

# Decision Notice 124/2022

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## Closure of places of worship

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**Public authority: Scottish Ministers**

**Case Ref: 202100417**



Scottish Information  
Commissioner

## Summary

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The Ministers were asked for details of any discussions or considerations made to ensure that the regulations and guidance on places of worship complied with the European Convention on Human Rights.

The Ministers disclosed some information, but withheld the remainder under various exemptions. In their review, they concluded that only one document fell within the scope of the request. As it was legal advice, they withheld it under section 36(1) of FOISA. During the investigation the Ministers identified further information that fell within the scope of the request, which they also withheld under section 36(1) of FOISA.

The Commissioner investigated and found that the Ministers had partially breached FOISA in responding to the request. While they had correctly withheld the legal advice under section 36(1) of FOISA, they had failed to identify all of the information falling within the scope of the request, had failed to comply with the timescales set out in FOISA, had initially withheld information which should have been disclosed in response to the request and had wrongfully stated that they were allowed 40 working days to respond to a requirement for review.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 10(1) (Time for compliance); 16(1) (Refusal of request); 19 (Content of certain notices); 21(1) (Review by Scottish public authority); 36(1) (Confidentiality)

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

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1. On 4 January 2021, the Applicant made a request for information to the Scottish Ministers (the Ministers). The information requested was:  
*...details of any meeting minutes, or other recorded information, that pertains to any discussion or consideration made to ensure the regulations and guidance on places of worship comply with the European Convention on Humans Rights - in particular article 9.2.*
2. The Ministers responded on 22 February 2021. They provided four redacted documents, with information withheld under sections 29(1)(a), 38(1)(b) and 30(b)(i) and (ii) of FOISA. They also withheld some documents in their entirety under section 29(1)(a) and 36(1) of FOISA, and they referred the Applicant to information that was available online, applying section 25(1) of FOISA to that information.
3. On 22 February 2021, the Applicant wrote to the Ministers, requesting a review of their decision as he did not agree with the Ministers' reliance on the exemptions contained in sections 29(1)(a), 30(b)(i) and (ii), and 36(1) of FOISA. He did not challenge their reliance on section 38(1)(b) of FOISA.
4. The Ministers notified the Applicant of the outcome of their review on 31 March 2021. They concluded that only one document actually fell under the scope of the request and they upheld the application of the exemption contained in section 36(1) of FOISA to this single document. The Ministers explained that the original response had taken a very broad

interpretation of the Applicant's request and had identified information as being relevant when it was not, in fact, within the scope of the request.

5. On 31 March 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Ministers' review because:
  - (i) they had failed to respond to the original request and requirement for review within 20 working days;
  - (ii) they gave him inaccurate information regarding the legal timescales for applying for a review;
  - (iii) the review removed documents from the scope of the request, that were deemed to be in scope in the original response; and
  - (iv) they had not given due consideration to the public interest test.

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 1 April 2021, the Ministers were notified in writing that the Applicant had made a valid application. The Ministers were asked to send the Commissioner the information withheld from the Applicant. The Ministers provided the information and the case was 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 Ministers were invited to comment on this application and to answer specific questions. These related to their application of the exemption in section 36(1) of FOISA, and their view that some information was no longer within the scope of the request.

## **Commissioner's analysis and findings**

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9. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Ministers. He is satisfied that no matter of relevance has been overlooked.

### **Information disclosed during the investigation**

10. During the investigation, the Ministers reassessed the information they had deemed to be out of scope at review stage, and they concluded that some of the information was, in fact, within the scope of the request. They disclosed this information to the Applicant.
11. After being questioned about the searches they had conducted, the Ministers identified further information that they considered to fall within the scope of the request. They identified 15 new documents in total, which comprised emails, attachments and other papers. They subsequently disclosed a small amount of this information to the Applicant, but withheld some text from one document under section 30(c) of FOISA: the information in the remaining documents was withheld under section 36(1) of FOISA.

