



Scottish Information  
Commissioner  
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# Decision Notice 191/2024

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## Part-time Junior Doctors Pension Contribution

**Applicant: The Applicant**

**Authority: Scottish Public Pensions Agency**

**Case Ref: 202400210**

### Summary

The Applicant asked the Authority for legal advice with respect to how changes made in October 2023 to how workers contribute to the pension scheme related to Employment, the Equalities Act and any relevant Equalities Impact Assessment. The Authority provided a link to the Equalities Impact Assessment but withheld the legal advice on the basis that it was legally privileged, and that the public interest favoured withholding the information

The Commissioner investigated and found that the Authority had partially complied with FOISA in responding to the request. He found that the Authority had only been entitled to withhold some of the information falling within the scope of the Applicant's request.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 36(1) (Confidentiality); 47(1) and (2) (Application for decision by Commissioner)

### Background

1. On 13 December 2023, the Applicant made a request for information to the Authority. He asked:

“Until October 2023, Junior Doctors working less than 40 hours per week (classified as part time) paid pension contributions in line with the same tier as their Full Time Equivalent

counterparts even if their actual pay would have had them pay contributions in a lower tier were they also Full-Time workers.

In October 2023, changes were made so that workers would contribute to the pension scheme based on a tier reflecting their actual pensionable pay.

Please share any legal advice with respect to how this relates to Employment, the Equalities Act and any Equalities Impact Assessment relevant to this.”

2. The Authority responded on 5 January 2024, with a letter dated 28 December 2023. It provided a link to the relevant Equalities Impact Assessment and relied on the exemption in section 25 of FOISA, as this information was otherwise accessible to the Applicant. In relation to legal advice, the Authority relied on the exemption in section 36(1) (Confidentiality) of FOISA for withholding information from the Applicant.
3. On 5 January 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he did not agree that the legal advice should be withheld under section 36(1) of FOISA. He highlighted that this exemption required consideration of the public interest, and considered that the public interest in this case favoured disclosure of the information he had requested.
4. The Authority notified the Applicant of the outcome of its review on 29 January 2024. It upheld its initial position, withholding the information the Applicant had requested under section 36(1), but also provided its view on the public interest. It apologised that this was not considered in its initial response but found that the public interest favoured maintaining the exemption in this case.
5. On 9 February 2024, 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 Authority’s review because he was unhappy with the Authority’s decision to withhold information concerning legal advice under section 36(1) of FOISA, as he believed this information should be disclosed.

## **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 8 March 2024, 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. The Authority 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 Authority was invited to comment on this application and to answer specific questions. These related to the Authority’s reasons for withholding information under the exemption in section 36(1) of FOISA, including consideration of the public interest.

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

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

### ***Section 36(1) – Confidentiality***

10. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies.
11. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given.
12. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled:
  - (i) The information must relate to communications with a professional legal adviser, such as a solicitor or advocate;
  - (ii) The legal adviser must be acting in their professional capacity; and
  - (iii) The communications must occur in the context of the legal adviser's professional relationship with the client.

### ***Is the information subject to legal professional privilege?***

13. The Authority submitted that section 36(1) of FOISA applied to the withheld information as it relates to legal advice being sought and given. The Authority confirmed that the advice had been requested from, and provided by a Solicitor acting in their professional capacity, where the Authority was the client.
14. The Applicant, in his application, stated that he believed the Authority had waived its confidentiality in the information by stating a benefit to the groups in question. He considered this strongly implied, in the context of the overall document, that benefit is given to these groups by correction of a previous deficit. He believed this position was likely to have been reached on the basis of advice highlighted in legal opinion, relating to the previous arrangements' interaction with the Equality Act.
15. The Authority did not accept that legal advice privilege had been waived. It agreed that the Equality Impact Assessment recognised that calculating contribution rates for part-time members using actual annual pensionable pay rather than whole time equivalent delivers a fairer outcome, but maintained that the communication in question remained confidential. The Authority also considered all of the necessary conditions for legal advice privilege to apply were satisfied in this case.
16. The Commissioner has considered the content of the information and the circumstances in which it was created and is satisfied that the information meets the conditions (set out in paragraph 12) for legal advice privilege to apply. He is therefore satisfied that the withheld information is subject to legal advice privilege.
17. 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: information must possess the quality of confidence at the time, so it cannot have

been made public, either in full or in a summary substantially reflecting the whole. The Commissioner is satisfied that the information in question remained confidential at the time the Authority dealt with the Applicant's information request for information and his requirement for review (and that it remains so now).

18. The Commissioner is therefore satisfied that the exemption in section 36(1) of FOISA is engaged for this information.
19. The exemption in section 36(1) is a qualified exemption, which means that it is subject to the public interest test set out in section 2(1)(b) of FOISA. This means that the exemption can only be upheld if the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

### ***The public interest test***

#### *The Applicant's submissions about the public interest*

20. The Applicant explained that his request was to understand whether there was legal advice around how the previous pension contribution arrangements related to the Equalities Act
21. In the Applicant's view the public interest favoured disclosure. He believed that disclosure was in the public interest given the importance of the Equalities Act and the Human Rights Act and how these pertain to fairness and justice.
22. He argued that the circumstances before and after the change were likely to affect many tens of thousands of workers, given the size of NHS Scotland as an employer. He emphasised the high proportion of staff who were women, and that they were more likely to work part-time.
23. He highlighted that there was already a recognised pay and pension gap between the sexes as described in the Authority's own documents, and that it should be a matter of public interest to address any potential unfair gap which may have existed or exist into the future.
24. The Applicant argued that disclosure of the information could possibly expose public body organisational practice which was discriminatory over a number of years, and that there was profound public interest in the upholding of the Equality Act and in the overarching principle of fairness. He believed that disclosure was important in the interests of transparency and trust in government. The Applicant likened the circumstances to the public interest in the Equal Pay claim taken forward against Glasgow City Council.
25. The Applicant submitted that disclosure would increase public understanding of the Equality Act and how it is applicable to many issues including pensions, and that this is likely to have a positive impact, encouraging more people to recognise and act where inequalities exist.

