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Commissioner  
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# Decision Notice 072/2024

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## Information relating to the handling of an information request

**Authority: Scottish Ministers**  
**Case Ref: 202101331**

### Summary

The Authority was asked for correspondence relating to a FOI request and requirement for review it had previously received.

The Authority disclosed some of the information, but withheld the remainder under various exemptions in FOISA. During the investigation, the Authority disclosed some information it had wrongly withheld on the basis that disclosure prejudiced the effective conduct of public affairs, that it comprised the personal data of a third party, or that it was confidential.

The Commissioner found that the Authority had partially breached FOISA in responding to the request. While the Commissioner found that the Authority had correctly withheld some information, he found that it had wrongly withheld information it later disclosed during the investigation, as well as wrongly withholding other information under exemptions claimed. He required the Authority to disclose certain information to the Applicant.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1) and (2)(e) (Effect of exemptions); 30(b) and (c) (Prejudice to effective conduct of public affairs); 38(1)(b), (2A), (5) (definitions of “the data protection principles”, “data subject”, “personal data” and “processing”, “the UK GDPR”) and (5A) (Personal information); 36(1) (Confidentiality); 47(1) and (2) (Application for decision by Commissioner)

United Kingdom General Data Protection Regulation (the UK GDPR) articles 4(1) (definition of “personal data”); 5(1)(a) (Principles relating to processing of personal data); 6(1)(f) (Lawfulness of processing)

Data Protection Act 2018 (the DPA 2018) sections 3(2), (3), (4)(d) and (5), (10) and (14)(a), (c) and (d) (Terms relating to the processing of personal data)

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. On 16 July 2021, the Applicant made a request for information to the Authority. He asked for
  - (i) Any and all internal and external correspondence including emails, letters, WhatsApp messages, Signal messages, text messages relating to government business from officials, ministers, and special advisers and any other interested party relating to FOI ref: 202000077818
  - (ii) Any and all internal and external correspondence including emails, letters, WhatsApp messages, Signal messages, text messages relating to government business from officials, ministers, and special advisers and any other interested party relating to FOI review ref: 202000094934
2. The Authority responded on 14 September 2021. It apologised for the delay in responding to the request, and it provided the Applicant with most of the information he had requested. The Authority notified the Applicant that it was withholding some information under sections 30(b)(i) and (ii), 30(c), 36(1) and 38(1)(a) and (b) of FOISA.
3. On 16 September 2021, 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 exemptions applied in all cases, and he considered that the public interest favoured disclosure.
4. The Authority notified the Applicant of the outcome of its review on 14 October 2021. The Authority upheld the exemptions it had applied without modification.
5. On 25 October 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 Authority’s review because he believed the Authority had applied exemptions erroneously and that the public interest favoured disclosure.

## **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. 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 (focusing on its reliance on sections 30(b), (c), 36(1) and 38(1)(a) and (b) of FOISA).

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

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

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

10. During the investigation the Authority withdrew its reliance on some exemptions and it disclosed additional information to the Applicant.
11. Specifically, the Authority withdrew its reliance on section 30(b)(i) as it had been applied to document 44. It withdrew its reliance on section 30(b)(ii) as it had been applied to parts of documents 3, 38, 47, 51, 52 and 54. The Authority also withdrew its reliance on section 30(c) of FOISA, as it had been applied to parts of documents 20, 34, 38 and 39, and it withdrew its reliance on section 36(1) of FOISA, as it had been applied to document 32. Across most, if not all of the documents, the Authority disclosed information it had wrongly withheld under section 38(1)(b) of FOISA.
12. In the absence of submissions to the contrary, the Commissioner must find that the above described information was not exempt from disclosure and that the failure to disclose it at an earlier stage was a breach of Part 1 of FOISA.