12. With regard to the information the Ministers have now disclosed to the Applicant, the Commissioner will not consider it any further in his decision. As the Ministers have now concluded that this information does fall within the scope of the Applicant's information request, and are now offering no reason for it being withheld earlier, the Commissioner must find that the information was wrongly withheld from the Applicant and that, in this respect, the Ministers failed to comply with section 1(1) of FOISA.

### **Out of scope information**

13. As noted above, the Applicant is dissatisfied that the Ministers have narrowed their understanding of his request, to the extent that information that was identified as falling within the scope of the request in the original response was removed during the review stage.
14. The Applicant acknowledges that the Ministers have since provided him with some of the information they excluded, but he argues that the Ministers' previous claim that this information was "out of scope" was completely untenable. He notes that Article 9 (of the ECHR) is explicitly mentioned in the information they disclosed to him, and he questions how this could honestly be judged as "out of scope". The Applicant contends that it seems more likely that the legal case (that was pending at that time, but which has since taken place) was the motivation for this information being suppressed.
15. The Applicant submits that, throughout this whole process, the Ministers have been the opposite of what FOISA seeks to achieve, releasing the absolute bare minimum (if that) and refusing to release anything that might prove embarrassing or show their decisions in a negative light. Given this, the Applicant submits that he still wants the Commissioner to investigate the Ministers' decision to continue to withhold information from him.
16. The Commissioner understands the Applicant's frustrations in this case. He notes that the Ministers disclosed additional information to the Applicant, after he had questioned their grounds for arguing that it was outwith the scope of the request. As noted above, the Commissioner has found that the Ministers breached section 1(1) of FOISA by failing to disclose information in response to the original request, and, having regard to the information before him, that is the extent of the findings he can make.
17. The Commissioner has re-examined all of the information that the Ministers initially identified as falling within the scope of the Applicant's request, before concluding that it was not relevant, and he has some concerns with the content of document 5b, as this contains references to Article 9 of the EHRC. The Commissioner asked the Ministers to re-evaluate this document and to explain, in more detail, why it was not relevant to the Applicant's information request.
18. In response, the Ministers noted that the Applicant asked for "*details of any meeting minutes, or other recorded information, that pertains to any discussion or consideration made to ensure **the regulations and guidance on places of worship** comply with the European Convention on Human Rights – in particular article 9.2*". They explained the nature of the advice in document 5b which, in the Ministers' view, does not contain analysis of the regulation-making powers included in schedule 19 of the Coronavirus Act 2020, which were eventually used to place restrictions on places of worship.
19. The Ministers submitted that document 5b concerns the potential use of proposed direction-making powers and does not relate to regulations and guidance in place during the period from March 2020 to 4 January 2021. The Ministers also submitted that, if this information

was deemed to be within the scope of the Applicant's request, they would seek to withhold it under section 36(1) of FOISA.

20. The Commissioner has carefully considered the wording and the scope of the Applicant's email along with the content of document 5b and the Ministers' submissions, and he is satisfied, for the reasons given by the Ministers. that document 5b does not contain information which falls within the scope of the Applicant's information request.
21. With regard to the remaining information that was excluded from the scope of the request at review stage, the Commissioner is satisfied that it does not fall within the scope of the Applicant's request. Generally, this is information about COVID-19 itself, as well as regulations enacted to suppress transmission and restrictions on funerals and other gatherings. As a result, while there are some discussions about places of worship, and proposed restrictions, none of them contain discussions on whether the proposed regulations will comply with the ECHR.
22. The Commissioner has also considered the 15 documents that the Ministers belatedly identified as falling within the scope of the request, during the investigation, and he is satisfied that documents A(i), C, D, E, F, G(ii), J(i) and K are wholly out of scope of the request. He has also found that parts of documents A, B, G, G(i), H, I and J are outwith the scope of the request. As noted above, the Commissioner has found this information to be about COVID-19 itself, as well as its impacts and regulations, and none of it specifically discusses Article 9.2 of the ECHR in relation to the closure of places of worship.
23. Given this, the Commissioner will now go on to consider whether or not the exemption contained in section 36(1) of FOISA, applies to the information being withheld under this exemption (i.e. document 10, and the relevant parts of documents A, B, G, G(i), H, I and J.) During the investigation, the Applicant decided not to challenge the Ministers application of section 30(c) of FOISA, so the Commissioner will not consider that information in his decision: he will focus solely on the information that is being withheld under section 36(1).

