



Scottish Information
Commissioner
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Decision Notice 181/2026

Terms of engagement provided to firm of solicitors for the investigation of a complaint

Authority: Orkney Islands Council
Case Ref: 202501436

Summary

The Applicant asked the Authority for information relating to terms of engagement or instructions provided to a firm of solicitors for an investigation into a complaint made by the Applicant to the Authority. The Authority advised that the information was exempt from disclosure as it was subject to legal professional privilege and the public interest favoured withholding it. The Commissioner investigated and found that although the Authority had correctly withheld some of the information, most of it was wrongly withheld from the Applicant under the exemption claimed. He required the Authority to reconsider that information.

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 15 June 2025, the Applicant made a request for information to the Authority. Referring to an independent investigation report prepared by Brodies LLP, he asked for:
 - (i) A copy of all of the terms of engagement or instructions provided to Brodies LLP for the investigation into my complaint (including for each part).

- (ii) Confirmation of whether the solicitors were instructed to conduct an independent fact-finding investigation or to provide legal advice to [the Authority] (and confirmation of the nature of the advice sought).
 - (iii) Details of the solicitors' relationship with [the Authority], including whether they are regularly engaged for legal services by [the Authority]
2. The Authority responded on 5 July 2025. For part (i) of the request, the Authority informed the Applicant that it was withholding the information requested on the basis that it was subject to legal advice privilege and, therefore, exempt under section 36(1) of FOISA, and that the public interest in maintaining the exemption outweighed that in disclosure. For parts (ii) and (iii), of the request, the Authority notified the Applicant that it did not consider these as being valid requests for information.
 3. Later that same day, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision because he did not consider the response to be appropriate. He considered that the Authority had set a precedent in providing information to him about the engagement of Brodies LLP.
 4. The Authority notified the Applicant of the outcome of its review on 25 July 2025, which upheld its original decision.
 5. On 24 August 2025, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. He stated that he was dissatisfied with the outcome of the Authority's review because he considered that the Authority had provided inadequate justification for applying the exemption in section 36(1) of FOISA to part (i) of his request.

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 8 October 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 the application of the exemption in section 36(1) of FOISA and its consideration of the public interest test.

Commissioner's analysis and findings

9. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.
10. As stated in previous decisions, in [Scottish Ministers v Scottish Information Commissioner \[2006\] CSIH 8](#)¹, at paragraph [18], the Court of Session recognised that:

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

"... in giving reasons for his decision, [the Commissioner] is necessarily restrained by the need to avoid, deliberately or accidentally, disclosing information which ought not to be disclosed."

11. In this decision notice, the Commissioner has endeavoured to give as full account of his reasoning as he can, but, by necessity, in this case the comments of the Court of Session are applicable to some aspects.

Section 36(1) – Confidentiality

12. 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.
13. 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:
 - the information must relate to communications with a professional legal adviser, such as a solicitor or advocate
 - the legal adviser must be acting in their professional capacity
 - the communications must occur in the context of the legal adviser's professional relationship with their client.
14. Litigation privilege is different and covers documents created in contemplation of litigation (also known as communications post litem motam).
15. Communications post litem motam are granted confidentiality to ensure that any person or organisation involved in or contemplating a court action can prepare their case as fully as possible, without the risk that their opponent, or prospective opponent, will gain access to the material generated by their preparations. The privilege covers communications from the stage when litigation is pending or in contemplation.
16. Whether a particular document was prepared in contemplation of litigation will be a question of fact, the key question generally being whether litigation was actually in contemplation at a particular time.
17. Litigation privilege will apply to documents created by the party to the potential litigation, expert reports prepared on their behalf and legal advice given (and sought) in relation to the potential litigation. However, the communication need not involve a lawyer, and the litigation contemplated need never actually happen for the privilege to apply. It will continue to apply after any litigation has been concluded.
18. There is a further matter to be considered, however, before the Commissioner can determine whether, or the extent to which, the section 36(1) exemption in FOISA is applicable in the circumstances of this case. The information cannot be privileged unless it is also confidential.
19. For the section 36(1) exemption in FOISA to apply, the withheld information must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. In other words, the claim must have been capable of being sustained at the time the exemption is claimed.
20. A claim of confidentiality cannot be maintained where, prior to a public authority's consideration of an information request or conducting a review, information has been made

public, either in full or in a summary sufficiently detailed to have the effect of disclosing the advice. Where the confidentiality has been lost in respect of part or all of the information under consideration, any privilege associated with that information is also effectively lost.

