Scottish Information Commissioner
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Decision Notice 170/2026

Trans Policy and related correspondence with Terence Higgins Trust

Applicant: The Applicant
Authority: Fife Health Board
Case Ref: 202500535

Summary

The Applicant asked the Authority for a copy of a specific policy, communication relating to it, other policies or guidelines that superseded or replaced it, and instructions, policies or guidance to staff on a specified topic from January 2023 until the date of this request. The Authority relied on several exemptions to withhold some information and stated that other information was otherwise available. The Commissioner investigated and found that the information requested was not otherwise available, and that the Authority had wrongly withheld some of the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 25(1) (Information otherwise accessible); 30(b) and (c) (Prejudice to effective conduct of public affairs); 38(1)(b), (2A), (5) (definitions of “the data protection principles”, “data subject”, “personal data” and “processing”, “the UK GDPR”) and (5A) (Personal information); 39(1) (Health, safety and environment); 47(1) and (2) (Application for decision by Commissioner).

United Kingdom General Data Protection Regulation (the UK GDPR) articles 4(1) (definition of “personal data”) (Definitions); 5(1)(a) (principles relating to the processing of personal data); 6(1) (Lawfulness of processing).

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

Background

1. On 26 February 2025, the Applicant made a request for information to the Authority. He stated that it was a matter of record that the Terence Higgins Trust (THT) reviewed and approved a Trans Policy by 6 May 2024, as this was reported to the Staff Governance Committee, and asked:

   i. Please provide a copy of this Trans Policy;

   ii. Please provide copies of communications between the Authority and the THT related to this and other possible trans policies, including but not limited to those affecting staff (names can be redacted where appropriate);

   iii. If any other polices or guidelines superseded or replaced it subsequently, please provide these;

   iv. Please also provide any written policy, guidance or other instructions with regard to trans staff members' rights to access sex/gender segregated spaces that were in force from January 2023 until the date of receipt of this request.

   The Applicant asked that if the Authority was unable to, or declined to, provide all requested information, to provide that which it was able and chose to.

2. The Authority responded on 27 March 2025. It confirmed that the THT did review a draft policy for it but that the policy was not progressed. It stated that instead the Authority was adopting the Once for Scotland Workforce Polices, developed in partnership for use by all NHS Boards in Scotland. The Authority explained that there was a Once for Scotland Trans Inclusion policy for staff that was currently being "soft launched". The Authority provided information on that policy in three attachments. It stated that having taken account of the likelihood and severity of any prejudice and how far the information would help public understanding, it refused to disclose any further information as this might prejudice/be detrimental. The Authority quoted its reliance on the exemptions in sections 25(1) and 38(1)(b) of FOISA.

3. On the same day, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he did not agree with the Authority's reasons for withholding the information as he considered the public had a right to be provided with it. He also questioned what would be prejudiced by disclosure, and to whom disclosure would be detrimental. The Applicant noted that he was under no obligation to provide the reason for his request but stated that the nature and degree of influence being accorded by tax-payer funded hospitals to activist organisations was clearly in the public's interest because the public funded it and hospitals provided services, often in the most dire circumstances, and that members of the public were employed by hospitals. He stated that there was an unarguable public interest in the information. He reiterated his previous statement that it would be acceptable for personal data to be redacted.

4. The Authority notified the Applicant of the outcome of its review on 10 April 2025. The Authority upheld its position and repeated the same explanation as it had provided in its response to the Applicant's request.

5. On 11 April 2025, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review because he did not agree with the exemptions claimed by the Authority. He also commented on the fact that the review outcome provided did not respond to his

questions and just copied and pasted the prior response. The Applicant also reasserted his view that disclosure of the information was in the public interest.

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 11 April 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 allocated to an investigating officer.

8. The schedule provided by the Authority to accompany the withheld information noted a number of additional exemptions that the Authority was seeking to rely on to withhold information. These were in addition to those the Applicant was informed of at the time of the response and review outcome. The Authority was relying on sections 30(b)(i) and (ii), 30(c) and 39(1) of FOISA, as well as sections 25 and 38(1)(b) as previously conveyed to the Applicant.

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. These related to its reasons for relying on the various exemptions stated to withhold information falling within the scope of the request, as well as questions about the searches carried out to identify relevant information held within the scope of the request. The Authority was also asked to inform the Applicant of the additional exemptions it was now relying on alongside those he was already aware of from the review outcome.

10. The Commissioner also asked the Applicant for his comments on all of the exemptions being relied upon by the Authority to withhold information falling within the scope of his request, which he provided.

11. During the investigation further submissions were sought and received from the Authority.

12. On 14 August 2025, the Authority provided the Applicant with a revised review outcome informing him of the additional exemptions it was relying on and its reasons for doing so.

13. The Applicant was provided with an opportunity to make any further comments on this revised review outcome to the Commissioner, which he did.

