

Decision Notice 100/2022

Handling of harassment complaints involving current or former ministers

Applicant: The Applicant

Authority: Scottish Ministers

Case Ref: 202100898

Summary

The Applicant asked the Authority about the handling of harassment complaints involving ministers. The Authority withheld information on the grounds that the information was exempt from disclosure under section 26(c) (contempt of court) and section 35(1)(g) (ascertaining if conduct was improper). The Commissioner investigated and agreed that the information was exempt from disclosure.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1) and (2)(b) (Effect of exemptions); 26(c) (Prohibitions on disclosure); 35(1)(g) and (2)(b) (Law enforcement); 47(1) and (2) (Application for decision by Commissioner); 50(1)(a) (Information notices)

Contempt of Court Act 1981 (the 1981 Act) section 11 (Publication of matters exempted from disclosure in court)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 19 August 2020, the Applicant made a request for information to the Authority relating to its procedures for [Handling of harassment complaints involving current or former ministers](#)¹. Only two parts of the request are the subject of this Decision Notice:
 - The outcome of each complaint including any official report (question 2).
 - If a meeting took place as part of the outcome of the investigation into the complaint, ...the date, time, location, attendance record, agenda, minutes and any handouts provided to attendees (question 2a).
2. The Authority responded on 17 September 2020. It refused to disclose the information as it believed the information was exempt from disclosure including under sections 26(c) and 35(1)(g) of FOISA.
3. On 28 September 2020, the Applicant wrote to the Authority requesting a review of its decision. He argued that the exemptions had been applied incorrectly.
4. The Authority notified the Applicant of the outcome of its review on 26 November 2020. It withdrew its reliance on the exemptions and notified the Applicant that it did not in fact hold the information (section 17(1) of FOISA).
5. On 1 December 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA.
6. The Commissioner investigated this application and, on 27 May 2021, issued [Decision 083/2021](#)². He found that the Authority did hold the information and required it to provide the Applicant with a new review outcome.
7. The Authority issued a new review response on 21 July 2021. The Authority explained that, in light of Decision 083/2021, it had interpreted question 2 as seeking a copy of the Decision Report prepared by the Permanent Secretary, of 21 August 2018, which was subsequently reduced by the Court of Session on 8 January 2019 (“the Decision Report”). The Authority withheld this Decision Report in full under section 26(c) and section 35(1)(g) of FOISA.
8. In relation to question 2a, the Authority:
 - applied the exemption in section 25(1) to information which had already been published (and provided the Applicant with a link to where the information could be located)
 - notified the Applicant under section 17(1) of FOISA that it did not hold some of the information (agenda, attendance record and minutes)
 - applied the exemptions in sections 26(c) and 35(1)(g) of FOISA to the remaining information it held.
9. On 26 July 2021, the Applicant made a further application to the Commissioner for a decision in terms of section 47(1) of FOISA. He argued that:

¹ <https://www.gov.scot/publications/handling-of-harassment-complaints-involving-current-or-former-ministers/>

² <https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2021/202001437.aspx>

- (i) while some redaction would be necessary, the Authority had taken an “overly cautious, overly legalistic” interpretation not only of the exemption in section 26(c) but of the undertaking it had given to the Court of Session
 - (ii) section 35(1)(g) did not apply – and even if it did, the public interest favoured disclosure.
10. The Applicant did not question the Authority’s reliance on section 17(1) or section 25(1), so these matters are not considered in this Decision Notice.

Investigation

11. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
12. On 17 August 2021, 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. (Given the sensitivity of the information and the Authority’s concerns in relation to the undertaking it had given to the Court of Session, discussed below, the Commissioner subsequently issued an Information Notice to the Authority under section 50(1)(a) of FOISA. This Notice required the Authority to give the Commissioner access to the information which was the subject of the application. The Authority complied in full with the Information Notice.)
13. 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 in relation to the exemptions in sections 26(c) and 35(1)(g).

