



# Decision Notice 229/2024

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## Complaints about art exhibition

**Authority: UHI Moray**  
**Case Ref: 202400393**

### Summary

The Applicant asked the Authority for copies of complaints made about a cancelled art exhibition. The Authority withheld the information under a number of exemptions in FOISA. The Commissioner investigated and found that the Authority was entitled to withhold the information.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 16(1)(c) (Refusal of request); 30(c) (Prejudice to effective conduct of public affairs); 47(1) and (2) (Application for decision by Commissioner)

### Background

1. On 10 February 2024, the Applicant made a request for information to the Authority. He asked for information relating to the cancellation of an exhibition called “[The Opening of] a Fragile Pot”. The Applicant said he understood that the decision to cancel the exhibition was made partly in response to a complaint and he requested a copy of the complaint, and all subsequent correspondence concerned with the issue.
2. The Authority did not respond to the information request.
3. On 11 March 2024, the Applicant wrote to the Authority requesting a review of its failure to respond to his information request.

4. The Authority responded to the Applicant the same day. It informed him that two anonymous complaints had been received, but it withheld the information he had requested under section 38(1)(b) of FOISA, on the grounds that disclosure could lead to the identification of individuals, which would be a breach of data protection law.
5. On 12 March 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority's review because he did not accept that the exemption applied.

## **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 27 March 2024, and in line with section 49(3)(a) of FOISA, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments.
8. The Authority was also asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information, and the case was subsequently allocated to an investigating officer.

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

9. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.
10. During the investigation, the Authority stated that as well as withholding the requested information under section 38(1)(b) of FOISA, it was also relying on the exemptions contained in sections 30(b)(i) and (ii), 30(c), s35(1)(a), (b) and (g) and 39(1) of FOISA to withhold the information. It also applied section 26(a) of FOISA but later withdrew its reliance on that exemption.
11. The Authority also provided the Applicant with some additional information. The Authority notified the Applicant that the complaints took the form of two abusive telephone calls, rather than a formal written complaint. It confirmed that it was withholding four pieces of information and briefly summarised each.
12. After receiving this additional information from the Authority, the Applicant was not satisfied, and he informed the Commissioner that he still required a decision.

### ***Section 30(c) of FOISA***

13. Section 30(c) of FOISA provides that information is exempt information if its disclosure would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
14. The word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b).

This is a broad exemption and the Commissioner expects any public authority applying it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure.

15. There is no definition of "substantial prejudice" in FOISA, but the Commissioner considers the harm in question would require to be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur therefore, the authority 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.

*The Authority's submissions on section 30(c)*

16. The Authority explained that it was legally required to maintain and uphold a complaints process that met the requirements of the Scottish Public Services Ombudsman's (SPSO). Guidance, most notably the SPSO's "principles". It argued that disclosure of the information would substantially prejudice its ability to carry out complaint investigations in line with the SPSO guidance, and that it would inhibit its delivery of an effective and just complaints process.
17. The Authority commented that its complaints process only benefits individuals, public bodies, and the public in general, if it is used. It submitted that if public and service users refuse to use the complaints process (because they have lost confidence in it and/or are worried about a lack of confidentiality) then the process is useless and is entirely undermined.
18. It noted that one of the "principles" in the SPSO guidance was confidentiality and it submitted that revealing specific details relating to evidence, context or other information could undermine the just and due process of a complaint investigation. The Authority argued that disclosure would undermine its complaints process by irrevocably eroding trust and confidence in the confidentiality of the process.
19. The Authority submitted that those making complaints, and those contributing to the complaints process, would expect that their identities and much of the evidence and detail of the process would remain confidential. It argued that complainants had a high expectation of privacy, and an expectation that the Authority will not release any information (personal or otherwise) that would cause them harm or risk or which would interfere with the just and due process of the complaint handling.
20. The Authority submitted that revealing all details of a complaint handling process, in full and with specific detail would, clearly and obviously, lead to a loss of confidence in the confidentiality of the confidentiality complaints process and the effectiveness and just delivery of the process. It argued that this loss of confidence would, clearly and obviously, deter individuals from making complaints – as they would be concerned that their personal matters will be made available to the public. This deterrent effect would also extend to others who might contribute to the complaints process, including witnesses, experts, or staff.
21. The Authority argued that the loss of confidence is a predictable and, almost certain, result of disclosure of information that should, and must, remain confidential.
22. The Authority argued that disclosure would be likely to undermine its investigation into the complaint, and the confidence of individuals involved in future complaints or incidents.

