



Scottish Information
Commissioner
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Decision Notice 134/2022

Deleted comments from staff on a blog post and survey

Applicant:

Authority: Scottish Ministers

Case Refs: 202101439 and 202101440

Summary

The Applicant asked the Authority for comments from staff in relation to a blog post and a survey. The Authority disclosed redacted versions of the comments, withholding the deleted comments on the grounds that disclosure would endanger the mental or physical health or the safety of individuals. The Commissioner investigated and found 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)(b) (Effect of exemptions); 39(1) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner)

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. This Decision Notice considers two requests to the Authority from the same Applicant.

Request 1 (202101439)

2. On 27 July 2021, the Applicant made a request for information to the Authority. His request was as follows:

Under FOI could you please send me a blog post on Saltire written by Leslie Evans about the Black Lives Matter movement, and include all comments which were left by staff in response to this.

The post I am referring to was referenced by Ms Evans in a Q&A session with staff on July 23. Ms Evans said: "I was equally thoughtful when I spoke and wrote in Saltire not that long ago about Black Lives Matter. Some of the response that produced in the organisation was to use a civil service term disappointing."

Please include the full post by Ms Evans and all comments and responses including any that may have been deleted by administrators. If responses were deleted, please make clear which ones.

I understand names of non-senior civil servants will be redacted so there is no need to consider names of non-senior staff to be within the scope of this request.

Request 2 (202101440)

3. On the same day, the Applicant made another request for information to the Authority. His request was as follows:

I understand there was a poll run recently on the Scottish Government's Saltire intranet service about the use of pronouns on email signatures. The poll he was referring to is mentioned in this FOI response: <https://www.gov.scot/publications/foi-202100210730/>

Under FOI, could you please provide copies of all comments which were left by staff on Saltire in response to the poll. Please reproduce the comments in full, including those that were deleted by administrators.

Please do not include the names of any non-senior civil servants who left the comments - I understand these would be exempt from disclosure.

Can you please also make clear which of these comments were deleted/removed by administrators, and which were left up.

Responses to requests 1 and 2

4. The Authority responded to both requests, separately, on 23 September 2021.
5. In its response to both requests, it stated that some of the comments were not held, as they were deleted by Saltire users before the request was received; therefore, section 17(1) of FOISA (Notice that information is not held) applied.
6. In relation to comments deleted by administrators and moderators, the Authority explained that Saltire users must ensure their comments are appropriate, accurate, relevant and lawful, and in line with the Civil Service Code and IT Code of Conduct. If another Saltire user believes a published comment is in breach of the Scottish Government's moderation policy, for example, if it is deemed likely to upset or distress other members of staff, they can report it and their complaint will be reviewed, and a decision taken about whether or not the comment needs to be removed.
7. In relation to request 1, it disclosed the Permanent Secretary's vlog on Race and Inclusion, and related comments by staff. [The response has since been published: [FOI Disclosure Black Lives Matter](#)¹].

¹ [FOI202100226047/annex-a-b-c.pdf \(www.gov.scot\)](https://www.gov.scot/publications/foi-202100226047/annex-a-b-c.pdf)

8. In relation to request 2, it disclosed comments by staff. [The response has since been published: [FOI Disclosure pronoun survey²](#)].
9. The Authority withheld comments that had been deleted in line with the moderation policy under section 39(1) of FOISA, on the basis that disclosure would, or would be likely to, endanger the physical or mental health or safety of an individual, even if not intended.
10. Having weighed up the public interest, while recognising a public interest in openness and transparency, the Authority considered there to be a greater public interest in ensuring that the mental wellbeing of staff was not harmed by putting into the public domain information which had previously been removed by moderators and which is not freely available within the Scottish Government as a consequence.
11. The Authority also withheld some information as personal data of civil servant in Bands A to C, under section 38(1)(b) of FOISA (Personal information).

