title:(+o%27brien+))

disclosure of the legal advice given to the Presiding Officer regarding the legislative competence of the Bill.

60. While the Commissioner recognises that there is still a public interest in disclosure of the legal advice given to the Presiding Officer regarding the legislative competence of the Bill, he must take account of the important public interest in legal professional privilege and the public interest in allowing public authorities to obtain confidential legal advice.

61. The Commissioner accepts that there is a strong public interest in the Presiding Officer being able to receive full, unhindered legal advice. Without such comprehensive advice being available to the Presiding Officer, their decision-making would be restricted, which would not be in the public interest.

62. The Commissioner has considered the Applicant's submission that disclosure of the legal advice would ensure full transparency and accountability and facilitate the investigation of any negligence or inappropriate behaviour on the part of any of those involved in the process.

63. The Commissioner recognises, as he did in Decision 020/2017, that there is a general public interest in enabling the scrutiny of the actions and decisions of officials, and particularly where the officer holds a position with as much constitutional importance as the Presiding Officer. While he recognises that the Applicant and others (including the Scottish Government and eminent legal experts) are of the view that the Bill was not legislatively competent, the Commissioner is not aware of any evidence suggesting that the Presiding Officer acted improperly in making their statement on the legislative competence of the Bill.

64. The Commissioner has also considered whether disclosure of the legal advice would enhance scrutiny of the Presiding Officer's assessment of legislative competence.

65. While he accepts that disclosure of the legal advice would provide further insight into the legal advice available to the Presiding Officer, the Commissioner considers that the issue of legislative competence can be scrutinised by reference to the Bill as introduced, public statements made about competence and the statutory mechanisms for challenge. He is not persuaded that disclosure of the legal advice would add sufficient material value to that scrutiny to outweigh the strong public interest in maintaining legal professional privilege.

66. In all of the circumstances, and having considered the nature of the information requested, the substance of the withheld information itself and the other ways in which the question of legislative competence can be challenged and scrutinised, the Commissioner is not satisfied that the public interest in disclosure of the withheld information is significant enough to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client.

67. In conclusion, after careful consideration, the Commissioner is satisfied that the Authority correctly withheld, under section 36(1) of FOISA, the information requested.

## 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**

**29 June 2026**