



Scottish Information
Commissioner
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Decision Notice 228/2026

Correspondence relating to a published statement regarding a specified employment tribunal

Authority: Fife Health Board
Case Ref: 202501765

Summary

The Applicant asked the Authority for information about a statement published by the Authority on its website in relation to a specified employment tribunal. The Authority withheld the information on the grounds that disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. The Commissioner investigated and found that the Authority was entitled to withhold some information but was not entitled to withhold other information. He required the Authority to disclose the wrongly withheld information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1) and (2) (Effect of exemptions); 16(1) Refusal of request; 30(b) (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); 47(1) and (2) (Application for decision by Commissioner); 50(1)(a) (Information notices).

United Kingdom General Data Protection Regulation (the UK GDPR) Articles 5(1)(a) (Principles relating to processing of personal data) and 6(1)(f) (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 20 July 2025, the Applicant made a request for information to the Authority. They asked for copies of all internal correspondence covering the period from 14 July 2025 to 20 July 2025 held by the Authority relating to the "[Statement on the Recommencement of the Employment Tribunal](https://www.nhs.uk/news/2025/07/statement-on-the-recommencement-of-the-employment-tribunal/)"¹ issued on 18 July 2025.
2. Specifically, the Applicant sought emails, Microsoft Teams messages and meeting minutes between members of the corporate communications team, the senior management team, other Authority staff, legal representatives and members of the board of the Authority discussing the content, drafting, approval, and timing of the release of the statement. They also requested any attachments to emails or Teams messages, as well as any notes or records of meetings (including informal discussions if recorded).
3. The Authority responded on 18 August 2025. It withheld the information requested under the exemptions in sections 25 and 30(b) of FOISA.
4. Later the same day, 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 of the information withheld under the exemption in section 30(b) of FOISA.
5. The Authority notified the Applicant of the outcome of its review on 25 September 2025, which upheld its original decision.
6. On 2 October 2025, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. They stated they were dissatisfied with the outcome of the Authority's review for the same reasons as in their requirement for review.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 4 November 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.
9. On 21 November 2025, the Authority refused to provide the withheld information to the Commissioner.
10. On 24 November 2025, the Commissioner issued an Information Notice to the Authority, under section 50(1)(a) of FOISA, requiring it to provide him with the withheld information.
11. The Authority provided the withheld information to the Commissioner, and the case was subsequently allocated to an investigating officer.
12. 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

¹ <https://www.nhs.uk/news/2025/07/statement-on-the-recommencement-of-the-employment-tribunal/>

this application and to answer specific questions related to its reasons for withholding the information requested.

Commissioner's analysis and findings

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

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

14. The Authority withheld all of the information requested under section 30(b) of FOISA.
15. There are two exemptions in section 30(b) of FOISA: section 30(b)(i) and (ii). However, the Authority did not clearly specify which of these exemptions the Authority wished to rely upon or whether it wished to rely on both. In the circumstances, the Commissioner will consider both exemptions in section 30(b) of FOISA.
16. In terms of section 16(1)(c) of FOISA, a refusal notice must specify the exemption in question and state (if not otherwise apparent) why the exemption applies. Given the lack of specificity in the Authority's refusal notice, the Commissioner notes that the Authority breached section 16(1)(c) of FOISA.
17. In order for the Authority to rely on the exemptions in section 30(b)(i) and (ii) of FOISA, 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.
18. 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.
19. 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.

The Applicant's submissions

20. The Applicant made no submissions on whether the exemptions in section 30(b) of FOISA applied, instead submitting that the public interest would favour disclosure.

The Authority's submissions

21. The Authority argued that its staff needed to be able to receive free and frank advice from multiple services/staff members and other subject matter experts to enable deliberation and decision making. Disclosure of the exchanges undertaken when considering a sensitive legal matter would lead to a reduction in the willingness of staff members to provide "frank, honest and counter challenging views".