Requests for review for requests 1 and 2

12. On 23 September 2021, the Applicant wrote to the Authority, requesting a review of its decisions. The Applicant stated that he was dissatisfied with the decisions to withhold information under section 39(1) of FOISA, and explained in detail why he did not consider the exemption applied to both requests.
13. In summary, he argued that he did not consider disclosure would damage the mental health of staff, submitting that he did not consider it credible that all of the deleted comments would be so extreme. He suggested that any remotely controversial or contrary comment may have been deleted, while noting that controversial remarks were part and parcel of living in a free society and the possibility of causing offence was not a reason for keeping them secret. He suggested that far more extreme views would be found in wider society.
14. The Applicant noted that it was a matter of public record that Ministers were often very robust in discussions with civil servants. In his view, they should apply the same standards consistently. In addition, people leaving these comments knew they could be read by thousands of their colleagues. If the Authority was genuinely so toxic that civil servants left comments on work blogs so extreme that they genuinely posed a risk to colleagues' health, then it was in the public interest they were disclosed.

Review responses for request 1 and 2

15. The Authority notified the Applicant of the outcome of each review on 12 November 2021. It upheld its initial responses, without modification, and highlighted that one of the key considerations for withholding the information related to its duty of care as an employer. Notwithstanding any information or views staff might be exposed to outside of work, disclosing comments which were deleted by moderators because they could have caused distress to a number of staff would not be in line with its duty of care as an employer.

Applications for requests 1 and 2

16. On 22 November 2021, the Applicant wrote to the Commissioner, applying for decisions in relation to both requests in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's reviews because he did not accept that the

² [Saltire comments regarding pronouns intranet poll: FOI release - gov.scot \(www.gov.scot\)](#)

exemption in section 39(1) applied, and expanded upon his comments made in his requirements for review.

Investigation

17. The Commissioner determined that the applications complied with section 47(2) of FOISA and that he had the power to carry out investigations.
18. On 9 December 2021, the Authority was notified in writing that the Applicant had made valid applications. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the cases were allocated to an investigating officer.
19. 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 the two applications and to answer specific questions. These related to its reasons for withholding the requested information. The Authority provided its submissions, which will be considered in further detail below.
20. The investigating officer also contacted the Applicant to ask if he had any further comments he wished to submit, specifically any submissions on the public interest in disclosure of the withheld information. The Applicant responded, referred to the reasons outlined in his requests for review and applications for arguing that the exemption applied in relation to both requests, but acknowledged that if the Commissioner concluded that the very high bar of the exemption was met, the public interest test would be unlikely to favour disclosure.

Commissioner's analysis and findings

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

Section 39(1) of FOISA (Health, safety and the environment)

22. Section 39(1) of FOISA states that information is exempt information if its disclosure under FOISA would, or would be likely to, endanger the physical or mental health or the safety of an individual. This is a qualified exemption and is subject to the public interest test required by section 2(1)(b) of FOISA.
23. As the Commissioner notes in his [briefing on the exemption](#)³, section 39(1) does not contain the usual harm test. Instead of the "substantial prejudice" test found in many other harm-based exemptions in Part 2 of FOISA, this exemption refers to the "endangerment" of health or safety. This test is less demanding than the "substantial prejudice" test.

The Authority's submissions

Background

24. The Authority explained that online discussion forums such as intranets and social networking are considered to be one of the tools which give employees a voice and help to

³ <https://www.itspublicknowledge.info/sites/default/files/2022-04/BriefingSection39HealthSafetyandtheEnvironment.pdf>

encourage engagement within organisations. Officials are advised that their comments on Saltire are expected to conform with the Authority's comments and moderation policy and the Civil Service Code.

25. The Authority submitted that it does not proactively pre-moderate comments, but staff can report any published comments they consider are in breach of the moderation policy (which will be considered as a complaint and reviewed by moderation team).
26. The Authority stated that it has a legal duty to pay due regard to eliminating discrimination and harassment in the workplace, and a proactive legal duty to foster good relations between people who share a protected characteristic, and those who do not. It also has a responsibility to ensure that the information on its channels complies with the Civil Service Code and all relevant conduct policies.
27. It is expected that colleagues will adhere to the comments and moderation policy at all times. However, it may be the case that the harm caused to colleagues at the time of publication was unintentional, was due to a lack of understanding about wider societal issues or the impact on colleagues with protected characteristics, or a lack of understanding of what really constitutes a breach of the moderation policy.
28. Comments considered to be in breach of the comments and moderation policy or the Civil Service Code will be removed. These could include comments which:
 - are inappropriate, or may provoke or offend others
 - contain language likely to offend
 - are personal criticism of or attack on others
 - reinstate or paraphrase a comment already removed through moderation

Section 39(1) submissions

29. The Authority submitted that disclosure would be likely to endanger the health and safety of colleagues with protected characteristics under the Equality Act, and in particular would cause distress to vulnerable groups of staff.
30. It had sought and received views from relevant staff representative groups, and also received comments from Race Equality Network and trade unions, expressing significant concern about the impact that disclosure of the comments will have on vulnerable groups of staff. These views and comments were provided together with the Authority's submissions.
31. None of the individual members of staff who originally posted the deleted comments had indicated that they had concerns about their disclosure. However, different group of individuals had said they would experience harm as a result of disclosure of the withheld comments.