### ***Scope of the investigation***

13. During the investigation, the Applicant stated that he was not challenging the redactions made under section 38(1)(a) of FOISA. As a result, the Commissioner will not consider this exemption in this decision notice.
14. The Authority identified 85 documents that were relevant to the Applicant's information request. Of these 85 documents, it submitted that documents 40, 45 and 60(a) were wholly out of scope of the request and documents 41, 45, 46, 69, 70, 72, 73, 74, 75, 76, 77 and 78 contained some information that was out of scope.
15. Having considered their content and the terms of the Applicant's information request, the Commissioner is satisfied that the information deemed to be out of scope of the request by the Authority is, in fact, out of scope of the request. He notes that none of the information contained in these documents discuss the Authority's response to the information request or review. As the Commissioner has determined that the information marked as out of scope does not fall within the scope of the Applicant's information request, he will not consider it any further in this decision.
16. The Authority also submitted that documents 29(a) and 60(b) were duplicates of document 28(a). Having reviewed these documents, the Commissioner is satisfied that documents 29(a) and 60(b) are duplicates of document 28(a) and therefore he will not consider these two documents any further in this decision.
17. The Authority is withholding information under the following exemptions:
  - Section 30(b)(i) of FOISA, applied to parts of documents 7, 26 and 38

- Section 30(b)(ii) of FOISA, applied to parts of documents 1, 3, 4, 14, 26a, 38, 39, 60, 61 and 63 and the entirety of documents 38(b) and 54
- Section 30(c) of FOISA, applied to parts of documents 2, 3 and 7
- Section 36(1) of FOISA, applied to parts of documents 3 and 7 and the entirety of documents 11, 12, 13, 21, 27, 31, 48 and 49.
- Section 38(1)(b) of FOISA, applied to parts of almost all of the documents

### ***Section 38(1)(b) – Personal information***

18. Section 38(1)(b), read in conjunction with section 38(2A)(a) or (b), exempts information from disclosure if it is “personal data”, as defined in section 3(2) of the DPA 2018, and its disclosure would contravene one or more of the data protection principles set out in Article 5(1) of the UK GDPR.
19. The exemption in section 38(1)(b) of FOISA, applied on the basis set out in the preceding paragraph, is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.
20. In order to rely on this exemption, the Authority must show that the information being withheld is personal data for the purposes of the DPA 2018, and that its disclosure into the public domain (which is the effect of disclosure under FOISA) would contravene one or more of the data protection principles to be found in Article 5(1) of the UK GDPR.
21. The Authority is withholding the names and contact details of junior staff, and the name of one member of senior staff, under this exemption.

#### *Is the withheld information personal data?*

22. The first question the Commissioner must address is whether the information is personal data for the purposes of section 3(2) of the DPA 2018. (The definition of “personal data” is set out in full in Appendix 1.)
23. The two main elements of personal data are that:
  - (i) the information must “relate to” a living person; and
  - (ii) the living individual must be identifiable.
24. Information will “relate to” a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
25. An “identifiable living individual” is one who can be identified, directly or indirectly, by reference to an identifier (such as a name) or one or more factors specific to the individual (see section 3(3) of the DPA 2018).
26. The Commissioner is satisfied that the information being withheld under section 38(1)(b) is personal data: it comprises the names and/or contact details of individuals and, as such, it is information that clearly relates to those individuals.

#### *Would disclosure contravene one of the data protection principles?*

27. The Authority argued that disclosure would breach the data protection principle in Article 5(1)(a) of the UK GDPR. Article 5(1)(a) states that personal data shall be processed “lawfully, fairly and in a transparent manner in relation to the data subject.”

28. "Processing" of personal data is defined in section 3(4) of the DPA 2018. It includes (section 3(4)(d)) disclosure by transmission, dissemination or otherwise making available personal data. The definition therefore covers disclosing information into the public domain in response to a FOISA request.
29. The Commissioner must consider whether disclosure of the personal data would be lawful. In considering lawfulness, he must consider whether any of the conditions in Article 6 of the UK GDPR would allow the data to be disclosed.
30. The Commissioner considers that condition (f) in Article 6(1) is the only condition which could potentially apply in the circumstances of this case.
31. As noted above, the information being withheld under this exemption is the names and contact details of individuals.