22. The Authority explained that any internal drafts or discussions which took place regarding the compilation of the public statement were not published. Disclosure of these deliberations would prevent the provision of future free and frank expressions of views and therefore thorough consideration and deliberation on any given matter.
23. The Authority noted that the tribunal proceedings, the issues considered and discussed throughout the tribunal and the Authority's associated policies, procedures and publications attracted significant attention and debate from the public and external organisations.
24. The Authority stated that the publication of the statement represented the Authority's formal response on the matter. Disclosure of information pertaining to the compilation of the document would inhibit staff from contributing further, thereby restraining, decreasing, and suppressing the freedom with which opinions or options were expressed during an ongoing matter, given the information may be presented in the media out of context.
25. The Authority submitted that, if the information requested were to be disclosed, staff at all levels – including senior managers, clinical leaders, HR personnel, communications staff and those involved in operational and strategic decision-making – would be substantially inhibited from providing candid advice. It explained that this was due to the exceptional level of media attention surrounding the matter, which had been sustained locally, regionally, nationally and, at times, internationally.
26. Given this high-profile scrutiny, the Authority argued that its staff would have a reasonable and genuine concern about internal advice provided solely for the purpose of discussion, consideration and informed deliberation being disclosed into the public domain, where it might be taken out of context. This would create a significant "chilling effect", discouraging individuals from contributing fully and openly to internal discussions for fear that their advice, provided in good faith, might be misrepresented or misinterpreted publicly.
27. The Authority considered that this inhibition would materially affect its ability to conduct internal business effectively, as staff might withhold detail, moderate their views, or avoid providing written advice altogether, thereby undermining robust and informed decision-making. It also submitted that there was a real and tangible concern that staff contributions, if disclosed or misinterpreted publicly, could place individuals at further risk or subject them to unwarranted scrutiny, pressure or distress.

The Commissioner's view

28. Having reviewed the withheld information, the Commissioner considers that there are at least three distinct sets of information being withheld:
 - Set A – correspondence with another public authority advising them, as a courtesy, of the press release
 - Set B – communications from another party's legal adviser
 - Set C – internal correspondence (including correspondence with the Authority's legal advisers).
29. The Commissioner will consider each set of information in turn.

Set A

30. Having carefully considered the information in set A, the Commissioner does not consider that it contains advice or any meaningful exchange of views for the purposes of deliberation, nor is it expressed in a particularly frank fashion.

31. In any event, the Commissioner is not satisfied that the Authority has demonstrated how disclosure of that information would, or would be likely to, inhibit substantially the future provision of advice or exchange of views. General assertions that officials may be less candid are insufficient, particularly where the information in question consists of factual information.
32. The Commissioner therefore finds that neither of the exemptions in section 30(b)(i) and (ii) of FOISA apply to the information in set A.

Set B

33. Having carefully considered the information in set B, the Commissioner also does not consider that it contains advice or any meaningful exchange of views for the purposes of deliberation. As stated above, this information relates to communication from another party's legal adviser.
34. Given the duties the legal adviser in question owes to their client, the Commissioner considers that there would only be very limited circumstances in which they could appropriately advise the Authority or engage in deliberation (as opposed to debate or negotiations) with the Authority.
35. In any event, as with the information in set A, the Commissioner is not satisfied that the Authority has demonstrated how disclosure of the information in set B would, or would be likely to, inhibit substantially the future provision of advice or exchange of views.
36. The Commissioner therefore finds that neither of the exemptions in section 30(b)(i) and (ii) of FOISA apply to the information in set B.
37. However, the Commissioner notes that this does not mean that all communications with the legal adviser of another party received by a public authority will be disclosed under FOISA. Each case must be considered on its own merits, and the Commissioner considers all cases with regard to the exemption(s) applied by the public authority.