Commissioner's analysis and findings

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

Information under consideration

15. The information provided to the Commissioner and being withheld from the Applicant related to parts i. and ii. of his request is comprised of:

- Document 3 - a copy of the policy, “NHS Fife Wide Trans, Non-binary & Gender Nonconforming Patients Policy”.
- Document 4 - an email chain between the Authority and the THT

16. At a later date, after being requested by the Commissioner, information in the attachments referred to in the email correspondence (in document 4) was also provided. This information comprised two versions of the draft policy, one sent by the Authority to the THT and one returned to the Authority with comments added by the THT. Two further attachments, with additional relevant reference information belonging to another third-party organisation, were also attached by the THT for the Authority.

17. The Authority withheld the two versions of the draft policy under the same exemptions as for documents 3 and 4 and relied on the same submissions for doing so. When considering the application of these exemptions the Commissioner will also be considering the information in these two versions of the draft policy.

18. The Authority considered the other attachments to document 4 to fall out with the scope of the request, as the information in these documents did not belong to the Authority.

19. The Commissioner did not accept the reason provided by the Authority as to why this information fell out with the scope of the request. He did not agree that simply because the information did not belong to the Authority that this was a sufficient reason for deeming it to be out with scope.

20. Having considered the information attached to document 4, which the Authority considered to be out of scope, along with the subject matter of the Applicant’s request, the Commissioner concluded that the information within these two attachments was not directly related to the policy under discussion, as it consisted of general information on the trans topic as opposed to being specifically related to patients and healthcare. Although the attachments formed part of the communication requested by the Applicant, they appeared to have been related to an earlier conversation between the sender and recipient.

21. The Commissioner is satisfied, that, for the reason set out above, the information in these attachments to document 4 did not fall within the scope of part ii. of the Applicant’s request. As a consequence, he will not consider these any further in this Decision Notice.

22. The Authority also provided the Commissioner with copies of the information in the documents it had disclosed to the Applicant within its initial response:

    - Document 5 – NHS Scotland Communication dated 15 October 2024, NHS Scotland Workforce Policies – Phase 2.2
    - Document 6 – NHS Scotland Workforce, Gender transitioning guide
    - Document 7 – NHS Scotland Workforce, Equalities, Diversity and Inclusion Policy

Section 25 – Information otherwise accessible

23. Information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt from disclosure. This exemption is not subject to the public interest test in section 2(1)(b) of FOISA.

24. Section 25(1) of FOISA is not intended to prevent or inhibit access to information, but to relieve public authorities of the burden of providing information that an applicant can access readily without asking for it.

25. The Authority relied on section 25 in both its response and review outcome. In its submissions it clarified to the Commissioner that it was not relying on section 25 in relation to information in documents 3 or 4 but to the information in the NHS Scotland Once for Scotland Workforce Policies it had provided to the Applicant in response to his request That is, the information contained in documents 5, 6 & 7.

26. The Applicant commented in his application to the Commissioner, that section 25 was clearly invalid as the information he was requesting was demonstrably not publicly available.

27. During the investigation, it became clear that the Authority had not relied on section 25 in relation to any of the information falling within scope of parts i. and ii. of the Applicant's request. The information it had attached to its initial response, although intended to be helpful, did not in fact fall within the scope of parts i. and ii. Section 25 was therefore not relevant to parts i. and ii. of the Applicant's request as the information falling within the scope of these parts was not otherwise accessible.

28. The Commissioner considers that part of document 6 which refers to toilets and changing facilities may fall within parts iii. and/or iv. of the Applicant's request but that the Authority failed to make this clear, either to the Applicant in its response to his request or its review outcome, or to the Commissioner in its submissions.

29. Although, as mentioned above, it became apparent that the Authority was not relying on section 25 in relation to information falling within the scope of parts i. and ii. of the Applicant's request, the Commissioner is of the view that its reference to section 25 in both the initial response and its review outcome made it appear that it was. This led to unnecessary confusion for both the Applicant and the Commissioner. The Commissioner does not take issue with the Authority applying section 25 to the information provided to the Applicant (the Applicant has not, in fact, raised this), but it should have made it a good deal clearer that this was what it was doing.

30. The Commissioner would therefore urge public authorities to ensure that when they do provide a response to a request, in line with the requirements of section 16(1) of FOISA, they clearly set out whether they hold the requested information, specify the exemption(s) they are relying on to withhold the information and state why the exemption applies. This should be done for each part of the request. Similarly, in responding to a requirement for review, the authority should ensure it complies with section 21(4).

Parts i. and ii. of the Applicant's request

31. As mentioned above the Authority identified information falling within the scope of parts i. and ii. of the Applicant's request which it sought to withhold under the exemptions in sections 30(b)(i) & (ii), 30(c), 38(1)(b) and 39(1) of FOISA. Each of these will now be considered in turn.

