

# Decision Notice 073/2021

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## Submissions regarding a complaint

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**Applicant: The Applicant**

**Public authority: Commissioner for Ethical Standards in  
Public Life in Scotland**

**Case Ref: 202000976**



Scottish Information  
Commissioner

## Summary

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The CESPLS was asked for all submissions from South Ayrshire Council, including those individuals being investigated, in a specific complaint. The CESPLS withheld some information as it had been obtained for the purpose of investigation to ascertain whether a person was responsible for improper conduct.

The information was disclosed during the investigation. The Commissioner found that the CESPLS had not been entitled to withhold the information.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 34(3) (Investigations by Scottish public authorities and proceedings arising out of such investigations); 35(1)(g) and (2)(b) (Law enforcement)

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 21 April 2020, the Applicant made a request for information to the Commissioner for Ethical Standards in Public Life in Scotland (the CESPLS). The information requested was all submissions from South Ayrshire Council, including those individuals being investigated, in a specific complaint.
2. The CESPLS responded on 10 June 2020. It provided the Applicant with some information, but withheld other information on the basis that it had been obtained for the purpose of an investigation and was considered exempt from disclosure in terms of sections 34(3) and 35(1)(g) of FOISA.
3. On 20 June 2020, the Applicant wrote to the CESPLS, requesting a review of its decision as he did not accept that the exemptions applied. He also commented on the investigation that had been conducted, stating that the investigation should be subject to public scrutiny and disclosure was in the public interest. (The CESPLS had also withheld some third party personal data under section 38(1)(b) of FOISA, but the Applicant did not object to this.)
4. The CESPLS notified the Applicant of the outcome of its review on 7 August 2020. The CESPLS upheld its original decision that the information was exempt from disclosure in terms of sections 34(3) and 35(1)(g) of FOISA.
5. On 25 August 2020, 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 CESPLS's review because he did not accept the exemptions claimed applied, with reasoning. He again submitted that it was in the public interest that the information be disclosed, with reference to what he perceived to be inadequacies in the investigation.

## 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 15 September 2020, the CESPLS was notified in writing that the Applicant had made a valid application. The CESPLS was asked to send the Commissioner the information withheld from the Applicant. The CESPLS 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 CESPLS was invited to comment on this application and to answer specific questions, focusing on the authority's reasons for applying the exemptions claimed.
9. The CESPLS responded, accepting that section 34(3) of FOISA did not apply and withdrawing its application of this exemption. The CESPLS provided submissions maintaining that the information was exempt from disclosure in terms of section 35(1)(g) of FOISA, in conjunction with section 35(2)(b).
10. Following further correspondence and discussions with the investigating officer, the CESPLS advised the Commissioner that it was no longer relying on any of the exemptions previously claimed and confirmed that it had provided the withheld information to the Applicant.
11. The Applicant confirmed receipt of the information, but wished the Commissioner to issue a decision on the matter.

## Commissioner's analysis and findings

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12. 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 CESPLS. He is satisfied that no matter of relevance has been overlooked.

### **Section 34(3) of FOISA – Investigations by Scottish public authorities and proceedings arising out of such investigations**

13. Section 34(3) states that information held by a Scottish public authority is exempt information if (a) it was obtained or recorded by an authority for the purposes of investigations (other than such investigations as are mentioned in section 34(1)) which are, by virtue either of Her Majesty's prerogative or of powers conferred by or under any enactment, conducted by the authority for any purpose specified in section 35(2) **and** (b) if the information relates to the obtaining of information from confidential sources.
14. As mentioned above, during the investigation the CESPLS accepted that the exemption contained in section 34(3) of FOISA did not apply to the information held. In the absence of submissions from the CESPLS as to why the information was initially considered exempt from disclosure under this exemption, the Commissioner must conclude that the information in question was not properly withheld under section 34(3).

## **Section 35(1)(g) – Law enforcement**

15. The CESPLS initially submitted that the information it held was exempt from disclosure in terms of section 35(1)(g) of FOISA, read in conjunction with section 35(2) as outlined below.
16. 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 Scottish public authority (as defined by FOISA) of its functions for any of the purposes listed in section 35(2) of FOISA. The CESPLS argued that disclosure of the information requested would, or would be likely to, prejudice substantially the exercise of its functions of the purposes specified in section 35(2)(b), that is to ascertain whether a person is responsible for conduct which is improper.
17. The CESPLS is a Scottish public authority for the purposes of FOISA.
18. As mentioned above, while it initially stated that it considered that this exemption applied, during the investigation the CESPLS withdrew its reliance on section 35(1)(g) of FOISA.
19. In the absence of submissions from the CESPLS to justify withholding the information under this exemption, the Commissioner must conclude that the information in question was not properly withheld under section 35(1)(g) of FOISA, in conjunction with section 35(2)(b).
20. The Commissioner therefore finds that the CESPLS was not entitled to withhold the information under either of the exemptions claimed.
21. Given that the information was disclosed during the investigation, the Commissioner does not require the CESPLS to take any action in this case.

## **Decision**

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The Commissioner finds that the Commissioner for Ethical Standards in Public Life in Scotland (the CESPLS) failed to comply with Part 1 (and, in particular, section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA), not being entitled to withhold the information as exempt in terms of section 34(3) or section 35(1)(g) of FOISA. As the information was disclosed during the investigation, the Commissioner does not require the CESPLS to take any action in this case, in response to the Applicant's application.

## **Appeal**

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Should either the Applicant or the CESPLS 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.

**Margaret Keyse**  
**Head of Enforcement**

**12 May 2021**

## 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.

#### 34 Investigations by Scottish public authorities and proceedings arising out of such investigations

...

- (3) Information held by a Scottish public authority is exempt information if-
- (a) it was obtained or recorded by the authority for the purposes of investigations (other than such investigations as are mentioned in subsection (1)) which are, by virtue either of Her Majesty's prerogative or of powers conferred by or under any enactment, conducted by the authority for any purpose specified in section 35(2); and
  - (b) it relates to the obtaining of information from confidential sources.

...

#### 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;

...

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