The Authority's submissions

21. The Authority explained that the information requested comprised of:
 - instructions from the Authority to Brodies LLP regarding the terms of reference of the investigation report
 - correspondence from Brodies LLP to the Authority in respect of those instructions, and
 - correspondence from the Authority's in-house solicitor to a senior officer concerning the instruction of the investigation.
22. The Authority further explained that the information requested, consisted of its instructions to Brodies LLP, correspondence from Brodies LLP to the Authority in respect of those instructions, and email correspondence from the Authority's in-house solicitor to a senior officer concerning the instruction of the investigation.
23. The Authority confirmed that Brodies LLP, its external legal advisors, acted in a professional legal capacity for the Authority during the course of the instructions and that the withheld information related to communications with Brodies LLP while acting in its capacity as the Authority's legal advisors.
24. The Authority stated that the withheld information contained information which was otherwise confidential – namely, instructions from the Authority to Brodies LLP for the purpose of seeking legal advice, correspondence further to those instructions between Brodies LLP and the Authority and internal correspondence involving an in-house solicitor. The Authority confirmed that the withheld information was not available to Brodies LLP from a source other than the Authority and that it continued to be treated as confidential by both parties.
25. The Authority recognised that there would be instances where legal professional privilege would not apply. However, the Authority confirmed that it had not, at any stage, waived legal professional privilege by making the requested information publicly available, whether in full, in part or as a summary. The Authority maintained that the withheld information attracted legal advice privilege.
26. While the Authority's position is that all of the withheld information attracted legal advice privilege, it noted that correspondence from the Authority's in-house solicitor discussed potential litigation arising from the investigation. On that basis, the Authority considered that this correspondence alone also attracted litigation privilege.

The Applicant's submissions

27. The Applicant provided detailed submissions, which the Commissioner has considered in full. However, he has only summarised these submissions in this part of the decision notice to the extent that they are relevant to whether the exemption in section 36(1) of FOISA applies (i.e. whether the withheld information attracted legal privilege or not).
28. The Applicant believed that the Authority had "misapplied" the exemption in section 36(1) of FOISA. He was concerned that the Authority had claimed that the information sought constituted legal advice and attracted legal privilege, despite the investigation being described as independent.

29. The Applicant considered that the information he was seeking related to a “fact-finding process” and not one which involved the “provision of legal advice”. He also considered that the Authority was “stretching” the meaning of the terms “legal advice” and “legal privilege” to withhold the terms of engagement documentation because an independent investigation “should not have required legal advice or privilege”.
30. According to the Applicant, the Authority should have sought legal advice separately, through a different firm, in order to maintain fairness and impartiality as required by its own complaint handling process.
31. The Applicant did not consider that consideration had been given to separating exempt and non-exempt information. He believed that the Authority’s assertion that the terms were wholly privileged lacked justification, which was supported by the Authority previously providing him with a copy of the investigation plan.
32. The Applicant considered that the Commissioner’s own precedent made it clear that section 36(1) did not apply to investigative reports commissioned from solicitors. In support of this, he referred to Decisions [087/2016](https://www.foi.scot/decision-0872016)² and [180/2012](https://www.foi.scot/decision-1802012)³ of the Commissioner. He believed that the parallels with these cases and his case were exact: an external solicitor was commissioned to conduct an independent investigation into complaints, to make findings of fact, and provide recommendations – not to give legal advice.
33. The Applicant explained that he had obtained information via a subject access request which showed Brodies LLP discussing litigation risks with Authority prior to conducting the investigation. However, he did not accept that any of the withheld information attracted litigation privilege. He submitted that no litigation was in contemplation at the time of the instruction and that no threat of legal action has been made by him (and no evidence of any threat by him to take legal action existed).