Set C

38. The Commissioner notes the Authority's concerns about misinterpretation of the information, were it disclosed. However, the Commissioner's [guidance](#)² on the public interest test is clear that if a public authority is concerned that information might not be easily understood, or would be misinterpreted, there is nothing to stop the authority from explaining the information.
39. The Commissioner has consistently found that public authorities must consider whether information is genuinely sensitive and not apply the exemptions in section 30(b)(i) or (ii) on a blanket basis.
40. The Commissioner would urge the Authority, and all Scottish public authorities, to fully consider the actual content of information falling within the scope of a request when considering non class-based exemptions such as section 30(b)(i) and (ii). He fails to see how a public authority can come to a considered decision on whether an exemption is engaged or not without doing so. In his view, this is basic practice when considering any information for disclosure under FOISA.

² <https://www.foi.scot/sites/default/files/2022-03/PublicInterestTestFOISA.pdf>

41. Having carefully considered the information in set C, the Commissioner does not consider all of it to be expressed in a particularly free or frank fashion, to represent rough drafts or to otherwise represent anything more than routine exchanges.
42. While other information is expressed in a franker fashion, the Commissioner notes that this information appears to reflect the considered position of the Authority's senior staff. Given the professional responsibilities of these senior individuals, the Commissioner does not agree that disclosing this information would lead to a substantial inhibition to their willingness to provide considered advice or engage in deliberation.
43. The Commissioner considers that the Authority needed to provide more specific evidence to demonstrate why disclosure of the withheld information would, or would be likely to, substantially inhibit individuals operating at these levels from providing free and frank advice or engaging in the free and frank exchange of views for the purposes of deliberation in future.
44. On balance, the Commissioner is not persuaded, from the submissions he has received, or the content of the information itself, that disclosure of this information would, or would be likely to, result in the substantial inhibition required for the exemptions in section 30(b)(i) and (ii) of FOISA to be engaged.
45. The Commissioner therefore finds that the Authority was not entitled to rely on the exemptions in sections 30(b)(i) or 30(b)(ii) of FOISA to withhold this information.
46. However, the Commissioner considers that some of the withheld information, consisting of professional presentational advice, draft media lines and what he considers to be quick and candid initial responses in response to a rapidly developing situation, is materially more sensitive than the information so far discussed.
47. The Commissioner agrees that public authorities, in appropriate circumstances, should be allowed to benefit from a private space in which to draft and consider what their messaging should be and to receive candid assessments or unguarded views on how particular matters should be handled, particularly where the matter concerned is contentious and high-profile.
48. In the circumstances, having had regard to the nature, sensitivity and timing of this information, the Commissioner accepts disclosure would, or would be likely to, cause those involved to be more circumspect when providing comparable advice or expressing comparable views in future. He considers that this would materially inhibit the candour and robustness of these views, resulting in the Authority receiving slower and less candid views during rapidly developing situations.
49. The Commissioner therefore finds that the Authority was entitled to rely on the exemptions in sections 30(b)(i) or 30(b)(ii) of FOISA to withhold this information. He will now go on to consider the application of the public interest test in section 2(1)(b) of FOISA in relation to this information.

The public interest test

50. The "public interest" is not defined in FOISA but has been described as "something which is of serious concern and benefit to the public", not merely something of individual interest. The public interest does not mean "of interest to the public" but "in the interest of the public", i.e. disclosure must serve the interests of the public.