### **Section 36(1) of FOISA**

24. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As noted above, the Ministers have applied this exemption to information contained in eight documents.
25. Among the types of communication which fall within this category are those which are subject to legal professional privilege.

#### *Legal advice privilege*

26. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given. For legal advice privilege to apply, certain conditions must be fulfilled:
  - (i) the communications must involve a professional legal adviser, such as a solicitor or an advocate. This may include an in-house legal adviser or an external solicitor engaged by the Ministers;
  - (ii) the legal adviser must be acting in his/her professional capacity; and
  - (iii) the communications must occur in the context of the legal adviser's professional relationship with his/her client.

27. The Ministers have argued that the withheld information constitutes confidential communications between in-house legal advisers acting in their professional capacity and the Scottish Government as their client, within which legal advice is being provided. The Ministers contended that all of the material was either made or affected for the principal or dominant purpose of seeking or giving legal advice, or evidenced those communications.
28. The Ministers argued that release of the material would breach legal professional privilege by divulging information about the points being considered by lawyers, their comments and the issues being flagged up for further consideration. They further argued that disclosing the advice would inhibit the provision of full and frank advice in future and they stressed that it was important that Scottish Government officials could obtain legal advice in confidence. The Ministers submitted that all of the necessary conditions for legal advice privilege to apply were satisfied.
29. Having considered the content of all of the information withheld under section 36(1) of FOISA, the Commissioner is satisfied that the information relates directly to seeking and obtaining legal advice from a professional legal adviser, acting in that capacity.
30. Information cannot be privileged unless it is also confidential. It must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The claim must be capable of being sustained at the time the exemption is claimed: the information must possess the quality of confidence at that time, and so cannot have been made public, either in full or in a summary substantially reflecting the whole.
31. The Ministers submitted that a claim to confidentiality could be maintained in legal proceedings because the correspondence in question was only shared between the Scottish Government and its legal advisers. They argued that the advice had not at any time been shared with anyone outwith the Scottish Government (apart from being provided to the Commissioner for the purposes of his investigation into this appeal). The Ministers contended that the information had remained confidential at the time they responded to the Applicant's request and requirement for review (and that it remained so). They maintained that legal professional privilege had not been waived.
32. Having considered both the information and the views put forward by the Applicant and the Ministers, the Commissioner is satisfied that the withheld information remained confidential at the time the Ministers responded to the Applicant's information request and requirement for review (and that it remains so now).
33. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Having decided that the information is exempt under section 36(1), the Commissioner must go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

#### *Public interest test*

34. The Ministers recognised that there is public interest in disclosure of the withheld information as part of open, transparent and accountable government. They acknowledged that there is general public interest in the measures put in place by the Scottish Government in relation to the coronavirus pandemic and the restrictions imposed through regulations (including the closure of places of worship), and that releasing this information could provide a greater public understanding in that regard and thus inform public debate.