The Commissioner’s view

34. The Commissioner has carefully considered the submissions of both parties, together with the withheld information. He has also had regard to the conclusions reached in Decision 180/2012, which he considers to be relevant to the present case.
35. In Decision 180/2012, the Commissioner considered whether Scottish Water was entitled to withhold, under the exemption in section 36(1) of FOISA, a report produced by a named firm of solicitors on the basis that it attracted legal advice privilege.
36. The Commissioner found that the report did not attract legal advice privilege because, while it was prepared by a legal adviser on the instructions of Scottish Water, the legal adviser had been asked to carry out an independent review of the allegations made in that case. While the skills of a legal adviser may have been helpful in this task, the Commissioner did not accept that this was a task requiring those skills.
37. In the present case, the request does not seek the report itself, but the terms of engagement or instructions provided to Brodies LLP for their independent investigation of the complaint. Nevertheless, the Commissioner considers that the conclusions of Decision 180/2012 are relevant. Having considered the withheld information, he cannot accept that the majority of it attracts legal advice privilege because – having had regard to the reasons set out in the

² <https://www.foi.scot/decision-0872016>

³ <https://www.foi.scot/decision-1802012>

preceding paragraph – it is not strictly legal advice within the meaning of section 36(1) of FOISA.

38. The Commissioner also does not consider that any of the withheld information attracts litigation privilege. He is not satisfied that anything more than a general apprehension of future litigation or possibility that the Applicant might, at some point in the future, raise a court action, existed. In fact, the Applicant is clear that he has never given the Authority any such indication and the Authority has not provided the Commissioner with any evidence to the contrary.
39. Consequently, the Commissioner is not satisfied that the Authority was entitled to withhold the majority of the withheld under the exemption in section 36(1) of FOISA. As he is not satisfied that this information is exempt from disclosure under section 36(1) of FOISA, he is not required to consider the public interest test in relation to this information in section 2(1)(b).
40. However, given that Brodies LLP are also the Authority's external legal advisers, the Commissioner accepts that some of the withheld information in parts of Documents 21- 26 and 28 meets the conditions for legal advice privilege to apply. While he must be careful not to reveal the content of the withheld information, he considers this information to be materially different in nature from the majority of the withheld information in that it is not simply terms of engagement or instructions for an independent complaint investigation, but it also provides legal advice within the meaning of section 36(1) of FOISA.
41. The Commissioner is satisfied that the confidentiality of the legal advice in parts of Documents 21-26 and 28 has not been lost or waived through being shared with limited relevant employees or members with the Authority. He therefore 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 it remains so now).
42. 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.
43. The Commissioner will now go on to consider the public interest test in relation to the information in parts of Documents 21-26 and 28 that he has found the Authority was entitled to apply the exemption in section 36(1) of FOISA.

The public interest test - section 36(1)

The Authority's submissions

44. The Authority acknowledged that accountability was expected of all public authorities and that there is a public interest in improving accountability of public decision-making. However, it noted that the Commissioner had previously recognised a strong public interest, also recognised by the courts, in maintaining the right to confidentiality of communications between legal advisor and client on administration of justice grounds.
45. The Authority also noted that the High Court had commented in [Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien \[2009\] EWHC](#)

[164 \(QB\)](#)⁴ (at paragraph [53]) that “[t]he in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight”.

46. In light of the above, the Authority submitted that it was evident from previous decisions of the Commissioner and relevant case law that the public interest in maintaining legal privilege was a significant factor when carrying out the balancing exercise of the public interest test.
47. On the other hand, the Authority acknowledged that there will be occasions where significant public interest in favour of withholding legally privileged information may be outweighed by a compelling public interest.
48. However, having undertaken the balancing exercise required by section 2(1)(b) of FOISA, the Authority did not consider that there was an overriding public interest in disclosure the withheld information in this case.