It submitted that, if members of the public, businesses or any other interested party believed that the information they provided to the Authority, during a formal investigation would be released in response to a FOI request, it would negatively impact on its ability to carry out its statutory role and regulatory functions. The Authority considered this to be a real and foreseeable threat. The Authority also maintained that a loss of confidence in its complaints process would result in a general loss of confidence in the Authority itself, which would substantially prejudice the delivery of its educational and research public task set by statute.

23. The Authority submitted that, in many cases (such as this one) complaints related to matters of substantial public debate and interest. In such cases, it argued that staff (including junior staff) can face unfair criticism and/or threats based on their interaction with a complaint, the complaints process, or a party to a complaint. It commented that if staff were worried that their details or information about their interactions with a complaint could be made public (even if they were following best practice), there may be a “chilling effect”, discouraging full and thorough engagement, or a lack willingness to contribute. This is because, even if a case is heard totally impartially and in keeping with best practice, members of the public may seek to criticise, or even threaten, those who have been involved in the case, if they do not agree with the outcome.
24. The Authority stated that it considered this harm foreseeable and likely in cases involving topics that are polarising and of heated national debate (as in this case). The Authority submitted that there were alternative means (beyond harmful transparency) that better demonstrate the impartiality and quality of complaint handling, such as the oversight of the SPSO.
25. The Authority emphasised the risks to its staff (and other parties to the complaint) that could arise from disclosure of too much detail. It submitted that any risks to its staff would extend to others involved in the complaints process, including the complainer, witnesses, etc. The Authority argued that, even if individuals were not specifically named, it was foreseeable that those whose passions were raised by such matters were likely to commit substantial effort to seeking to identify individuals involved.
26. The Authority also submitted that the process of investigation relied on both relevant parties to a complaint (including its own staff) engaging with the Authority in a fair and honest manner. It argued that this could only be achieved by maintaining the confidence of all parties involved (and the confidence of the complaint and handling process).
27. The Authority noted that it had provided the Applicant with some information, which it did not consider to be exempt. It also referred to [Decision 052/2024](#)<sup>1</sup> which it considered to be similar and therefore relevant to the current appeal.

#### *The Applicant's submissions*

28. In his application to the Commissioner, the Applicant stated that he was dissatisfied with the exemptions being relied on by the Authority, as he did not consider them to be appropriate to the case or reasonable.
29. The Applicant stated that [redacted] and he argued that the decision to cancel the event [redacted].
30. Furthermore, in his view, the manner in which the event was cancelled and the Authority's reasoning for the cancellation [redacted].

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<sup>1</sup> <https://www.foi.scot/decision-0522024>

He quoted the Authority's public statement about the cancellation, in which it said that some promotional material for the event referred to what could be regarded as a partisan viewpoint.

31. The Applicant said that this statement effectively [redacted]. After the Authority disclosed additional information about the nature of the complaints to the Applicant during the Commissioner's investigation, the Applicant commented that he now knew that both complaints were anonymous and abusive (adding that it was not clear if there was one complainant or two). The Applicant said it was of concern that a public body could be intimidated to this extent by an anonymous abusive individual.
32. The Applicant submitted that the Authority had failed to apply its own policies intended to protect both complainants and staff and therefore had placed both at risk. He submitted that the Authority also had a role in protecting members of the public and said that if it had correctly applied its policies [redacted] would not have happened.
33. The Applicant also stated that the Authority had been extremely economical in the account it gave him of the precise series of events and their nature. He stated that he was initially given the clear impression of a formal complaint and response, which he described as a highly edited version of events.

*The Commissioner's conclusions on section 30(c)*

34. The Commissioner has carefully considered the submissions from the Applicant and the Authority in relation to the exemption, together with the information that is being withheld.
35. Having considered the nature and content of the withheld information, the Commissioner accepts that its disclosure would be likely to dissuade individuals who have received abusive or threatening communications from engaging with the Authority's complaints process, in an open and honest manner, for fear that the details of their involvement would be made public. If this occurred, and individuals were deterred from raising complaints or becoming involved in the Authority's complaint handling process, he is satisfied that it would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.
36. Furthermore, the Commissioner accepts that if complainants (and witnesses, etc.) did not believe that the Authority's complaints procedures were confidential, and believed that any information they provided to the Authority would be routinely disclosed in response to a FOI request, they would not engage with its complaints' procedures. If this occurred, it would critically undermine the Authority's ability to investigate complaints in a fair and just manner and this would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.
37. In all the circumstances, the Commissioner accepts that the Authority was entitled to apply the exemption in section 30(c) of FOISA to this information.