*Condition (f) – legitimate interests*

32. Condition (f) states that processing shall be lawful if it is necessary for the purposes of legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data (in particular where the data subject is a child).
33. Although Article 6 states that this condition cannot apply to processing carried out by a public authority in the performance of their tasks, section 38(5A) of FOISA (see Appendix 1) makes it clear that public authorities can rely on Article 6(1)(f) when responding to requests under FOISA.
34. The three tests which must be met before Article 6(1)(f) can be met are as follows:
  - (i) Does the Applicant have a legitimate interest in the personal data?
  - (ii) If so, would the disclosure of the personal data be necessary to achieve that legitimate interest?
  - (iii) Even if the processing would be necessary to achieve the legitimate interest, would that be overridden by the interests or fundamental rights and freedoms of the data subjects?
35. There is no presumption in favour of the disclosure of personal data under the general obligation laid down by section 1(1) of FOISA. Accordingly, the legitimate interests of the Applicant must outweigh the rights and freedoms or legitimate interests of the data subjects before condition (f) will permit the data to be disclosed. If the two are evenly balanced, the Commissioner must find that the Authority was correct to refuse to disclose the personal data to the Applicant.

*Does the Applicant have a legitimate interest?*

36. The Authority argued that it did not consider that the Applicant had any legitimate interest in the names of the individuals contained within the information, or that identifying the individuals would aid in the understanding of the information. The Authority further commented that, even if the Applicant did have legitimate interests it did not believe these would outweigh the individuals' interests in protecting their privacy.
37. In his submissions, the Applicant submitted that disclosure of the names that have been redacted under section 38(1)(b) of FOISA would enable the public to better understand the

internal decision-making processes of the Authority, and he argued that this would be in the public interest.

38. The Commissioner agrees that, in the circumstances, the Applicant has a legitimate interest in the withheld names. The Commissioner notes that the Applicant is seeking information on how the Authority processed a request and requirement for review he had made for a copy of the decision report issued in response to the complaints made against Mr Salmond. The Commissioner notes that the Authority's response to the Applicant's requirement for review differed markedly from the response it gave him initially, and he considers that the Applicant does have a legitimate interest in knowing which officials were involved in the Authority's handling of his request and requirement for review.
39. The Commissioner also notes that he issued a decision in response to the original request ([Decision 083/2021](#)<sup>1</sup>) which found against the Authority and concluded that its arguments at review, were not persuasive. In the circumstances, he considers that the Applicant, and the wider public, have a legitimate interest in knowing which officials were involved in responding to his request and requirement for review.
40. However, the Commissioner does not accept that the Applicant has a legitimate interest in the direct contact details of staff. He does not accept that disclosure of this information would aid the Applicant, in any way, in understanding the decision-making processes of the Authority or to better understand the information that has been disclosed. He finds that the Applicant's legitimate interest in the withheld personal data is limited to the names of staff and not their contact details. Given this, he will not consider the contact details of staff any further in this decision.

*Is disclosure necessary to achieve that legitimate interest?*

41. The Commissioner will now consider whether disclosure of officials' names is necessary for the Applicant's identified legitimate interest. In doing so, he must consider whether these interests might reasonably be met by any alternative means.
42. The Commissioner has considered this carefully in light of the decision of the Supreme Court in [South Lanarkshire Council v Scottish Information Commissioner \[2013\] UKSC 55](#)<sup>2</sup>.
43. Here, "necessary" means "reasonably" rather than absolutely or strictly necessary. The Commissioner must, therefore, consider whether the disclosure is proportionate as a means and fairly balanced as to the aims to be achieved, or whether the Applicant's legitimate interests can be met by means which interfere less with the privacy of the data subjects.
44. The Commissioner must bear in mind that, if the information the Applicant has requested is disclosed in response to a FOISA request, it is, in effect, disclosed into the public domain.
45. The Authority did not believe disclosure was necessary to achieve the Applicant's legitimate interest. It did not accept that disclosure of the redacted information was necessary in order for the Applicant to understand the information that was disclosed. The Authority submitted that disclosure was unlawful for the purposes of the UK GDPR, purely because it was unnecessary.
46. As noted above, the Commissioner has accepted that the Applicant and the wider public have a legitimate interest in the names of junior and senior officials involved in handling the