The Applicant's submissions on the public interest

51. The Applicant acknowledged that there was a broad public interest in allowing a private space within which the Authority's staff can provide free and frank advice. However, in this case, they argued that the public interest favoured disclosure of the information requested.
52. The Applicant submitted that there was a legitimate public interest in knowing how this particular public statement was formulated, particularly if the statement influenced public confidence in the governance, fairness and transparency of the Authority.
53. The Applicant commented that internal communications about the public statement were not just "private deliberations": they shaped what was said on the public record. They considered that understanding how the statements were developed was essential for holding the authority to account.
54. The Applicant argued that the Authority should expect scrutiny when preparing public-facing communications, especially on matters involving tribunals and public trust. They commented that the Authority's staff, particularly those in senior roles, knew and expected FOI requests to be made in relation to important decisions and communications.
55. The Applicant highlighted that the publication of the statement prompted significant public debate and concern, including among local politicians and by [the Commissioner](#).³ In these circumstances, they considered that the public deserved to understand discussions around the publication of the statement and to see how this matter of significant import was handled internally.
56. Referring to the Commissioner's guidance on the public interest, the Applicant suggested that disclosure of the information requested would:
 - ensure fairness in relation to applications or complaints, reveal malpractice or enable the correction of misleading claims
 - help enable effective oversight of expenditure of public funds and that the public obtain value for money
 - contribute to a debate on a matter of public interest.

The Authority's submissions on the public interest

57. The Authority submitted that it is essential that the Authority's staff have access to a protected internal space within which they can seek, provide, and discuss advice and views freely before reaching an informed decision. The ability to engage in open and unconstrained deliberation is fundamental to effective public administration, and it is clearly in the public interest that the Authority is able to make well-reasoned, evidence-based decisions.
58. To discharge its statutory and operational functions, the Authority explained that it depends on receiving full, candid, and expert advice from a wide range of internal services, senior leaders, subject matter experts and external stakeholders. Disclosure of the information requested would be likely to inhibit the frankness, detail, and completeness of such advice in future.

³ <https://www.foi.scot/new-questions-over-nhs-fife-compliance>

59. The Authority submitted that disclosure of the information requested would lead to contributors reasonably anticipating the possibility of onward release, with the result that they might feel compelled to limit the extent of their contributions, moderate their views or avoid recording preliminary assessments in writing. This would diminish the quality of internal deliberation and would not serve the public interest.
60. The Authority noted that the contributions in question were provided specifically for the purpose of internal consideration and collective deliberation. They were not intended to be taken in isolation, nor would they provide an accurate or fair representation of the full decision-making context if separated from the deliberative process of which they formed part.
61. Having conducted a comprehensive consideration of the public interest test, the Authority also submitted that it had not identified an “overriding public benefit” to disclosure.

The Commissioner’s view

62. The Commissioner has carefully considered all of the arguments presented to him in relation to the public interest test, together with the information to which he has found the exemptions in section 30(b) of FOISA apply.
63. The Commissioner recognises the significant public interest that exists in relation to the specified employment tribunal and related matters. Specifically, he agrees that there is a clear public interest in understanding the discussions that the Authority had regarding the publication of the various versions of the statement.
64. However, the Commissioner also recognises the significant public interest that exists in enabling the Authority to discuss matters freely and frankly, without concern that exploratory discussions or preliminary views will be routinely disclosed into the public domain. He accepts that it is in the public interest that relevant stakeholders are not inhibited from giving their free and frank views in future, particularly in relation to a high-profile and contentious matter.
65. The Commissioner also considers that disclosing information that would limit the future provision of advice to the Authority, where to do so would substantially inhibit the quality or timeliness of that advice, would be contrary to the public interest.
66. The Commissioner acknowledges that there is a strong inherent public interest in the transparency of public authorities, and he agrees that public authorities should expect scrutiny of their decision-making processes. In his view, disclosure of the information to which he has found neither of the exemptions in section 30(b)(i) and (ii) of FOISA apply will go a significant way towards meeting the public interest in the information requested.
67. On balance, having examined the withheld information and the submissions from the Applicant and the Authority, the Commissioner is not satisfied that the public interest arguments in favour of disclosure are sufficiently strong to outweigh the public interest in maintaining the exemptions in section 30(b)(i) and (ii) of FOISA.
68. Consequently, the Commissioner finds that the public interest in maintaining the exemptions in section 30(b)(i) and (ii) of FOISA outweighs that in disclosure. He therefore accepts that the remaining information was properly withheld under these exemptions.
69. The Commissioner will write to the Authority to specify the information it was entitled to withhold under the exemptions in section 30(b)(i) and (ii) of FOISA.

