Scottish Information Commissioner
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Decision Notice 275/2026

Application of Unacceptable Actions Policy

Authority: Scottish Ministers
Case Ref: 202501125

Summary

The Applicant asked the Authority for information regarding its application of its Unacceptable Actions Policy (UAP) to him. The Authority refused to disclose the information under FOISA on the basis that it was the Applicant's own personal data and therefore exempt from disclosure. The Commissioner investigated and found that the Authority complied with FOISA in responding to the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (4) and (6) (General entitlement); 38(1)(a) (2A), (5) (definitions of "the data protection principles", "data subject", "personal data" and "the UK GDPR") (Personal information); 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) and 15 (Right of access by the data subject).

Data Protection Act 2018 (the DPA 2018) sections 3(2), (3) and (5) (Terms relating to the processing of personal data).

Background

1. On 29 April 2025, the Applicant made a request for information to the Authority. He asked for:

(i) "… a Freedom of Information/Subject Access request to publish the legal guidance you sought to apply the Unacceptable Actions Policy on me…"

(ii) "… along with all evidence (including all communications and reasoning discussed by your management) that you have followed the correct processes to apply the UAP."

2. The Authority responded on 21 May 2025, in the following terms:

"… the [Authority] does not have the information you have requested. The reasons why we don't have the information is the decision to implement the Unacceptable Actions Policy is made by senior management and does not require legal advice".

3. On 28 May 2025, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision because the Authority had failed to respond to part (ii) of his request.

4. The Authority notified the Applicant of the outcome of its review on 17 June 2025. It apologised for its failure to respond to part (ii) of his request and otherwise took the following steps:

- it notified him that it held information falling within the scope of part (ii), which it was withholding under section 38(1)(a) of FOISA as it comprised his own personal data
- it advised him that this information had been provided to him via a separate subject access request (SAR) response under the UK GDPR (which it specified)
- it informed him that its SAR response provided "all the information that is held within scope of your request".

5. On 11 July 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, having inspected the information disclosed to him under the UK GDPR, he considered that the Authority's response (in terms of FOISA) to part (ii) of his request was incomplete.

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 28 August 2025, the Authority was notified in writing that the Applicant had made a valid application. 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 how the Authority interpreted the request, its searches for relevant information and its reliance on the exemption in section 38(1)(a) of FOISA.

9. The Applicant raised some matters in his application to the Commissioner that do not fall within the Commissioner's remit. The Commissioner will therefore not consider these matters in his decision notice. His remit is limited to considering whether the Authority complied with FOISA in responding to part (ii) of the request. He has no locus to comment

on the Authority's compliance with its UAP or to determine what information an authority ought to record, or how: he is concerned with what information the authority actually holds.

Commissioner's analysis and findings

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

Section 38(1)(a) – Personal information (requester's own personal data)

11. Section 38(1)(a) of FOISA contains an absolute exemption in relation to personal data of which an applicant is the data subject. The fact that it is absolute means that it is not subject to the public interest test set out in section 2(1) of FOISA.

12. This exemption exists under FOISA because individuals have a separate right to make a request for their own personal data under the UK GDPR. This route is more appropriate for individuals accessing their personal data, as it ensures that it is disclosed only to the individual.

13. Section 38(1)(a) of FOISA does not deny individuals a right to access information about themselves but ensures that the right is exercised under the correct legislation (the UK GDPR) and not under FOISA.

14. Personal data are defined in section 3(2) of the DPA 2018 which, read with section 3(3), incorporates the definition of personal data in Article 4(1) of the UK GDPR:

    "… any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person".

15. The Commissioner has carefully considered the information withheld under section 38(1)(a) of FOISA, which was disclosed to the Applicant in response to his SAR under the UK GDPR and which the Authority considered fully satisfied part (ii) of his request. It is apparent that the subject matter of the request and the withheld information relate to a matter directly concerning the Applicant and that the Applicant could be identified from the information the Authority withheld under section 38(1)(a) of FOISA.