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<sup>1</sup> <https://www.itspublicknowledge.info/decision-0832021>

<sup>2</sup> <https://www.supremecourt.uk/cases/docs/uksc-2012-0126-judgment.pdf>

specified request and requirement for review. The Commissioner notes the Applicant's reasons for believing the Authority should disclose the information, and he accepts that the Applicant has a legitimate interest in understanding which individuals took part in discussions about the handling of the request and requirement for review. The Commissioner can identify no other viable means of meeting the Applicant's legitimate interests than providing the withheld information. In all the circumstances, the Commissioner is satisfied that disclosure of the information is necessary for the purposes of the Applicant's legitimate interests.

*Balancing the legitimate interests of the Applicant and the legitimate interests or fundamental rights and freedoms of the data subjects*

47. The [Commissioner's guidance on section 38 of FOISA](#)<sup>3</sup> lists certain factors that should be taken into account in balancing the interests of the parties. These include considering:
  - (i) Does the information relate to an individual's public life (their work as a public official or employee) or their private life (their home, family, social life or finances)?
  - (ii) Would disclosure cause harm or distress?
  - (iii) Whether the individual has objected to the disclosure.
48. As noted above, disclosure under FOISA is public disclosure; information disclosed under FOISA is effectively placed into the public domain.
49. The Commissioner acknowledges that the communications were sent or received by Authority employees and that they relate to the work of that Authority. On balance, then, the Commissioner is satisfied that the withheld information relates to the public lives of the employees, in that it identifies them as employees of the Authority discussing matters that are relevant to the work of that Authority.
50. The Commissioner has considered the harm or distress that might be caused by disclosure of the officials' names.
51. The Authority explained that it has a general approach of disclosing information about senior members of staff. It submitted that it generally releases details of staff within senior civil service (SCS) roles and officials with relatively senior roles that are public facing, but it withholds those details for more junior members of staff. The Authority submitted that in this case, it is withholding the names of junior officials, as well as the name of one official who is a member of the SCS.
52. The Authority commented that while it usually finds that the legitimate interests of the requester outweighs the rights and freedoms of the individual when considering senior civil servants, it does not find this to be the case regarding the SCS individual whose name is being withheld. The Authority submitted that disclosure of their name would cause a high risk of harm to the individual involved, given previous publicity on the matter and the impact that this had on the individual's health. The Authority submitted that employees have an expectation that their employer will protect them and, in this case, it considers that the rights and freedoms of the data subjects outweigh any legitimate interests that the Applicant may have.

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<sup>3</sup> <https://www.itspublicknowledge.info/sites/default/files/2022-04/BriefingSection38PersonalInformationGDPR.pdf>

53. The Commissioner is aware of the Decision reached in [Home Office v Information Commissioner EA/2011/0023](#)<sup>4</sup> where the First Tier Tribunal took the view that the names of junior civil servants were generally protected unless they occupied a public facing role. However, in the later case of [Cox v Information Commissioner and Home Office \[2018\] UKUT 119 \(AAC\)](#)<sup>5</sup>, the Upper Tribunal made it clear that each case should be considered on its merits.
54. The Commissioner recognises that junior employees would not have had any reasonable expectation that their names would be made public and linked to the comments that have already been disclosed under FOISA. He is satisfied that the legitimate rights and freedoms of individuals who hold junior roles are not outweighed by the Applicant's legitimate interests in obtaining the information.
55. However, the Commissioner does not agree that the name of the individual holding a senior post should be withheld. In his view, individuals employed in a senior role should expect to have their personal data disclosed in response to a FOI request. The Commissioner has taken account of the Authority's arguments regarding the negative press that affected the senior post holder in the past, but he is not persuaded that that is sufficient to outweigh the Applicant's legitimate interests in this case.
56. In reaching this view, the Commissioner has considered the [guidance](#)<sup>6</sup> produced by the (UK) Information Commissioner (the ICO) regarding the personal data of representatives from other organisations, which states (at page 21):
- The more senior the representative of the other organisation, the more likely it is that it is reasonable to release their names.*
- Also, if someone normally acts [as] a spokesperson for the other organisation, disclosure of their name is more likely to be reasonable.*
57. Furthermore, the Commissioner notes that this member of staff held a senior position with commensurate salary, during a high-profile event. He recognises that negative media attention may have caused some distress to the individual, but he notes that they remain in a senior post. He considers that they must still have an expectation that their name may be disclosed in response to a FOI request about a matter of considerable public interest. Additionally, the Commissioner is not persuaded that disclosure in this case is likely to engender the same level of media interest as the original event or that it would lead to the same level of harm.
58. After carefully balancing the legitimate interests of the Applicant against the interests or fundamental rights and freedoms of the data subjects, the Commissioner finds that the legitimate interests served by disclosure of the names of junior staff are outweighed by the unwarranted prejudice that would result to the rights and freedoms or legitimate interests of individuals who hold these junior roles. Condition (f) in Article 6(1) of the UK GDPR cannot, therefore, be met in relation to the names of junior members of staff.

