Scottish Information Commissioner
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Decision Notice 254/2026

East of Scotland Research Ethics Committee minutes

Authority: Tayside Health Board
Case Ref: 202301418

Summary

The Applicant asked the Authority for the minute of a specified meeting of the East of Scotland Research Ethics Committee. 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 or exchange of views for the purposes of deliberation. The Commissioner investigated and found that the Authority was not entitled to withhold the information requested and required the Authority to disclose the information to the Applicant.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(b) (Prejudice to effective conduct of public affairs); 47(1) and (2) (Application for decision by Commissioner).

Background

1. On 26 August 2023, following a response to an earlier information request, the Applicant made a fresh request for information to the Authority relating to the Research Ethics Application for Generation Scotland approved by the East of Scotland Research Ethics Committee 1 in February 2020. Specifically, she asked for a copy of the minutes of the meeting at which the substantial amendments seeking approval to include children aged 12 to 15 in the research were considered, with the names of the Committee members redacted.

2. The Authority responded on 18 September 2023. It withheld the information requested under the exemption in section 36(2) of FOISA.

3. On 25 September 2023, the Applicant wrote to the Authority requesting a review of its decision. She stated that she was dissatisfied with the decision because, while she acknowledged that there may be information of a confidential nature within the minute, she only wished to see the information related to the discussion which led to the approval for DNA samples to be received from children aged 12 to 15. She indicated that she was content for any "commercial" information to be redacted, as with personal data.

4. The Authority notified the Applicant of the outcome of its review on 17 October 2023. While it acknowledged that it could withhold personal information (i.e. the names of attendees) contained within the minute, it stated that it was withholding the minute under the exemptions in section 30(b) of FOISA.

5. On 14 November 2023, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. She stated that she was dissatisfied with the outcome of the Authority's review because she disagreed that the Authority was entitled to withhold the minute.

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 24 January 2024, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments.

8. The Authority was also asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and its comments to the Commissioner.

9. The case was subsequently allocated to an investigating officer.

10. During the investigation, the Authority provided further comments to the Commissioner.

11. At review stage and in its comments to the Commissioner, the Authority only expressly relied on the exemptions in section 30(b)(i) and (ii) of FOISA. While the schedule of information the Authority provided to the Commissioner indicated that the Authority also wished to rely on the exemption in section 38(1)(b) of FOISA, the Authority has not otherwise expressly relied on, or provided him with any submissions in support of, this exemption. In what follows, the Commissioner will therefore only consider the application of the exemptions in section 30(b)(i) and (ii) of FOISA.

Commissioner's analysis and findings

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

13. As stated in previous decisions, in Scottish Ministers v Scottish Information Commissioner [2006] CSIH 8, at paragraph [18], the Court of Session recognised that:

> "… 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."

14. In this decision notice, the Commissioner has endeavoured to give as full an 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 30(b)(i) and (ii) of FOISA – Prejudice to the effective conduct of public affairs

15. There are two exemptions in section 30(b) of FOISA: section 30(b)(i) and (ii). In order for the Authority to rely on these exemptions, 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.

16. 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.

17. The Commissioner's guidance[1] on the exemptions in section 30 of FOISA 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.

The Applicant's submissions

18. The Applicant disagreed that the Authority was entitled to withhold the minute in question – a decision she found "surprising".

19. The Applicant provided other submissions relating to issues with the substantial amendment to include children aged 12 to 15 in the research in question. As these submissions are not

[1] https://www.foi.scot/sites/default/files/2022-04/BriefingSection30PrejudicetotheEffectiveConductofPublicAffairs.pdf

relevant to the application of the exemption, the Commissioner has not summarised them in his decision notice.

The Authority's submissions

20. The Authority noted that the research in question, the Scottish Family Health Study tissue bank, remained an active research resource. Unlike time-limited research projects, tissue bank approvals were renewed periodically to facilitate long-term longitudinal research and maximise the use of donated samples.