Next steps

70. As noted above, the Authority only relied on the exemptions in section 30(b)(i) and (ii) of FOISA to withhold the information requested. The Commissioner has found that the Authority was entitled to withhold some information under these exemptions, but not other information.
71. For the information the Commissioner has found the Authority was not entitled to withhold under these exemptions, he notes that it includes certain third-party personal data which appears, on its face, capable of being withheld under the exemption in section 38(1)(b) of FOISA given the more junior roles of the individuals to whom the data relate.
72. In the circumstances, the Commissioner requires the Authority to disclose to the Applicant the information he has found to be wrongly withheld under the exemptions in sections 30(b)(i) and (ii) of FOISA, subject to the redaction of the third-party personal data of more junior individuals. He will specify to the Authority the third-party personal data that he accepts can be redacted.
73. While, in this case, the Commissioner accepts that certain third-party personal data may be withheld under section 38(1)(b) of FOISA, notwithstanding the fact that the Authority did not rely on that exemption, responsibility rests with public authorities to identify and justify any exemption relied upon. The Commissioner reserves the right to require disclosure where no applicable exemption has been properly applied.

Handling matters

74. In the circumstances, the Commissioner must comment further on the Authority's handling of the request.
75. During the investigation, the Authority informed the Commissioner that it had not even identified the information in scope of the request by the time of the review outcome. As a result, the Commissioner was required to issue an information notice to the Authority to require it to provide him with the information withheld from the Applicant.
76. Although it ultimately complied with the information notice, the Authority initially refused to provide the withheld information in response to the information notice because it had decided that the public interest favoured not identifying and locating the information falling within the scope of the request.
77. The Commissioner must stress that it is a basic requirement (a fundamental element of compliance with section 1(1)) when responding to a request under FOISA for public authorities to first identify and locate the information requested so that the specific content of the information can be assessed for disclosure. He has already stressed this basic practice to the Authority in [Decision 171/2025](#)⁴, which pre-dated the request under consideration in this decision notice.
78. As stated above, the Commissioner fails to see how a public authority can come to a considered decision on whether an exemption is engaged or not, without first identifying, locating and engaging with the information requested.
79. In the Commissioner's view, even a cursory inspection of the withheld information shows that the exemptions in section 30(b)(i) and (ii) of FOISA are unlikely to apply to a significant proportion of the information. He therefore considers it likely that if the Authority had

⁴ <https://www.foi.scot/sites/default/files/2025-07/Decision171-2025.pdf>

identified, located and engaged with the withheld information, in line with basic requirements, it would have resulted in at least some of the information being disclosed to the Applicant.

80. The Commissioner would also highlight that compliance with an information notice issued under section 50(1)(a) of FOISA is a binding statutory requirement: he has the right to certify to the Court of Session that an authority has failed to comply with an information notice. The Court of Session has the right to inquire into the matter and may deal with the authority concerned as if it had committed a contempt of court.
81. The Commissioner took these failings into account when he instigated his intervention into the Authority. Since then he has been reassured by the Authority's ongoing efforts and engagement with his office to improve its FOI practice and is satisfied that the work to address the issues identified is well established and that they are unlikely to happen again.

Decision

The Commissioner finds that the Authority partially complied 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 by correctly withholding some information under the exemptions in section 30(b)(i) and (ii), the Authority complied with Part 1 of FOISA.

However, by wrongly withholding other information under the exemptions in section 30(b)(i) and (ii), the Authority failed to comply with Part 1 of FOISA.

The Commissioner therefore requires the Authority to disclose the wrongly withheld information to the Applicant (subject to the permitted redaction of certain third-party personal data), by **26 October 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
11 September 2026