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<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i724/20120327%20Decision%20EA20110203.pdf>

<sup>5</sup> [https://assets.publishing.service.gov.uk/media/5aded4de5274a0d820946cd/GIA\\_2906\\_2017-00.pdf](https://assets.publishing.service.gov.uk/media/5aded4de5274a0d820946cd/GIA_2906_2017-00.pdf)

<sup>6</sup> [https://ico.org.uk/media/for-organisations/documents/1187/section\\_40\\_requests\\_for\\_personal\\_data\\_about\\_employees.pdf](https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf)

59. In the absence of a condition in Article 6 of the UK GDPR allowing personal data to be disclosed, the Commissioner has concluded that disclosing the names of individuals who hold junior roles would be unlawful.
60. However, in relation to the senior employee, the Commissioner finds that the legitimate interests served by disclosure of the withheld personal data are not outweighed by the unwarranted prejudice that would result to the rights and freedoms or legitimate interests of the individual who holds a senior role. This individual already has a public profile and a level of seniority whereby their expectations of disclosure of their personal data are significantly greater than those of more junior staff. It is the Commissioner's view that condition (f) in Article 6(1) of the UK GDPR can, therefore, be met in relation to the name of the individual who holds a senior post.

#### *Fairness*

61. As the Commissioner has determined that the processing of the personal data of a senior individual would be lawful, and bearing in mind his reasoning in reaching that conclusion, he can identify no reason for finding that the disclosure of the name of an individual in a senior role would be other than fair.
62. In relation to the personal data of junior staff, as the Commissioner has concluded that the processing of this personal data would be unlawful, he is not required to go on to consider separately whether disclosure of their names would otherwise be fair and transparent.

#### *Conclusion on the data protection principles*

63. For the reasons set out above, the Commissioner is satisfied that the disclosure of the names of junior staff would breach the data protection principles in Article 5(1)(a) of the UK GDPR, but disclosure of the names of individuals with senior or public facing roles would not constitute such a breach.
64. Consequently, he is satisfied that, while the personal data of junior staff are exempt from disclosure under section 38(1)(b) of FOISA, the personal data of the individual with a senior role has been wrongly withheld under this exemption.
65. The Commissioner requires the Authority to provide the Applicant with the name of the individual holding a senior role that has been wrongly withheld under section 38(1)(b) of FOISA.

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

66. The Authority is withholding information documents 3, and 7, and the entirety of documents 11, 12, 13, 21, 27, 31, 48 and 49 under this exemption.
67. 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.
68. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given. 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 their client.