16. The Commissioner therefore considers that the information withheld under section 38(1)(a) of FOISA is the Applicant's own personal data and can therefore be withheld under this exemption.

Section 1(1) – General entitlement

17. 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. In this case, as noted above, the relevant qualification is the exemption in section 38(1)(a) of FOISA.

18. The information to be given is that held by the authority at the time the request is received, as defined by section 1(4) of FOISA. This is not necessarily to be equated with information an applicant believes the authority should hold.

19. 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 of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.

20. The Commissioner also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.

The Applicant's submissions

21. The Applicant submitted that part (ii) of his request sought "the reasoning and evidence that [the Authority] had followed the correct processes and procedures to apply the Unacceptable Actions Policy (UAP) on me".

22. The Applicant considered that the SAR response referred to by the Authority did not contain the information specified in his FOISA request (i.e. "evidence the correct process was followed"). In his view, the Authority had therefore provided an incomplete response to his FOISA request and, furthermore, was refusing to provide the information requested on the basis that doing so would "prove" that it had failed to follow the correct process.

The Authority's submissions

23. The Authority explained that it had interpreted part (ii) of the request as seeking "all information held about the application of the UAP", a matter in relation to which the Applicant continued to be dissatisfied.

24. The Authority considered that all relevant information on its decision-making in respect of the UAP had been provided in its response to the Applicant's SAR (the precise terms of which it provided to the Commissioner).

25. The Authority submitted that, given it was satisfied that the information requested by the Applicant under FOISA was the same as that requested in his subject access request, it had not been necessary to carry out further searches for relevant information beyond locating its SAR response.

The Commissioner's view

26. The Commissioner has carefully considered the submissions made by both parties, together with the terms of the respective FOISA request and SAR and the withheld information.

27. As stated above, the Commissioner's remit is limited to considering whether the Authority complied with FOISA in responding to part (ii) of the request. In this case, in this respect, his remit is limited to establishing what records exist and the extent to which the information actually requested is held by the Authority.

28. Having considered the Authority's submissions regarding its interpretation of the request, he recognises that it applied a broad reading (i.e. "all information relating to the UAP"). In the Commissioner's view, this would encompass any and all "evidence" relating to its application of the UAP to the Applicant.

29. The Commissioner has considered the terms of the SAR, which related, in part, to communications, evidence and reasoning in respect of the UAP. Having done so, he is

satisfied that searches undertaken on the basis of those terms would capture all information falling within the scope of the specific terms of part (ii) of the Applicant's FOISA request.

30. The Commissioner has also inspected the information withheld in terms of section 38(1)(a) of FOISA together with the information disclosed in response to the Applicant's SAR. He is satisfied that this information provides a comprehensive picture of the Authority's decision-making regarding, and subsequent application of, its UAP to the Applicant. It is not apparent to the Commissioner that any information falling within the scope of part (ii) of the request has been omitted from the withheld information.

31. In all of the circumstances, the Commissioner is satisfied that the Authority's restriction of its searches to locating its response to the Applicant's SAR was reasonable and proportionate in this case. Given the explanations and submissions provided, the Commissioner accepts that the Authority took adequate and proportionate steps in the circumstances to establish what information was held. On balance, he is satisfied that the Authority does not hold any further information falling within the scope of part (ii) of the request.

32. The Commissioner can only focus on what recorded information is actually held by the Authority (or was at the time of the request). While the Applicant appeared to have believed and expected different or further information to be held by the Authority, the Commissioner is satisfied, on balance, that this is not the case.

33. The Commissioner is therefore satisfied, on the balance of probabilities, that the Authority does not (and did not, on receipt of the request) hold any further information falling within the scope of part (ii) of the Applicant's request. Consequently, he finds that the Authority responded to the request in accordance with Part 1 of FOISA.

Decision

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

Appeal

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

Euan McCulloch
Head of Enforcement

16 November 2026