#### *The Authority's submissions on the public interest*

26. The Authority recognised that there may be public interest in the release of this information as it would enhance scrutiny of the Authority's decision-making process, in the interests of open and transparent government.
27. However, it considered that there was a strong public interest in maintaining the exemption relating to legal professional privilege in order to ensure confidentiality if communications for the following reasons:

- (i) 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 be taken out of context.
  - (ii) There is a public interest in ensuring that the Authority's position on any issue is not undermined by the disclosure of legal advice.
  - (iii) Legal advisers need to be able to present their clients with the complete picture, and it is in the nature of legal advice to set out the possible arguments both for and against a particular view, weighing up their relative merits.
28. The Authority submitted that there was a strong public interest in protecting the confidentiality of this information to allow it to discuss and take policy decisions in full possession of thorough and candid legal advice. It stated that this ensured that the Authority could take decisions in a fully formed legal context, having received legal advice in confidence, as any other client would.
29. The Authority considered that, in this instance, the public interest in maintaining the exemption outweighed that of disclosure, given the overriding public interest in maintaining the confidentiality of communications between lawyers and their clients and the public interest in allowing full and detailed internal consideration on the topic of pensions.

#### *The Commissioner's view on the public interest*

30. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest on 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>1</sup>. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
31. The Commissioner acknowledges that there will be occasions where the significant in-built public interest in favour of withholding legally privileged communications may be outweighed by the public interest in disclosing the information. For example, disclosure may be appropriate where (the list is not exhaustive):
- the privileged material discloses wrongdoing by/within an authority
  - the material discloses a misrepresentation to the public of advice received
  - the material discloses an apparently irresponsible and wilful disregard of advice
  - a large number of people are affected by the advice
  - the passage of time is so great that disclosure cannot cause harm.
32. Having examined the withheld information, the Commissioner accepts that the contents of the advice would be of interest to the Applicant and to the general public.

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<sup>1</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+)))

33. He recognises that given the NHS is the largest employer in Scotland, any legal advice around the pension scheme would affect a large number of people, warranting consideration of whether disclosure in this case may be appropriate.
34. The Commissioner accepts that there is a public interest in the subject matter of the advice, i.e. changes to a public sector pension scheme. The Commissioner also accepts that there is a public interest in disclosure of the legal advice, in terms of accountability and transparency, with regard to a public authority who is a major employer, particularly of part-time staff likely to be affected by the changes. The Commissioner recognises that disclosure of the withheld information may allow greater understanding of the decision making of the Authority.
35. The Commissioner has reviewed the information along with the arguments put forward by the Authority and the Applicant. In relation to most of the information falling within the scope of the Applicant's request, the Commissioner is not convinced that in this instance the public interest in disclosure outweighs that in maintaining the exemption.
36. The Commissioner must take account of the important public interest in legal professional privilege itself and the public interest in allowing public authorities to obtain confidential legal advice.
37. Having done so, the Commissioner considers that, for the majority of the withheld information, greater weight should be afforded to the arguments which would favour maintaining the exemption. The Commissioner accepts that there is a strong public interest in a Scottish public authority being able to receive full, unhindered legal advice. Without such comprehensive advice being available to the Authority, its ability to come to fully-formed decisions would be restricted, which would not be in the public interest.
38. Having considered the public interest arguments on both sides, for the majority of the information falling within the scope of the Applicant's request, the Commissioner does not find the public interest in disclosure for most of this information is sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client.
39. However, in relation to the remaining information, the Commissioner is not persuaded that the public interest in maintaining the exemption outweighs that in disclosing the information. In particular, he considers that the date the advice was provided, and a small amount of information that does not go to the substance of the legal advice, should be provided to the Applicant. The Commissioner considers that disclosure of this information would enhance public understanding of when relevant legal advice was received and increase transparency around the process of implementing the changes, which, given the number of employees affected would be in the public interest.
40. The Commissioner has concluded that although the balance of the public interest lies in favour of maintaining the exemption in section 36(1) for the majority of the information, this was not the case for a small amount of information.
41. The Commissioner therefore requires the Authority to disclose to the Applicant the information detailed in a separate schedule, to be provided to the Authority.

## **Decision**

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

The Commissioner finds that by correctly withholding most of the information under section 36(1) of FOISA, the Authority complied with Part 1. However, the Commissioner also finds that, by relying on section 36(1) for other withheld information, the Authority failed to comply with Part 1.

The Commissioner therefore requires the Authority to provide the Applicant with the information detailed in a schedule to be provided to the Authority, by **21 October 2024**.

## **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.

**David Hamilton**  
**Scottish Information Commissioner**

**04 September 2024**