Commissioner’s analysis and findings

14. The Commissioner is required to consider whether the Authority’s revised review of 21 July 2021 complied with Part 1 of FOISA in responding to parts 2 and 2(a) of the Applicant’s request of 19 August 2020.
15. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.
16. He has endeavoured to give as full account of his reasoning as he can, but, as recognised by Court of Session in [Scottish Ministers v Scottish Information Commissioner](#) [2006] CSIH 8³, at paragraph [18]:
- "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."

Section 26(c) - Prohibitions on disclosure

17. The Authority argued that the Decision Report (request 2) and any information falling within (request 2a) were exempt from disclosure in terms of section 26(c) of FOISA.

³ <http://www.scotcourts.gov.uk/search-judgments/judgment?id=a94886a6-8980-69d2-b500-ff0000d74aa7>

18. Under section 26(c) of FOISA, information is exempt information if its disclosure by a Scottish public authority (otherwise than under FOISA) would constitute, or be punishable as, a contempt of court.
19. This exemption is not subject to the public interest test in section 2(1)(b) of FOISA (see section 2(2)(b)).

The section 11 order and the undertaking

20. On 29 August 2018, Alex Salmond, former First Minister, commenced judicial review proceedings against the Authority, challenging the handling of complaints which had been made against him.
21. On 8 October 2018, Lord Woolman made an order under section 11 of the 1981 Act (“the section 11 order”) in relation to these proceedings. The order was in the following terms (emphasis added):

“The Lord Ordinary ... makes an order in terms of Chapter 102.3(5) of the Rules of Court **withholding** from the public in these proceedings **the names and the designations, past and present, of the complainers** referred to in the decision report which is the subject matter of this petition **and any other information concerning those complainers which would lead to their identification**; orders, in terms of section 11 of the Contempt of Court Act 1981, that no publication by any means, including on social media, of any of the aforementioned information relating to the complainers, be made ...”
22. The parties entered into a Joint Minute which brought the proceedings to a conclusion. As part of this, the Authority gave the following undertaking:

“Save insofar as necessary to comply with any lawful requirement, to co-operate with any criminal investigation, or as may otherwise be approved by the Court, the [Authority] will not cause or permit the publication or dissemination to any other person of the said Investigating Officer’s report or any of the statements or other material taken or prepared by her in the course of preparing same.”
23. The Ministers noted that, where such an undertaking is given, a failure to take reasonable steps to ensure that the undertaking is adhered to, if that failure is so gross as to demonstrate a disregard for the importance which should have been attached to the undertaking, would constitute a contempt of court (see [Beggs v Scottish Ministers](#)⁴ 2005 1 S.C. at paragraph 46).
24. In addition, although the judicial review proceedings were concluded on 8 January 2019, the section 11 order continued (and continues) to have effect.

“Lawful requirement”

25. The Applicant questioned the Authority’s interpretation of “lawful requirement” in the undertaking, arguing that a disclosure under FOISA would constitute a “lawful requirement” for the purposes of the undertaking.
26. The Authority disagreed. It referred to the wording of section 26(c), which states (emphasis added):

⁴ <https://www.scotcourts.gov.uk/search-judgments/judgment?id=3a918aa6-8980-69d2-b500-ff0000d74aa7>

“Information is exempt information if its disclosure by a Scottish public authority (**otherwise than under this Act**) would constitute, or be punishable as, a contempt of court

27. In the Authority’s view, the effect of the words “otherwise than under this Act” means that authorities should discount the requirement to disclose information under section 1(1) of FOISA for the purposes of determining whether disclosure would constitute, or be punishable as, a contempt of court. Accordingly, the duty imposed by section 1(1) of FOISA does not, in the Authority’s view, comprise a “lawful requirement” for the purposes of the undertaking.
28. The Commissioner cannot disagree with this interpretation. The effect of the phrase, “otherwise than under this Act” means that any duty to disclose information (the duty is subject to sections 2, 9, 12 and 14 (section 1(6)) is not a “lawful requirement” for the purposes of the undertaking.
29. The Authority was unable to identify another “lawful requirement” which would allow disclosure without breaching the undertaking. The Commissioner is satisfied that no other “lawful requirement” exists.
30. The Commissioner is therefore satisfied that the disclosure of information under FOISA, which disclosed the Investigating Officer’s report or any of the statements or other material taken or prepared by her in the course of preparing same, would breach the undertaking and would constitute a contempt of court. He is further satisfied that the disclosure of information under FOISA, which would lead to the identification of the complainers, would breach the section 11 order and would constitute a contempt of court. It would therefore be exempt from disclosure under section 26(c) of FOISA.