Section 30(b)(i) and (ii) – Prejudice to the effective conduct of public affairs – free and frank provision of advice/exchange of views

32. In order for the Authority to rely on the exemptions in section 30(b)(i) and (ii), it must show that disclosure of the information would, or would be likely to, inhibit substantially the free and frank provision of advice (section 30(b)(i)) or the free and frank exchange of views for

the purposes of deliberation (section 30(b)(ii)). These exemptions are subject to the public interest test in section 2(1)(b) of FOISA.

33. In applying these exemptions, the chief consideration is not whether the information constitutes advice or opinion but whether the disclosure of that information would, or would be likely to, inhibit substantially (as the case may be) the provision of advice or the exchange of views. The inhibition in question must be substantial and therefore of real and demonstrable significance.

34. As with other exemptions featuring a similar test, the Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near future, not simply that inhibition is a remote or hypothetical possibility. For inhibition to be likely there would need to be at least a significant probability of it occurring.

35. The Commissioner's guidance[1] states that when assessing whether disclosure will cause substantial inhibition, an authority should consider the content of the information and the circumstances in which it was created. Factors to consider may include:

(i) The identity or status of the author and/or the recipient. There may be an inherent sensitivity in the fact that advice or views were passed from one person to another, depending on the relationship between those parties. Where advice or views are communicated and received as part of an individual's day to day professional functions, for example, then the risk of substantial inhibition may well be diminished.

(ii) The circumstances in which the advice or views were given. The context in which the communication took place might be relevant; for instance, views might be more sensitive during policy formulation or other discussions.

(iii) The sensitivity of the advice or views. The subject matter and content of the advice and opinions, as well as the way in which the advice or opinion is expressed, are likely to be relevant: disclosing advice or opinions while a decision Is being considered, and on which further views are being sought, might be more substantially inhibiting than disclosing the information once a decision has been taken. The degree to which a person will be, or is likely to be, inhibited in expressing themselves has to be of some real and demonstrable significance.

36. The Authority is relying on sections 30(b)(i) and (ii) of FOISA to withhold information in documents 3 and 4 (and attached draft versions of the policy) in their entirety.

The Authority's submissions about the exemption

37. The Authority submitted that disclosure of the information would otherwise or be likely to prejudice substantially the effective conduct of public affairs.

38. The Authority advised that the policy was developed during a period of significant political and legal uncertainty surrounding the matter it addressed. It added that, at the time, national guidance was anticipated.

39. It stated that the draft policy was never finalised or approved, nor was it implemented and it remained an incomplete piece of work. The Authority was of the view that releasing the information in the document would prevent the free and frank expression of views in relation to draft documents or more generally prevent such deliberation if drafts of policy documents could be recovered. Its assessment was that sharing an incomplete and unendorsed version

[11] https://acrobat.adobe.com/id/urn:aaid:sc:US:0d835205-40dc-4473-ae40-d919b94f0fab

of the policy could risk influencing or prejudicing whoever read it and that there was a significant risk that the draft could be misconstrued as reflecting the organisation's position, or that its contents could be taken out of context.

40. The Authority also highlighted that (at the time) there were ongoing tribunal proceedings related to the topic. Its view was that sharing an incomplete and unendorsed version of the policy during this sensitive period could risk influencing or prejudicing those proceedings, particularly given the highly charged environment.

The Applicant's submissions about the exemption

41. The Applicant noted the principle behind the exemption: "What is important is whether disclosure would have an inhibiting effect on the provision of advice or on the exchange of views".

42. He stated that the following from the Commissioner's guidance were indicators of where the inhibition may be lower:

- "However, where advice or views are communicated and received as part of an individual's day-to-day professional functions, then the risk of substantial inhibition may be lower"
- "Timing may also be relevant: disclosing advice or opinions while a decision is being considered, and on which further views are being sought, might be more substantially inhibiting than disclosing the information once a decision has been taken."

43. The Applicant submitted that a finished trans policy (captured by part i. of his request) that was devised by the work of at least one person consulting with an external organisation who approved it did not indicate who exchanged which views, and would not, in his view, prevent a free and frank provision of advice going forward. In making this submission the Applicant recognised the lower inhibition anticipated in disclosing information once a decision had been taken, referring to the fact that the THT had already reviewed and approved the policy by 6 May 2024.

44. With regard to information which would fulfil part ii. of his request, the Applicant argued that in his view disclosure of the extent and collaboration between the THT and the Authority in relation to the Trans Policy would not have the effect of restraining, decreasing or suppressing the freedom with which opinions were expressed. The Applicant argued that THT's views were clear from its website and it was largely the role of the Human Rights and Equality Officer to introduce such policies. Therefore, the Applicant considered that as any advice or views communicated and received would occur as part of an individual's day to day professional functions, then the risk of substantial inhibition might be lower. The Applicant considered it should be possible for redactions to be applied so his request could be met without causing such jeopardy, if that was a legitimate concern.