Representations from relevant members of staff and representative groups

32. The Authority provided extensive submissions from the representatives as to why the comments should not be disclosed. (Some pre-dated the September 2021 disclosure.) As the deleted comments refer to the withheld information and are individual's personal comments, as opposed to that submitted by the Authority, the Commissioner has not included a summary of the comments made.

The Applicant's submissions

33. The Applicant argued that the Authority had not demonstrated how releasing the withheld comments would significantly damage the mental health of its employees, and he did not consider disclosure would have a detrimental impact or could have caused distress.
34. He did accept that a few comments might invoke the exemption. Even if this was the case, however, he did not accept the reference to having a “detrimental impact” or “could have caused distress” would meet the high bar specified in the legislation i.e. that disclosure “would, or would be likely to, endanger the physical or mental health or safety of an individual.
35. He considered that it may have been perfectly reasonable for the comments to be deleted in a workplace context if they were deemed inappropriate or potentially upsetting to some staff. In his view, however, the bar set in the legislation was significantly higher and a different test must apply under FOISA.
36. He noted that the Authority had deleted comments in line with its duty of care as employer, but this was not the test under section 39(1)(a) of FOISA, and, in his view, the Authority had not demonstrated, or even attempted to show, any link beyond a hypothetical one.
37. The Authority had argued that staff might be distressed by release of the comments, but the Applicant noted that the Commissioner’s guidance specifically says this is not enough for the exemption to apply. Equally, the fact that the Authority might consider comments which it, or intranet administrators, disagree with as “distasteful” was not enough for the exemption to apply. Although he had not seen the withheld comments, given the context he expected they would be seen as legitimate debate/free speech.
38. He did not believe the Authority would be able to show that disclosure of the withheld comments, left by civil servants on a work platform, would realistically be likely to pose a significant risk to employees given the wider debates around this issue, in which staff will no doubt be exposed to far more extreme statements/positions.

The Commissioner's view about the exemption

39. The phrase "endanger" is broad enough to apply where there is a threat, direct or indirect, to the safety of a person. Since the exemption does not specify that any threat should be imminent before it applies, the threat may be either immediate, or one which would foreseeably arise in the future. The Commissioner believes that for endangerment to be considered likely, however, there must be some well-founded apprehension of danger, such that the prospect of harm could be regarded as a distinct possibility.
40. The Commissioner notes that the Authority incorporated guidance in its blog posts for individuals who are posting comments on the Saltire. This guidance was disclosed to the Applicant with the response. The Commissioner notes the key points of the guidance are:
 - “It’s your responsibility to ensure that all comments submitted are appropriate, accurate, relevant and lawful. Please refrain from posting comments that are hostile, heated or potentially divisive. Don’t say anything online that you wouldn’t say in a work context in person.”
 - “If a comment is removed because it is considered a disciplinary/serious matter, your manager will be contacted and made aware of this. Further action may be taken in line with the established disciplinary procedures or fairness at work policy.”