Would disclosure lead to the identification of the complainers?

31. The Applicant accepted that information needed to be redacted to avoid falling foul of the section 26(c) exemption. However, he believed that the Authority had applied “an overly cautious, overly legalistic interpretation” of the undertaking to the court and that disclosing information which would “potentially contribute to the potential identification” of a complainer would not fall foul of the undertaking. He therefore asked the Commissioner to determine whether any of the information could be disclosed without leading to the complainers being identified.
32. The Commissioner asked the Authority to address this point. The Authority considered that disclosing the withheld information would place into the public domain information concerning the complainers which would contribute to the process of identifying them when combined with other information which is in the public domain. The Authority provided the Commissioner with detail explaining how, in its view, disclosing information could lead to identification either directly or by a process of elimination.
33. It is clear, for the reasons set out above, that any information which is covered by the undertaking is exempt from disclosure under section 26(c) of FOISA.
34. However, the question the Commissioner must consider is whether all of the information withheld by the Authority which is not covered by the undertaking is indeed subject to the court order – in other words, is there information which could be disclosed which would not breach the section 11 order?

The Commissioner’s findings

35. The Commissioner has considered carefully the information which has been withheld under section 26(c). He has been conscious of the fact that he must consider all of the means

reasonably likely to be used by third parties to identify the complainers. As noted in [Decision 125/2019](#)⁵, which involved a request for the contents of the complaints made against Mr Salmond, the amount of speculation as to the identities of the complainers, particularly given the high profile of Mr Salmond, means that any information disclosed in relation to the complaints is highly likely to be scrutinised, in conjunction with other information already in the public domain, in an attempt to identify the individuals.

36. Having carefully considered the information, the Commissioner is satisfied that disclosing the vast majority of the information would lead to the identification of the complainers, either directly or indirectly, contrary to the section 11 order. Such information is exempt from disclosure under section 26(c) of FOISA.
37. There is a small amount of information which is not covered by the terms of the undertaking and which the Commissioner does not consider would lead to the identification of the complainers. The Commissioner will now go on to consider whether this information is exempt from disclosure under section 35(1)(g) of FOISA

Section 35(1)(g) – Law enforcement

38. Under section 35(1)(g) of FOISA, information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the exercise by any public authority (as defined by the Freedom of Information Act 2000) or by any Scottish public authority (as defined by FOISA) of its functions for any of the purposes listed in section 35(2). (The Authority is a Scottish public authority for the purposes of FOISA.)
39. The Authority argued that disclosure of the information would, or would be likely to, prejudice substantially the exercise of its functions of the purposes specified in section 35(2)(b), i.e. to ascertain whether a person is responsible for conduct which is improper.
40. The exemptions in section 35 are all qualified exemptions, in that they are subject to the public interest test in section 2(1)(b) of FOISA. In addition, the exemptions can only apply where substantial prejudice would, or would be likely to, occur as a result of the disclosure of the information. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner's view is that the harm in question must be of real and demonstrable significance. An authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur and therefore 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.
41. The Commissioner must therefore consider three separate matters:
 - does the Authority have a function in relation to the purpose mentioned in section 35(2)(b)?
 - if it does, would disclosure of the information prejudice substantially, or be likely to prejudice substantially, the Authority's ability to exercise that function?
 - if such prejudice would, or would be likely to, occur, does the public interest in maintaining the exemption outweigh that in disclosure of the information?

⁵ <https://www.itspublicknowledge.info/decision-1252019>

Does the Authority have a function in relation to section 35(2)(b)?