35. However, the Ministers argued that there is a very strong public interest in maintaining the exemption relating to legal professional privilege in order to ensure confidentiality of communications between legal advisers and their clients. In the Ministers' view, it remains important in all cases that lawyers can provide free and frank legal advice which considers and discusses all issues and options without fear that that advice may be disclosed and, as a result, potentially taken out of context. The Ministers noted that, in areas such as this, which are the subject of political debate, an expectation that legal advice could be released would inevitably lead to the legal advice being much more circumspect and therefore less effective.
36. The Ministers argued that there is a strong public interest in protecting the confidentiality of this information in order to ensure that the Scottish Government is able to discuss and take policy decisions in full possession of thorough and candid legal advice. This ensures that the Scottish Government can take decisions in a fully-informed legal context, having received legal advice in confidence as any other client would.
37. On balance, the Ministers contended that the public interest in maintaining the exemption outweighs that of disclosure, given the overriding public interest in maintaining the confidentiality of communications between lawyers and their clients in this case.
38. The Applicant argued that the information requested relates to decision making that led to interference of a fundamental human right for a significant number of people. He noted that this decision was [declared to be unlawful in the Scottish Courts](#)<sup>1</sup>. The Applicant argued that, given the weight that society as a whole places on fundamental human rights, it is certainly in the public interest to see how such a decision was made and, especially given that the decision was deemed to be unlawful, it is of particular relevance to the public to see what legal advice was given to the government. He argued that disclosure would enhance democratic scrutiny around this decision-making process and would increase accountability.
39. The Applicant contended that public funds were used to pay for legal costs defending this unlawful decision in court, and to cover the costs of the petitioners once the Scottish Ministers lost the case. Disclosure would, therefore, contribute to ensuring effective oversight of expenditure of public funds. He argued that, as public money was used, it is in the public interest to see the legal advice, which may either support, or call into question, the Scottish Ministers' use of public money in defending this unlawful decision.
40. The Applicant also argued that, as the information refers to a previous sitting of Parliament, the passage of time has lessened the sensitivity of the information, and therefore maintaining confidentiality is not as critical.

*Commissioner's conclusions on the public interest test*

41. The Commissioner has considered carefully the representations made by both the Applicant and the Ministers when assessing and balancing the public interest in this case. He has also fully considered the information withheld in this case.
42. The Commissioner acknowledges the public interest in the transparency and accountability expected of all authorities, and that disclosure of the information would go some way towards providing that transparency and accountability. He notes the Applicant's arguments that the

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<sup>1</sup> [https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2021csoh032.pdf?sfvrsn=f110efdd\\_0](https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2021csoh032.pdf?sfvrsn=f110efdd_0)

closure of places of worship led to the interference of a fundamental human right, and the Court's decision referred to above.

43. The Commissioner also recognises that, since the Court has found that the Scottish Ministers were not lawfully entitled to close places of worship, there is a strong public interest in understanding how the Ministers considered the issue and reached the decision to proceed with the regulations. In addition, as the Applicant notes, public money was spent on defending this court action, and there is a public interest in understanding the discussions that took place prior to the implementation of regulations, which were subsequently found to be unlawful and which cost the taxpayer money.
44. Nevertheless, there is a strong inherent public interest, recognised by the courts, in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. In a Freedom of Information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of [Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien \[2009\] EWHC 164 \(QB\)](#)<sup>2</sup>. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
45. The Commissioner acknowledges that there will be occasions where the significant public interest in favour of withholding legally privileged communications may be outweighed by a compelling public interest in disclosing the information. One of those occasions may be the disclosure of information as a means to determining whether an authority had fully considered the ramifications of a decision it was about to make, and how it reached the view that its course of action was compliant with the ECHR.
46. However, the Commissioner must agree with the Ministers that, in this case, there is a stronger public interest in protecting the confidentiality of the information in order to ensure that the Ministers can continue to take decisions based on the advice they receive in confidence from their legal advisors.
47. Having considered the public interest arguments advanced on both sides, and the withheld information, the Commissioner is not satisfied that the public interest in disclosure of this particular information is sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client. He has reached this conclusion bearing in mind the importance attached by the courts to maintaining confidentiality of communications on administration of justice grounds.
48. Consequently, he accepts that the Ministers correctly withheld the withheld legal advice contained in under section 36(1) of FOISA.