45. The Applicant commented that he had been given no reason for the Authority's view that disclosure would, or would be likely to, prejudice public affairs and queried whether it was referring to the (at that time, ongoing) Employment Tribunal.

46. The Applicant noted in the guidance "the Commissioner does not accept that the disclosure of advice or views in one case will automatically have a substantially inhibiting effect in all others" and "this does not justify a blanket exemption on all internal advice or views for fear that officials will react negatively to the release of information."

47. The Applicant argued that the Authority's position that the policy was not progressed was not apparent from the minutes he had read.

The Commissioner's view about the exemptions

48. The Commissioner has considered all of the relevant submissions, along with the information that was withheld under the exemptions in sections 30(b)(i) and (ii) of FOISA.

49. As mentioned above, the withheld information falling within scope of part i. of the Applicant's request consists of three versions of the Trans Policy referred to by the Applicant (document 3 and the two draft versions attached to document 4).

50. The Authority emphasised that the draft policy was never progressed, and indeed in as far as the policy does not seem to appear on the Authority's website along with its other current policies and procedures, it does not appear to have been. However, the Applicant noted that the last mention on the Authority's website was that the policy had been accepted to go ahead (with agreed, documented revisions). The Commissioner has noted the reference to the policy[2] (page 193) on the Authority's website (dated 6 March 2024 as opposed to 6 May 2024 as stated in the Applicant's request) and the inference from this that the policy was approved subject to the consideration of some action points The Commissioner has not been provided with any evidence or submissions from the Authority which show a documented decision to halt the progression of this policy, either in direct relation to it or as part of a wider pause in light of the employment tribunal that was ongoing during this period.

51. The Commissioner recognises that the wider subject matter of the draft policy has been the topic of much public debate, involving polarised views from some quarters.

52. However, in reaching a decision on whether the exemptions apply, the Commissioner is concerned with the actual information under consideration and the likely affect that disclosure of this would have on the provision of advice or exchange of views in future.

53. Although the subject matter of the policy may be considered to be sensitive at this time, it is not unexpected that a public body would seek to comply with legislative requirements (as understood at the time) to ensure that all its patients' needs are met and to have mechanisms in place to do this, which is what this policy would appear to be seeking to do.

54. The Commissioner has considered the Authority's comments about the author of the policy and their part in the tribunal. In doing so, he agrees with the comments of the Applicant that it would be expected that as part of their day to day professional duties a particular individual would be responsible for the preparation of a policy of this kind. That said, it is evident from the information that is available in the public domain that decisions on this public authority's policy making do not fall to one person alone; indeed, it is clear that there was involvement and input from other individuals within the Authority.

55. The process of drafting this type of document by a public authority in seeking to meet legislative requirements is neither controversial nor sensitive. The Commissioner is therefore not persuaded that disclosure of this information would result in the substantial inhibition that is anticipated by the Authority. As the Applicant has suggested, the draft policy had, in March 2024, been all but agreed (subject to some minor changes). The draft versions of the policy (attached to document 4) appear to have undergone the type of revision that any

[2] https://acrobat.adobe.com/id/urn:aaid:sc:US:c254e5c7-4dd6-454a-9ac0-7ab68f280804

document of this type may in any organisation. The Commissioner notes that there are no major changes but rather suggested changes to terminology.

56. Again, putting aside the subject matter, the information in document 4 (the email exchanges between the Authority and the THT) comprises a public authority seeking advice in relation to drafting a policy from an organisation it must have considered could advise it. The content of this correspondence in and of itself does not seem to the Commissioner to be particularly controversial or sensitive. In his view it is the type of correspondence that might be found taking place routinely in any public authority which seeks views from others on the interpretation and implementation of its statutory duties.

57. Having carefully considered the withheld information, the Commissioner is not satisfied that the Authority has shown that disclosure of the information being withheld under sections 30(b)(i) & (ii) would result in the harm necessary to engage these exemptions.

58. In the absence of any submissions persuading him otherwise, the Commissioner does not accept that disclosure of the information in documents 3 and 4 (and the attached draft policies) would, or would be likely to, inhibit substantially the free and frank provision of advice or exchange of views. He does not believe such a conclusion can be reached on the basis of the arguments provided.

59. The Commissioner therefore does not agree that the Authority was correct to rely on sections 30(b)(i) and (ii) to withhold the information in documents 3 and 4 (and the attached draft policies) under these exemptions.

60. Given that the Commissioner does not accept the application of these exemptions, he is not required to consider the application of the public interest test in section 2(1)(b).

61. As the Authority is also relying on the exemptions in sections 30(c), 38(1)(b) and 39(1) to withhold the same information, he will now go on to consider the application of these exemptions.