***Public interest test***

38. As mentioned above, the exemption in section 30(c) of FOISA is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.

### *The Applicant's submissions*

39. The Applicant argued that it was in the public interest to know how a public body had acted in the manner that it had, in relation to the complaints, and that disclosing the information was important in ensuring that this did not happen again.
40. The Applicant also stated that he did not think that the additional exemptions applied to the withheld information, including section 30(c) of FOISA, were appropriate or reasonable. In his view, the Authority was being obstructive and using exemptions in a manner not in keeping with FOISA or the public interest.

### *The Authority's submissions*

41. The Authority recognised that there was both a general public interest in transparency and a specific public interest in transparency as a means of examining, revealing and encouraging the quality of, for example, complaints processes. The Authority stated that there was a strong public interest in understanding that complaints were handled to a high standard. However, it argued that in the specific area of complaints, there were alternative, more effective, ways to meet that public interest, chiefly through the SPSO both in terms of general complaints processes and specific cases.
42. The Authority added that there was significant public interest in withholding information which would undermine the quality and due process of complaints handling procedures, and it reiterated that the public interest lay in maintaining the confidentiality of the complaints process.
43. The Authority noted that trust in public bodies was an essential part of a functioning society, and it followed that there was substantial public interest in maintaining that trust, including in the processes administered by those bodies (such as complaint handling processes).
44. The Authority considered that there was substantial public interest in the integrity of the complaints process itself, to avoid the substantial risk of causing harm to individuals by releasing information publicly which could also reveal investigatory techniques and evidence sources.
45. The Authority submitted that it had provided some information about the complaints to the Applicant, to meet the public interest in transparency, but it argued that there was an extraordinary public interest in public bodies maintaining and following robust complaints handling procedures, in keeping with the SPSO requirements and guidance. It considered that release of further information would provide little additional value in light of the potential cost to the conduct of public affairs.

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

46. The Commissioner agrees that there is always a general public interest in openness and accountability, particularly relating to the statutory functions of public authorities. Openness and accountability allow effective scrutiny and reassure the public, where appropriate.
47. On the other hand, the Commissioner has already acknowledged the risk of substantial prejudice to the effective conduct of public affairs in this case, with particular reference to the effect of disclosure on the confidence of those participating in its complaints procedures (both those raising complaints and those investigating complaints) and on the fairness and confidentiality of the complaints process.

48. The Commissioner has previously considered cases involving public bodies' complaints processes in relation to the exemption contained in section 30(c) of FOISA, including [Decision 052/2024](#)<sup>2</sup>; [Decision 185/2016](#)<sup>3</sup> and [Decision 160/2020](#)<sup>4</sup>. While these are undoubtedly relevant in this case, the Commissioner would also emphasise that both the exemption and any related public interest must be applied on a case-by-case basis, considering the information in question and all other relevant circumstances, and not generically to a process.
49. The Commissioner notes that during his investigation, the Authority provided the Applicant with a brief summary of the information that it held, including broad details of the complaints. While this information was brief, he considers that this disclosure helped satisfy the public interest in understanding the nature and detail of the complaints.
50. In all the circumstances, the Commissioner is satisfied that the public interest in disclosure is outweighed in this case by that in maintaining the exemption and allowing the information to be withheld under section 30(c) of FOISA. The Commissioner therefore finds that the Authority was entitled to withhold the information under this exemption.
51. As the Commissioner is satisfied that the Authority was entitled to withhold all of the information under section 30(c) of FOISA, he will not go on to consider whether the authority was also entitled to withhold that information under sections 30(b), 35(1)(a), (b) and (g) and 39(1) of FOISA. The authority's failure to apply the exemption until during the Commissioner's investigation is addressed in the "Decision" section below.

## 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

While the Commissioner is satisfied that the information was exempt from disclosure under section 30(c) of FOISA, he finds that the Authority breached section 16(1)(c) of FOISA by failing to notify the Applicant that it was applying this exemption.

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<sup>2</sup> <https://www.foi.scot/decision-0522024>

<sup>3</sup> <https://www.foi.scot/decision-1852016>

<sup>4</sup> <https://www.foi.scot/decision-1602020>

## **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**

**15 October 2024**