The Applicant's submissions

49. The Applicant argued that the public interest balance lay overwhelmingly in favour of disclosure because it would:
 - Enhance scrutiny of decision-making processes and thereby improve accountability and participation. Parents and payers of Council Tax deserved to know he the Authority structured the investigation into his complaint while obtaining “defensive legal advice”.
 - Contribute to ensuring effective oversight of expenditure of public funds and that the public obtain value for money – the value of which had now been publicly reported (and publicly confirmed by the Authority) as exceeding £50,000. He noted that the Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004 ([Section 60 Code](#))⁵ provides (at paragraph 8.3.1 of Part 2) that the public should be able to access the nature of the services that money is buying.
 - Ensure fairness in relation to application of complaints, reveal malpractice or enable the correction of misleading claims”. He submitted that the Authority had presented Brodies LLP’s investigation report as independent and impartial. If disclosure revealed a dual remit, he said that this would expose serious malpractice in a child protection-related complaint which would allow him to make a complaint to the Scottish Public Services Ombudsman (SPSO) requesting a finding of maladministration and the provision of an SPSO model procedures compliant report.
 - Contribute to a debate on a matter of public interest, given the media reporting on the £50,000 plus spend on the investigation.

The Commissioner's view

50. 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.

⁴ [https://www.bailii.org/cgi-bin/format.cgi?doc=ew/cases/EWHC/QB/2009/164.html&query=\(title:\(+o%27brien+\)\)](https://www.bailii.org/cgi-bin/format.cgi?doc=ew/cases/EWHC/QB/2009/164.html&query=(title:(+o%27brien+)))

⁵ <https://www.gov.scot/publications/foi-eir-section-60-code-practice/>

51. 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.
52. 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). Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
53. The Commissioner acknowledges that there will be occasions where the significant public interest in favour of withholding legally privileged communications may be outweighed by a compelling public interest in disclosing the information (and he has on occasion required disclosure of such information where the particular circumstances of the appeal supported it). 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.
54. While the Commissioner accepts, having examined the withheld information in question, that the contents of the advice would be of interest to the Applicant and likely to other interested parties, he does not consider that the circumstances of this case reflect any of the scenarios described above (or any other reason for disclosure of equal force).
55. The Commissioner 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.
56. The Commissioner accepts that there is a strong public interest in a Scottish public authority being able to receive full, unhindered legal advice. Without such comprehensive advice being available to the Authority, its ability to come to fully formed decisions would be restricted, which would not be in the public interest.

Consequently, in this case, the Commissioner is satisfied that the Authority correctly withheld, under section 36(1) of FOISA, the relevant information in Documents 21-26 and 28.

Next steps

57. As stated above, the Commissioner has found that the Authority was not entitled to withhold the majority of the withheld information under the exemption in section 36(1) of FOISA.
58. In this case, bearing in mind the content of at least some of the withheld information and the fact that disclosure under FOISA is disclosure to the world at large and not simply to one individual, the Commissioner requires the Authority to fully reconsider this information for disclosure and issue the Applicant with a revised review outcome (in terms of section 21 of FOISA but otherwise than in terms of section 36(1)) in relation to that information. In doing so, the Authority must ensure that, if it wishes to withhold any of this information, to clearly identify any such information and to justify and explain why it is being withheld.
59. The Commissioner must stress that it is fundamentally the responsibility of public authorities to justify and explain why it is withholding information. It is not his role to identify information

that he considers an authority might wish to have withheld. If an appropriate exemption under FOISA has not been applied by an authority to withhold certain information, the Commissioner has the right to require disclosure of that information.

Separately, the Commissioner acknowledges the Applicant's position that he required disclosure of all of the information requested to enable him to make a full complaint to the SPSO. He would note that, for the purposes of its investigations, the SPSO has the same powers as the Court of Session in respect of the production of documents.

Decision

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

The Commissioner finds that the Authority complied with Part 1 of FOISA by withholding some information under the exemption in section 36(1) of FOISA.

However, the Commissioner finds that the Authority failed to comply with Part 1 of FOISA by withholding the majority of the information under the exemption in section 36(1) of FOISA.

The Commissioner therefore requires the Authority to issue a revised review outcome (in terms of section 21 of FOISA and otherwise than in terms of section 36(1)) to the Applicant in relation to the information wrongly withheld under the exemption in section 36(1), by **20 August 2026**. He will specify to the Authority the information that he has found it was entitled to withhold.

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

Euan McCulloch
Head of Enforcement

6 July 2026