21. The Authority explained that the study was originally approved in 2010 and was currently operating under approval running until 2030. Previous approvals had been renewed on multiple occasions and numerous amendments, now known as modifications, had been submitted throughout the life of the tissue bank. As such, the Authority argued that the ethical and governance considerations recorded within the minute related to an ongoing activity rather than a concluded project.

22. The Authority stated that it remained concerned about the disclosure of information relating to the internal deliberations of a Research Ethics Committee sub-committee, which comprised volunteer REC members whose role was to provide independent ethical scrutiny. Although the individuals concerned were no longer serving members, it submitted that the principle remained that Research Ethics Committee decisions were collective decisions and individual members should not be identified or associated with particular deliberations.

23. The Authority noted that current Research Ethics Committee governance arrangements recognised the confidential nature of sub-committee discussions and minutes. In particular, it referred to section 2.81 of the Standard Operating Procedures for Research Ethics Committees[2] which provided that these minutes should be treated as confidential and not routinely disclosed.

24. The Authority also noted that section 3.2.6 of the Governance arrangements for Research Ethics Committees[3] stated that these Committees were to be independent and impartial and that their opinion must be free, and seen to be free, from conflicts of interest.

25. The Authority therefore submitted that it must withhold the minute in question to ensure that Research Ethics Committees could continue to pursue their future work without the concern of knowing that discussions and opinions would be made public in response to an information request. If this was to be the case, the Authority argued that it was likely that members would, particularly where proposals involved sensitive or potentially contentious ethical issues, temper their opinions and comments and, in some cases, refuse to participate.

26. The Authority submitted that disclosure of the withheld information would therefore have a detrimental impact on the work of Research Ethics Committees, the effectiveness of which depended upon members being able to express preliminary views, test arguments and raise concerns without concern that comments recorded as part of a deliberative process might subsequently be disclosed out of context.

[2] https://s3.eu-west-2.amazonaws.com/www.hra.nhs.uk/media/documents/RES_Standard_Operating_Procedures_Version_7.6_September_2022_Final.pdf

[3] https://s3.eu-west-2.amazonaws.com/www.hra.nhs.uk/media/documents/GAfREC_Final_v2.1_July_2021_Final.pdf

27. The Authority explained that it did not consider "simple redaction" would adequately protect the confidentiality of the deliberative process or remove the risk of attributing particular views to individual reviewers.

28. The Authority commented that it was important that the information contained within the withheld minute should be viewed in its proper context. The minute reflected part of an ethical discussion between Research Ethics Committee members and researchers regarding participant-facing materials, rather than a final statement of concern regarding the recruitment of children and young people. It submitted that disclosure of "isolated comments" from that discussion would not accurately reflect the wider review process, the justification provided by the researchers, or the extensive ethical scrutiny of that application.

29. The Authority also noted that the minute contained information extending beyond the specific issue raised by the Applicant and included discussion of other matters considered by the sub-committee.

The Commissioner's view

30. The Commissioner has considered all of the relevant submissions, together with the withheld information.

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

32. As with other exemptions imparting 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 (certainly the foreseeable) 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.

33. As a starting point, the Commissioner notes that the Applicant, in her requirement for review, expressly limited the scope of information she wished to obtain as being the information related to the discussion which led to the approval for DNA samples to be received from children aged 12 to 15.

34. The Commissioner therefore accepts that information in the withheld minute relating to other matters considered by the sub-Committee falls outwith the subset of information specified in the Applicant's requirement for review. He will not consider this information further in his decision notice.

35. The Commissioner notes that section 2.81 of the Standard Operating Procedures for Research Ethics Committees does not prohibit disclosure of the minutes of the Committee. In fact, the wording of section 2.81 – that it is subject to the provisions of FOI law and that minutes should not be "routinely disclosed" – expressly contemplates that disclosure may occur. The Standard Operating Procedures therefore provide no blanket basis for withholding Research Ethics Committee minutes. Any refusal must be justified by reference to the content of the particular minutes.