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

62. Section 30(c) of FOISA provides that information is exempt 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 FOSIA.

63. The word “otherwise” distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b). 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 the disclosure of the information, and how that harm would be expected to follow disclosure.

64. 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.

65. The Authority is relying on section 30(c) of FOISA to withhold information in documents 3 and 4 (and attached draft versions of the policy) in their entirety.

The Applicant's submissions about the exemption

66. The Applicant commented that he was forced to speculate on the nature of any "substantial inhibition" as the Authority had not indicated it to him. Additionally, he noted that in its first two responses the Authority had indicated that the information was already in the public domain, so he questioned how its disclosure could cause substantial inhibition to the conduct of public affairs.

67. The Applicant referred to the Commissioner's guidance where it stated, "Even where information relates to a sensitive or controversial matter, the information may not, in itself be sensitive". He considered this statement to relate to all aspects of his request. The Applicant questioned what conduct would be harmed by disclosing a draft policy that the Authority claimed had not been implemented, or a historic discussion about that draft policy. He also questioned the harm from disclosure of any current trans policy, if any existed.

68. The Applicant concluded that there would be none, reasoning that there would be no impact on establishing a current trans policy as this would be a separate process. The Applicant commented that if the process was different, there would be no harm to the current conduct in disclosing it, the Authority could respond to any criticism with "we're following a different approach now". If the process was the same, then the public had the right to know.

The Authority's submissions about the exemption

69. The Authority referred the Commissioner to the submissions it had provided in relation to its reliance on sections 30(b)(i) and (ii) above. It also stated that the information was exempt under section 30(c) due to it restricting day-to-day tasks of its staff. The Authority argued that disclosure would inhibit staff from creating, collaborating and commenting on draft documents that had not been approved and rolled out to the organisation.

70. It explained that the outcome of releasing any unapproved documents would have a significant effect on the Authority's reputation and would potentially mislead, as it would not represent an agreed or adopted organisational policy. It added that staff should be able to draft work without fear of public humiliation, which it considered was what disclosure had the potential to do.

The Commissioner's view on the exemption

71. The Commissioner has again carefully considered the submissions made by the Authority and the Applicant along with the withheld information. As noted, the Authority has relied on many of the same arguments in relation to section 30(c) as for sections 30(b)(i) and (ii).

72. While the Commissioner accepts that in some circumstances the withholding of information would be necessary to maintain the effective conduct of public affairs, he does not believe, based on the Authority's submissions and the nature of the withheld information, that is the case here.

73. For many of the same reasons explained in paragraphs 48-58, the Commissioner is not satisfied that the Authority has demonstrated through its submissions how the harm it has described would result in reality.

74. The Commissioner notes the Authority's concern that disclosure of any unapproved documents would have a significant effect on its reputation and would potentially mislead as it does not represent an agreed or adopted policy. However, in line with section 9.9.2 of the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish public authorities 2016 (Section 60 code), which states:

"…in some situations it may be helpful to provide context to a response to avoid information being misunderstood or misinterpreted."

there is nothing to prevent an authority from providing additional explanation or context with any information it discloses. The 2016 edition of the Section 60 code quoted here was that in force at the time of the Applicant's request and requirement for review. A revised version was published by the Scottish Government in March 2026. The section referred to above can now be found in section 9.12.2 of the updated version.

75. The Commissioner does not accept that the Authority was correct to rely on section 30(c) to withhold all of the information in documents 3 and 4 (and the attached draft versions of the policy).

76. Given that the Commissioner does not accept the application of this exemption, he is not required to consider the application of the public interest test in section 2(1)(b).

77. As the Authority is also relying on the exemptions in sections 38(1)(b) and 39(1) to withhold the same information, he will go on to consider these now.

Section 38(1)(b) – personal information

78. 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.

79. 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 in section 2(1)(b) of FOISA.

80. To rely on this exemption, the Authority must show that the information withheld 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 a disclosure under FOISA) would contravene one or more of the data protection principles set out in Article 5(1) of the UK GDPR.

81. The Authority has sought to withhold all of the information in document 3 (draft policy) and 4 (email communications and draft versions of policy attached) under section 38(1)(b) of FOISA.

Is the information personal data?

82. The first question the Commissioner must address is whether the withheld information is personal data for the purposes of section 3(2) of the DPA 2018.

83. Personal data are defined in section 3(2) of the DPA 2018 as "any information relating to an identified or identifiable living individual". Section 3(3) of the DPA 2018 defines "identifiable living individual" as a living individual who can be identified, directly or indirectly, in particular reference to:

    (a) An identifier such as a name, an identification number, location data, or online identifier, or

    (b) One or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

84. The two main elements of personal data are that the information must “relate” to a living individual, and that individual must be identified or identifiable from the data, or from the data and other accessible information.