42. The Applicant noted that, since the complaints against Mr Salmond were investigated, the Authority has changed its procedures and that future investigations would be carried out externally. He suggested that the move to an independent procedure meant that the Authority no longer had a function in relation to considering whether a minister had acted improperly. Accordingly, in his view, the exemption could not apply.
43. The Authority commented that, although the individuals who will investigate complaints and make decisions on complaints made under the revised procedure will be external to the Authority, the revised procedure remains a grievance process to be used by civil servants and the Authority is ultimately responsible for it as an employer. The Authority did not agree with the Applicant's assertion that the revised procedure is independent of its functions in the way suggested.
44. The Commissioner agrees with the Authority that the investigation of complaints will continue to be a function of the Authority, even if the investigation will be carried out externally. (The Commissioner also notes that the revised procedures were not in place when the Applicant made his information request.)
45. The Commissioner is satisfied that the Authority has a function in relation to the section 35(2)(b) of FOISA

Would disclosure prejudice the exercise of that function?

46. The Authority submitted that disclosure of the information would, or would be likely to, cause substantial prejudice to its ability to investigate future complaints of improper conduct because it is likely to deter other complainers from coming forward in future.
47. The Authority argued that those who make complaints have a reasonable expectation of confidentiality, and that this is particularly important where there is an imbalance of power (as when a civil servant makes a complaint about a minister). The negative effects of steps which reduce the confidentiality available to complainers were canvassed by the complainers in the evidence they gave to the Scottish Parliament's Committee on the Scottish Government Handling of Harassment Complaints.
48. The Authority also commented that the persons complained about would be less likely to cooperate voluntarily with investigations if they believed that information provided by them was likely to be disclosed outwith the investigation process.
49. Taken together, this would, in the Authority's view, substantially prejudice its ability to investigate such complaints, and so would constitute substantial prejudice for the purposes of ascertaining whether a person is responsible for conduct which is improper.
50. The Applicant disagreed. He noted that the Authority had accepted that the procedures under which the complaints against Mr Salmond had been handled were not appropriate for continued use and that future complaints against ministers would be handled by an external, independent process.
51. He considered that the Authority's concerns that disclosure of the information would deter complainants from coming forward, etc, would only be legitimate if the process for handling harassment complaints was not to be changed.
52. This point was put to the Authority. In its view, the revised procedure was irrelevant to the significant and substantial deterrent effect on individuals' willingness to come forward.

Notwithstanding the specifics of the procedure applied, if a complaint by a civil servant or any documents associated with it, including an investigation or decision report, may be subject to disclosure, they are likely to be concerned and inhibited from making a complaint.

53. The Authority also noted that the revised procedure was not in place at the time of the Applicant's request.
54. Finally, in the Applicant's view, the Authority's handling of harassment complaints relating to Mr Salmond since 2018 "is significantly more likely to prejudice any function of government than disclosure of the information sought" and "there is unlikely to be the situation where complainants are forced to deal with their complaints being made public without their permission, a judicial review of the decision report around their complaints, a criminal trial, a full parliamentary inquiry, its report, and two independent reports into the conduct of the investigations and senior ministers involved in handling the complaints".
55. The Commissioner acknowledges that complaint investigations of this kind rely upon the cooperation of witnesses coming forward and providing evidence: they would expect their identities to be revealed only in the context of the investigation and any subsequent action which would follow that investigation. The Commissioner accepts that disclosure outwith that context would be likely to have a serious negative impact on the investigative process, inhibiting individuals who might otherwise have done so from coming forward and providing full and frank statements. He has borne in mind that investigations of this kind will always have a degree of political sensitivity attached to them.
56. The Commissioner is satisfied, in the circumstances, that disclosure of the information would make it much less likely that those participating in such an investigation, such as complainers and witnesses, would be willing to provide information about concerns, to the substantial prejudice of the Authority's ability to investigate matters concerning the conduct of persons. This would, in turn, be to the substantial prejudice of the Authority's function to promote the observance of standards of conduct.
57. The Commissioner notes the arguments put forward by the Applicant in relation to the revised procedures now in place. However, in the Commissioner's view, the same issues would arise, regardless of the procedures in place.
58. He also notes that the Applicant believes that the handling of the complaints against Mr Salmond was significantly more likely to cause harm than the disclosure of the information he had asked for. This may, or may not, be the case. However, it is the effect of the disclosure of the information the Applicant has asked for which is relevant here.
59. The Commissioner is satisfied that disclosure of the information would have prejudiced substantially, or would have been likely to prejudice substantially, the exercise of the Authority's functions for the purpose mentioned in section 35(2)(b) of FOISA. Consequently, he is satisfied that the information is exempt from disclosure in terms of section 35(1)(g) of FOISA.