36. The Commissioner has considered the Authority's arguments that the study remains active, that discussion on future amendments to the study would be influenced by the knowledge that minutes could be disclosed in response to an information request and that the effectiveness of the Research Ethics Committee depended on a private space of sorts in

which to discuss matters freely and frankly, without concern that comments made in this space would be disclosed to the world-at-large.

37. The Commissioner must be careful not to reveal the specific content of the withheld information. However, the minute does not attribute the views expressed, to the extent they are recorded in the minute, to particular individuals but presents them as the views of the members of the Committee. In any event, the Applicant's request expressly allowed the names of the Committee members to be redacted.

38. The Commissioner also does not consider that the minute records views or advice at the level of detail suggested by the Authority's submissions. Instead, the withheld information is expressed in high-level terms and, in substance, records the decision (or opinion) reached by the Committee. To the limited extent that discussion is recorded, it is expressed in brief, high-level and uncontroversial terms.

39. While the Authority's argument that the effectiveness of the Research Ethic Committee depended on a private space of sorts might have greater force in relation to withheld information of a materially different nature, the Commissioner does not accept that, even in relation to an active study, disclosure of the withheld information under consideration, given its nature, would, or would be likely to, result in the substantial inhibition required for the exemptions in section 30(b)(i) and (ii) to be engaged.

40. In reaching this conclusion, the Commissioner has considered information available in the public domain at the time of the review (i.e. 17 October 2023) and, indeed, prior to the Applicant making her request regarding the substantial amendments seeking approval to include children aged 12 to 15 in the research.

41. As noted above, the Commissioner must be careful not to reveal the specific content of the withheld information. However, given the nature of the minute and the Applicant's express allowance for the names of the Committee members to be redacted, disclosure of the withheld information would appear to add little to the information already in the public domain at the time of the request and the review.

42. In the Commissioner's view, the prior availability of this information further reduces the extent to which disclosure of the minute could reveal information capable of causing the substantial inhibition required for the exemptions in section 30(b)(i) and (ii) to be engaged.

43. The Commissioner would remind public authorities of the importance of treating each request for information on a case-by-case basis. The fact that information should not be withheld in one case should not be taken to imply that information of a particular type will routinely be disclosed in future. The circumstances of each case, including the content of the specific information under consideration, must be taken into consideration and, where required, the public interest in each case assessed on its own merits. In this case, the Commissioner considers that the Authority's submissions lack focus on the actual content of the withheld information.

44. To the extent that the Authority has concerns that disclosure of the withheld information will lack context, it can choose to provide a commentary alongside this information, which places it in context or explains its limitations as it sees fit.

45. In conclusion, the Commissioner is not persuaded from the submissions he has received from the Authority and the content of the information itself, that disclosure of most of the withheld information would, or would be likely to, either result in the harm claimed by the

Authority or the harm required for the exemptions in section 30(b)(i) and (ii) of FOISA to be engaged.

46. The Commissioner therefore finds that the Authority was not entitled to rely on the exemptions in sections 30(b)(i) and (ii) of FOISA to withhold the information requested.

47. Given that the Commissioner does not accept the application of the exemptions in section 30(b)(i) and (ii) of FOISA, he is not required to consider the application of the public interest test in section 2(1)(b).

48. The Commissioner therefore requires the Authority to disclose the withheld information to the Applicant. However, given the terms of the Applicant's request and requirement for review, the Authority is permitted to redact the names of the Committee members and the information described in paragraphs 33 and 34 above. He will write to the Authority to specify the information to be disclosed.

Decision

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

In particular, the Commissioner finds that the Authority was not entitled to withhold the information requested under the exemptions in section 30(b)(i) and (ii) of FOISA.

The Commissioner therefore requires the Authority to disclose to the Applicant the wrongly withheld information, **by 20 November 2026**.

As noted above, the Authority is permitted to redact the names of the Committee members and the information described in paragraphs 33 and 34 above. The Commissioner will write to the Authority to specify the information to be disclosed.

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 October 2026