85. Information will “relate to” an individual if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them, or has them as its main focus.

86. An individual is “identified” or “identifiable” if it is possible to distinguish them from other individuals (see paragraph 83 above).

87. In this case the withheld information comprised of a draft policy, a series of emails and two versions of the draft policy which were attached to the email chain.

The Authority’s submissions

88. The Authority considered that all of the information being withheld was the personal information of either the individual member of staff who had drafted the policy or, in the case of the email exchange, Authority and THT staff.

The Applicant’s submissions

89. The Applicant highlighted that his request and requirement for review had specified that names could be redacted where appropriate. and he was happy for any other personal data that could identify or relate to a specific individual, or anything else the Commissioner considered necessary, to be redacted.

90. The Applicant does not consider that he asked for personal information. He commented that he requested a “trans policy” which existed and was discussed (covered by part i. of his request) and redacted discussions around that (part ii. of his request). In the Applicant’s view it was only possible for this exemption to apply to part ii. of his request and he noted that he was more than happy for any personal data, including names, email addresses, other contact details or other information that could identify or relate to a specific individual to be redacted to the extent appropriate.

The Commissioner’s view

91. Having considered the content of the information in document 4, (the email exchange between the Authority and the THT), the Commissioner cannot agree that the content of these emails is all personal data. He accepts that the names of the sender and recipient, as well as the first part of the email addresses and direct telephone/extension numbers, together with the sender and recipients job titles would fall within the definition of personal data as they relate to an identified or identifiable individual.

92. He does not accept though that the content of the emails themselves are personal data. These comprise an exchange between individuals in which they are conveying the views of the organisations they are employed by.

93. As the content of the emails has not met the first test of this exemption, and the Commissioner does not consider the content of this document to be personal data, he does not need to go on to consider any of the other tests required for engagement of section 38(1)(b).

94. The Applicant has clearly stated that he does not wish to receive personal data. Therefore, with regard to the information within document 4 that the Commissioner does consider to meet the definition of personal data, the Commissioner need not reach a view on whether

disclosure of the information would be a breach of any of the data protection principles and therefore exempt from disclosure in line with section 38(1)(b).

95. The Commissioner has also considered the content of the information in document 3, the draft trans policy provided to him by the Authority (and the attachments to the email chain in document 4). The information in these documents is a reflection of the way in which the Authority has interpreted the statutory and legislative requirements which are relevant to the subject matter in hand and also the mechanisms it proposes to put in place to ensure compliance with these requirements. This is the type of activity that any organisation would be expected to undertake as part of good governance. It does not represent the views of an individual.

96. As such, the Commissioner does not accept that the content of these documents constitutes personal data.

97. He does accept that other information included on the document (and the two draft versions attached to document 4), such as the job title of the author, would constitute personal data, as this individual would be identifiable from this information.

98. Again, as the Applicant has clearly intimated that he does not wish to receive personal data, the Commissioner need not go on to consider the other tests in section 38(1)(b) in relation to this.

99. To summarise, the Commissioner need come to no finding on the Authority's reliance on section 38(1)(b) of FOISA to withhold the information he does consider to fall within the definition of personal data:

- document 3 (and two versions of the draft policy attached to document 4) - the job title of the author, and
- document 4, the names and job titles of the sender and recipient, the first part of email addresses and the direct/extension of telephone numbers

as the Applicant is not seeking this information and has not challenged the withholding of this information.

100. For the remaining information within document 3 and 4 (and the two draft versions of the policy attached), the Commissioner is not satisfied that the information is personal data as defined in section 3(2) of the DPA 2018. As such, he finds that the Authority was not entitled to rely of section 38(1)(b) of FOISA to withhold this information.

101. As the Authority is also withholding this information under section 39(1) of FOISA, he will now go on to consider the application of that exemption.

Section 39(1) – health, safety and environment

102. 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.

103. As the Commissioner notes in his briefing on the exemption[3], section 39(1) of FOISA does not contain the usual harm test. Instead of the "substantial prejudice" test found in many

[3] https://www.foi.scot/sites/default/files/2023-07/BriefingSection39HealthSafetyandtheEnvironment_2023.pdf

other harm-based exemptions in Part 2 of FOISA, this exemption refers to the "endangerment" of health and safety.

104. The Authority sought to rely on the exemption in section 39(1) of FOISA to withhold all of the information it held in relation to parts i. and ii. of the Applicant's request – documents 3 and 4 (and attached draft versions of the policy).

The Applicant's submissions

105. The Applicant did not consider that disclosing draft policies and interactions with non-profit organisations could damage anyone's health. He highlighted that although there were extensive and well documented reprisals against those sceptical of gender activism, there was essentially no credible evidence of harassment or intimidation in the other direction for advocating the view that people can identify as a different gender, or that they should be supported in doing so.