- “If you believe a published comment is in breach of this guidance, you should report it to the Saltire moderation team using the 'report' button which can be found at the side of the published comment. Your complaint will be reviewed and consideration given as to whether the comment should be removed”
41. The Commissioner notes that the guidance does not include any explanation that comments submitted could be requested (but not necessarily disclosed) in relation to an information request under FOISA. From the representations provided by the Authority, many individuals were aware of the existence of FOISA, and that their comments could be requested, but expressed extreme concern as to disclosure of their personal views.
 42. The Commissioner also notes that the comments which are being withheld were deleted and cannot be accessed by staff. He notes that the comments made on the Black Lives Matter blog (202101439) were submitted in June 2020 and the comments made on the use of pronouns in emails (202101440) were submitted in June 2021.
 43. The Authority provided many pages of representations emphasising the harm and trauma if the deleted comments were disclosed. Many individuals commented that disclosing the deleted comments would have an exceedingly damaging effect on themselves and others, especially as the comments had been deleted and were no longer accessible. The Commissioner understands that requiring the disclosure of the deleted comments would be likely to have the effect of distressing individuals who were badly affected by the comments in the first place.
 44. The Commissioner has considered the representations in light of the comments made on the Saltire blogs in relation to both requests, and notes that minimal information (less than 20%) was withheld. Most of the withheld comments relate to a single matter in both cases. The Commissioner observes that the Authority did disclose all of the remaining comments that were not deleted, and that some individuals had expressed concern prior to disclosure in September 2021.
 45. The Commissioner considers that it could be queried, if the comments on the blogs have been disclosed, why the withheld comments cannot be disclosed. In reaching a decision, the Commissioner has taken into account that the comments were made in a personal capacity and represents the individuals’ personal views, and were not made on behalf of the Authority. As submitted by the Authority, the Saltire blog is one of tools which give employees a voice and help to encourage engagement within the organisation.
 46. The Commissioner considers that the harm that would result if the deleted comments were required to be disclosed would have a damaging effect on the individuals concerned. He considers it likely that disclosure would trigger further negative (and potentially hateful) public comment, with consequent psychological harm to those individuals. He has not reached this view lightly, and has been persuaded by the strength of feeling of the representatives that disclosure would cause substantial harm. The Commissioner also believes disclosing the deleted comments would greatly impact upon the openness with which individuals would be willing to submit comments in the future.
 47. While the Commissioner would not generally regard the scope for misinterpretation as a reason for upholding a harm-based exemption, here there appears to be a real risk of (quite possibly wilful) misinterpretation, with little real scope for mitigation. In all the circumstances, the Commissioner considers that relevant in concluding that the requisite scope for harm is present.

48. In all the circumstances, the Commissioner is satisfied that disclosure of the information would, or would be likely to, endanger the physical or mental health or the safety of the individuals concerned. Consequently, he must conclude that the exemption in section 39(1) of FOISA was correctly applied by the Ministers.

Public interest test

49. Section 39(1) is a qualified exemption, which means that its application is subject to the public interest test in section 2(1)(b) of FOISA. Therefore, having decided that the information is exempt under section 39(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. If it is not, he must order the Authority to disclose the information.

The Authority's submissions about the public interest

50. The Authority recognised that there was a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate.

51. The Ministers put forward the following arguments in favour of maintaining the exemption:

- There was a far greater greater public interest in ensuring that the mental wellbeing of staff was not harmed by putting into the public domain information which had previously been removed by moderators and which was not freely available within the Scottish Government as a consequence; and
- There was no public interest in disclosing information when that would lead to harm to the mental wellbeing of vulnerable groups of staff working within the Scottish Government.

The Applicant's submissions about the public interest

52. As stated above, the Applicant acknowledged that, if the Commissioner concluded that the very high bar of the exemption was met [in withholding the deleted comments], the public interest test would be unlikely to favour disclosure.

The Commissioner's view on the public interest

53. The Commissioner accepts that there is a public interest in transparency and in the disclosure of comments deleted from the blog and survey. It is clear that disclosing the information would provide openness and transparency and could inform an understanding of the matters under consideration.

54. Nevertheless, a balancing exercise must be undertaken. The Commissioner has found that disclosure of the information would, or would be likely to, endanger the mental health of individuals. This means the public interest arguments in favour of disclosure must be strong, to outweigh the public interest in ensuring that individuals are not endangered as a result of such disclosure.

55. The Commissioner has accepted the likelihood that individuals would be further traumatised if the deleted comments were disclosed, and this has a major bearing of his finding.

56. In all of the circumstances of the case, the Commissioner finds that the public interest arguments put forward by the Applicant are not strong enough to outweigh the public interest in ensuring that individuals are not endangered. He therefore finds that the public interest in maintaining the exemption in section 39(1) of FOISA outweighs that in making the

information available and that the Ministers were entitled to withhold the information under section 39(1) 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 requests 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.

Margaret Keyse
Head of Enforcement
28 November 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 –
 - ...
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- ...

39 Health, safety and the environment

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual.
- ...

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).

...