## Handling of the request

### *Failure to comply with timescales*

49. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.

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<sup>2</sup> [https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=\(title:\(+o%27brien+\)\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=(title:(+o%27brien+)))



50. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review. Again, this is subject to qualifications which are not relevant in this case.
51. In their submissions to the Commissioner, the Ministers acknowledged that they had not responded to the Applicant's request or requirement for review, within the 20 working days specified in FOISA. They submitted that, at the time they received the original request and requirement for review, their teams were dealing with a high volume of work and, due to pressures from other core business work as well as limited resources in the teams, they were unable to respond within the statutory timescales set out under FOISA.
52. The Ministers accepted that their handling of the Applicant's request had fallen short of the standards expected, and they apologised for this failure.
53. It is a matter of fact that the Ministers failed to respond to the Applicant's request for information of 4 January 2021 and their requirement for review of 22 February 2021, in the time allowed. The Commissioner therefore finds that the Ministers failed to comply with sections 10(1) and 21(1) of FOISA.
54. The Commissioner has recorded this procedural failure in his case management database, which is used to inform and monitor FOISA practice by authorities.

#### *Content of notices*

55. The Commissioner notes that the Ministers' response to the Applicant's request gave him inaccurate information about the amount of time the Ministers had to conduct a requirement for review. Specifically, the Ministers advised the Applicant that they would "*complete the review in accordance with FOISA as soon as possible, and not later than 40 working days from the day following the date we receive your review request*".
56. Section 21(1) of FOISA makes it clear that authorities must respond to a requirement for review no later than the 20<sup>th</sup> working day after the day it received the review request.
57. The Commissioner has issued guidance on the content of notices<sup>3</sup> which sets out what information authorities must include both in the response to a request for information and in response to a requirement for review.
58. It is clear that the notice that was issued to the Applicant under 16(1) of FOISA did not contain accurate information about the time allowed for complying with a requirement for review, and did not therefore fully comply with the requirements of section 19(a) of FOISA.
59. The Ministers were asked about this failure. They noted that, due to an administrative error, the incorrect number of working days was inadvertently entered in the response. The Ministers apologised for this error and any confusion it may have caused. As this appears to have been a singular mistake, the Commissioner does not require the Ministers to take any action in response to this failure, in response to the Applicant's application. However, he has noted the Ministers handling of the request in his case management system.

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<sup>3</sup> [https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Contentofnotices/Content\\_of\\_notices.aspx](https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Contentofnotices/Content_of_notices.aspx)

## Decision

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The Commissioner finds that the Scottish Ministers (the Ministers) 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 the information in one document under section 36(1) of FOISA, the Ministers complied with Part 1.

However, by failing to identify all of the information falling within the scope of the request, and by failing to provide information which they later disclosed to the Applicant, the Ministers failed to comply with section 1(1) of FOISA. In addition, the Ministers failed to comply with the timescales set out in section 10(1) and 21(1) of FOISA, and they wrongly notified the Applicant that they would respond to a requirement for review within 40 working days (instead of 20 working days), in breach of section 19(b) of FOISA.

The Commissioner does not require the Ministers to take any action in respect of these failures, in response to the Applicant's application.

## Appeal

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Should either the Applicant or the Scottish Ministers 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**

**11 November 2022**

## Appendix 1: Relevant statutory provisions

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### 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.

...

- (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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

#### 10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or

- (b) in a case where section 1(3) applies, the receipt by it of the further information.

...

#### 16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-

- (a) discloses that it holds the information;

- (b) states that it so claims;

- (c) specifies the exemption in question; and

- (d) states (if not otherwise apparent) why the exemption applies.

...

## **19 Content of certain notices**

A notice under section 9(1) or 16(1), (4) or (5) (including a refusal notice given by virtue of section 18(1)) or 17(1) must contain particulars-

- (a) of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and
- (b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).

## **21 Review by Scottish public authority**

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

## **36 Confidentiality**

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

...

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