106. The Applicant submitted that there was no evidence of a physical safety risk from the disclosure of the draft trans policy, or (suitably redacted) communications discussing the same, of any subsequent policies or of any parallel guidance in force related to sex-segregation of staff areas.

107. In his view, if the Authority was claiming that disclosure would harm the mental health of involved staff, this should be balanced against the mental health impacts on staff of knowing the risks of having a policy imposed by their employer after an opaque consultation with an external non-profit organisation. The Applicant believed the process by which such policies were established and agreed must not remain secret without concrete reasons, and the burden was on the Authority to justify these. He did not consider the disclosure of any of the information he had requested would cause significant mental distress that would justify secrecy forever.

The Authority's submissions

108. The Authority's submissions highlighted the employment tribunal it was engaged in (during this period) that related to issues concerning gender recognition and related policies. It highlighted that this had resulted in significant media coverage and unwanted approaches and harassment of staff, with some staff requiring security escorts to and from their workplace, negatively affecting their wellbeing. It also stated that there had been specific threats made against individual(s) (not identified to the Commissioner) that had meant they had to have a police alert for their home addresses.

The Commissioner's view

109. The Commissioner has carefully considered the submissions from both the Applicant and Authority as well as the withheld information.

110. 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.

111. For this exemption to apply disclosure of the information must lead, or be likely to lead to, this endangerment. The exemption does not cover information that does not itself give rise to endangerment.

112. As he did in Decision 231/2025[4] (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.

113. The Commissioner notes the Applicant's view that there is no evidence of harassment towards those advocating the view that people can identify as a different gender. However, he acknowledges the Authority's submissions in relation to this type of behaviour being directed at those who were involved in the recent tribunal case around this issue and the harm caused by this.

114. The Commissioner also notes the Authority's comments regarding the significant media coverage of the tribunal and its view that this resulted in unwanted approaches and harassment of some of its staff in relation to this matter, and the effect of this on them. The Commissioner does not condone abuse or intimidation of any kind. Neither would he minimise or dismiss the impact and harm that this behaviour can have on individuals who are performing the functions of their employment.

115. However, 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).

116. The Commissioner has carefully considered the Authority's submissions. Having done so, he is not persuaded that disclosure of the specified information requested in this case would meaningfully add to whatever risks to the health and safety of any individual (or group of individuals) already exist.

117. As the Commissioner commented in Decision 017/2026[5], the information under consideration here does not explicitly relate to the tribunal. Instead, the information being withheld comprises of a draft policy to do with the "trans" topic but in relation to patients, and communications between the Authority and an external organisation about that policy.

118. The Commissioner recognises the potential impact of increased attention that may follow the disclosure of the withheld information. However, this cannot mean that any information that is in any way related to this particular topic must necessarily be withheld. The Commissioner therefore must come back to 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 safety of an individual/individual(s).

119. Having done this, the Commissioner does not consider that disclosure of the particular withheld information would cause the harm required for the exemption in section 39(1) of FOISA to be engaged. Having taken account of the submissions made by the Authority, he is not persuaded it has provided sufficient evidence of the required "endangerment" of health or safety for the exemption in section 39(1) to be engaged.

120. In all the circumstances, the Commissioner finds that disclosure would not be likely to endanger the physical or mental health or the safety of an individual/individual(s). He therefore finds that the exemption in section 39(1) of FOISA has been wrongly relied on by the Authority.

[4] Decision 231/2025 | Scottish Information Commissioner

[5] Decision 017/2026 | Scottish Information Commissioner

121. 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).

Parts iii. and iv. of the Applicant's request

Information not held

122. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.

123. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.

124. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner must first of all consider the interpretation and scope of the request and thereafter the quality, thoroughness and results of the searches carried out by the public authority.

125. The Commissioner also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. Ultimately, however, the Commissioner's role is to determine what relevant recorded information is actually held by the public authority (or was, at the time it received the request).

126. To recap, in part iii. of his request, the Applicant asked for any other policies that superseded or replaced that requested at part i. In part iv of his request, he asked for any written policy, guidance or instructions with regard to trans staff members' rights to access sex/gender segregated spaces that were in force from January 2023.

127. In its revised review response, the Authority informed the Applicant that it did not have a Trans Policy, that the drafted policy was never approved and it did not have another that superseded it.

128. It also informed the Applicant that it did not have any further written policies or guidance in relation to trans staff members' rights to access sex/gender segregated workspaces.

The Applicant's submissions

129. The Applicant's view was that given the focus of the employment tribunal he considered it unlikely that no missive was sent to staff stating what the policy of the changing room was and would be going forward. He noted that this would fall under the heading of guidelines, if not policies. He also considered in the circumstances of the tribunal, it was unlikely that nothing at all was sent to staff members.

The Authority's submissions

130. The Authority submitted that searches had been carried out at the time of the request by individual staff members using relevant keywords in relation to part iv. of the request. It explained, however, that it was not able to provide details or evidence of the results of these searches.