Does the public interest in maintaining the exemption outweigh that in disclosure of the information?

60. As noted above, the exemption in section 35(1)(g) is subject to the public interest test contained in section 2(1)(b) of FOISA. This means that, although the Commissioner has accepted that the information is exempt from disclosure under section 35(1)(g) of FOISA, he must order the information to be disclosed unless he is satisfied, in all the circumstances of

the case, that the public interest in maintaining the exemption outweighs that in disclosing the information.

61. The Authority recognised that there is a general public interest in disclosure as part of open and transparent government, and to inform public debate. It also noted that there is a public interest in understanding how it dealt with these complaints, particularly given the outcome of the subsequent judicial review proceedings. However, the Authority believed that there was a greater public interest in ensuring that future complainers are not deterred from making complaints of improper conduct, and in respecting the confidentiality which complainers reasonably expect as part of that process. In its view, the function of ascertaining whether a person is responsible for conduct which is improper would be frustrated in its entirety if complainers were unwilling to make such complaints because they reasonably apprehended that information would be made public.
62. Although the Applicant did not believe the exemption applied, he stated that full transparency and, therefore, accountability around the complaints against Mr Salmond and the Authority's subsequent handling of them was paramount. If it were not, the judicial review, etc. would not have taken place. He therefore believed the information should be disclosed on public interest grounds.
63. The Commissioner acknowledges the strong public interest in the accountability of public authorities. He acknowledges the general public interest in the Authority being open and transparent, particularly given the subject and history of the complaints.
64. However, the Commissioner also accepts that there is a strong public interest in ensuring that future complainers are not deterred from making complaints of improper conduct and that the Authority continues to be able to ascertain whether individuals are responsible for improper conduct, albeit under new procedures. It is important, with a view to ensuring high standards of conduct are observed, that the Authority is able perform these investigative functions effectively.
65. Taking account of all the circumstances of this case including the nature of the withheld information concerned, the Commissioner is satisfied that the public interest in maintaining the exemption outweighs that in disclosure. Consequently, he finds that the Authority was entitled to withhold the information in question under section 35(1)(g) 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.

Daren Fitzhenry
Scottish Information Commissioner

7 October 2022

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - ...
 - (b) section 26;
 - ...

26 Prohibitions on disclosure

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)-

...

- (c) would constitute, or be punishable as, a contempt of court.

35 Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-
 - ...
 - (g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);
 - ...

(2) The purposes are-

...

(b) to ascertain whether a person is responsible for conduct which is improper;

...

47 Application for decision by Commissioner

(1) A person who is dissatisfied with -

(a) a notice under section 21(5) or (9); or

(b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

(2) An application under subsection (1) must -

(a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);

(b) state the name of the applicant and an address for correspondence; and

(c) specify –

(i) the request for information to which the requirement for review relates;

(ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);
and

(iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

...

50 Information notices

(1) Where the Commissioner -

(a) has received an application under section 47(1); or

...

that officer may give the authority notice in writing (referred to in this Act as “an information notice”) requiring it, within such time as it specified in the notice, to give the officer, in such form as may be so specified, such information relating to the application, to compliance with this Act or to conformity with the code of practice as is so specified.

Contempt of Court Act 1981

11 Publication of matters exempted from disclosure in court

In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purposes for which it was so withheld.