The Commissioner's view

131. The Commissioner has considered the submissions from both the Applicant and the Authority. He notes that the request was made on 26 February 2025 and that the employment tribunal also began in February 2025. The Commissioner must highlight that his remit is to consider what recorded information was held by the Authority falling with the scope of the request, at the time that request was received.

132. He notes the Applicant's reference to the employment tribunal that was in progress from February 2025, and his belief that, due to the circumstances around that, there must be further information held relevant to parts iii. and iv. of his request.

133. The Commissioner would reiterate his remit is to determine what recorded information is actually held, rather than what is thought should be held. However, even given this, the submissions from the Authority in relation to the searches it had carried out are limited.

134. On the basis of the submissions received from the Authority, the Commissioner is not satisfied that it has demonstrated the nature or quality of the searches which were carried out or shown that these would have been sufficiently thorough to identify any recorded information falling within scope of parts iii. and iv. of the Applicant's request, if it were held. As such, he is not in a position to reach a conclusion as to whether, on the balance of probabilities, the Authority holds any recorded information falling within scope of these parts of the Applicant's request.

135. The Commissioner therefore requires the Authority to carry out and document adequate and proportionate searches in relation to parts iii. and iv. of the Applicant's request and provide him with a new review outcome in these respects.

136. As the Commissioner does not consider that adequate searches were carried out to determine if any information falling within the scope of parts iii. and iv. of the Applicant's request was held, he must find that it failed to comply with section 1(1) of FOISA.

137. The initial response and review outcome provided to the Applicant did not clearly state that the Authority considered that, for some parts of his request, it did not hold any recorded information. The Commissioner would highlight that section 17 of FOISA requires that, where a public authority considers that no recorded information is held in relation to an applicant's request, it should provide the applicant with a notice clearly advising them of this. The Authority failed to do this.

General handling of the request

138. The Commissioner notes that the response, and review outcome, from the Authority to the Applicant, as well as some of the submissions provided to him during the investigation, were confusing. The Applicant was not clear what answers referred to which parts of his request. Furthermore, as was mentioned previously, the reference to section 25 suggesting that information within the scope of the request was otherwise accessible was both confusing and inaccurate.

139. The Applicant raised in his application that the review outcome provided to him was a copy of the initial response issued by the Authority.

140. The Commissioner has considered this in relation to what is set out in the 2016 version of the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities (Section 60 code), in particular sections 10.3.3 and 10.3.4, this being the edition that was in use at the time of this request. These state:

10.3.3 The aim of a review is to allow the authority to take a fresh look at its response to an information request, to confirm the decision (with or without modifications) or, if appropriate, to substitute a different decision. The review procedure must therefore be fair and impartial and allow decision makers to look at the request afresh. It should also enable different decisions to be taken. Review procedures should be sufficiently flexible to allow for differing circumstances such as the complexity and sensitivity of the information.

10.3.4 It is good practice for the reviewer to be a person who did not respond to or advise on the original request (where possible or practicable).

As mentioned previously, the 2016 edition of the section 60 code was superseded by an updated version released in March 2026, but the good practice that a public authority would be expected to consider would be that in place at the time it received the request and requirement for review. In any case, in the revised edition of the Section 60 code there has been no change to the wording of the guidance referred to in this decision (although in some cases the numbering has altered).

141. There was no evidence in the review outcome provided to the Applicant that a fresh look had been taken, or that the reviewer was a person who had not been involved in the initial response. As the applicant highlighted, the text of the response and review appeared to be the same. The Authority, although asked about this, provided no comment or submissions.

142. The Commissioner would highlight that the review process is intended, as indicated above, to allow an authority to have another look at the response it has given and to consider which of the options permitted by section 21(4) it would be appropriate to take. It may also be the opportunity, if appropriate, to provide advice and assistance to an applicant.

143. The Commissioner would encourage all public authorities to fully engage with the review process and follow the Section 60 code of practice.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) (specifically, section 1(1)) in responding to the information request made by the Applicant.

Specifically, he finds that the Authority failed to comply with Part 1 of FOISA by wrongly withholding information falling within the scope of parts i. and ii. of the Applicant's request under the exemptions in sections 30(b)(i) and (ii), 30(c), 38(1)(b) and 39(1).

The Authority also failed to comply with part 1 of FOISA by failing to carry out adequate searches to determine what information was held falling within the scope of parts iii. and iv. of the Applicant's request.

The Commissioner therefore requires the Authority:

- to disclose the information wrongly withheld in documents 3 and 4 (and the draft versions of the policy attached)

- to carry out and document adequate, thorough and proportionate searches for information falling within the scope of parts iii. and iv. of the Applicant’s request and provide him with a revised review outcome, by **13 August 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

29 June 2026