69. The Authority submitted that all of the information withheld under section 36(1) of FOISA relates to communications with, or references to communications with, in-house and external legal advisers acting in their professional capacity with the Authority as their client in which legal advice is being sought and provided, including material which evidences the substance of those communications. The Authority commented 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.
70. The Authority argued that disclosure of the information would breach legal professional privilege by divulging information about the points being considered by lawyers, the extent of their comments, and the issues being flagged up for further consideration. The Authority contended that all of the necessary conditions for legal advice privilege to apply were satisfied.
71. The Authority submitted that a claim to confidentiality could be maintained in legal proceedings because the correspondence in question was only shared between the Authority and its legal advisers. Apart from being provided to the Commissioner for the purpose of his investigation (in relation to this case) the Authority argued that the advice had not, at any time, been shared with anyone outwith the Authority. Given this, the Authority contended that the information was confidential at the time it responded to the Applicant's request and requirement for review (and it remains so now). The Authority submitted that legal professional privilege has not been waived.
72. 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 for legal advice privilege to apply. All the conditions stated above apply: the information involves communications with a legal adviser (a solicitor), who is acting in their professional capacity, and the communications occur in the context of the legal adviser's professional relationship with their client, i.e. advice regarding the Authority's response to a requirement for review. As a consequence, the Commissioner is satisfied that the exemption in section 36(1) of FOISA is engaged.

### ***Public interest***

73. 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.

### ***Applicant's comments on the public interest***

74. In his submissions to the Commissioner, the Applicant argued that there was a strong public interest in the exemption being overruled, on the same basis the then-deputy First Minister, John Swinney, did so in parliament when he published significant swathes of legal advice around the Salmond inquiry. As this request covers substantially the same issue as raised by MSPs during that time, namely transparency of government in its handling of the complaints against Mr Salmond, the Applicant argued that the same arguments in favour of disclosure applied.

75. The Applicant argued that, as the Commissioner found against the Authority in Decision 083/2021 and the Authority did not appeal the decision, there is no justifiable reason for maintaining secrecy on why these exemptions were applied in the way they were. In fact, the Applicant argued that there was an overwhelming public interest in what actions lawyers advised the Authority to take, particularly if the Authority ignored the advice offered by legal advisors, and took a path which was opposed by its legal advisors. The Applicant argued that the public should be allowed to know and hold them account.

*Authority's comments on the public interest*

76. The Authority recognised that there was a public interest in the release of the legal advice for reasons of transparency and openness. It acknowledged the public interest in the handling of FOI requests, and in the handling of requests on this subject matter in particular. However, the Authority considered that there was a strong public interest in maintaining the exception relating to legal professional privilege in order to ensure confidentiality of communications, for the following reasons:

- 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.
- There is a public interest in ensuring that the Authority's position on any issue is not undermined by the disclosure of legal advice. Legal advisers need to be able to present the full picture to their clients.
- It is in the nature of legal advice that it often sets out the possible arguments both for and against a particular view, weighing up their relative merits.

77. The Authority submitted that there was a strong public interest in protecting the confidentiality of this information in order to ensure that it is able to discuss and take policy decisions in full possession of thorough and candid legal advice. This ensures that the Authority can take decisions in a fully informed legal context, having received legal advice in confidence as any other client would.

78. On balance, the Authority argued that in this instance, the public interest in maintaining the exception outweighs 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 for full and detailed internal consideration of the issues at hand.

*Commissioner's view on the public interest*

79. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest 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>7</sup>. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.

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<sup>7</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+)))

80. The Commissioner recognises 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. In this particular case, he has given weight to the Applicant's views regarding the public interest in disclosure of information that may reveal whether the Authority did, or did not, use arguments in its review outcome in Decision 083/2021, that were provided by its legal advisors.
81. He acknowledges the significant public interest in how the Authority handled the complaints about Mr Salmond, and in how it responded to FOI requests on that subject matter. He recognises that there is a public interest, in understanding why the Authority argued, in its review outcome, that it did not hold the information requested in Decision 083/2021, particularly since his conclusion in that case was that the Authority did hold the information, and the Authority was wrong to have notified the requester that the information was not held.
82. The Commissioner also 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 followed the guidance issued by its legal advisors, when responding to a request for information or a requirement for review, under FOISA.
83. However, the Commissioner must agree with the Authority that, in this case, there is a stronger public interest in protecting the confidentiality of the information in order to ensure that the Authority can continue to take decisions based on the advice it receives in confidence from its legal advisors.
84. Having considered the public interest arguments on both sides, the Commissioner is not satisfied that the public interest in disclosure of this particular information to be sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client.
85. In conclusion, after careful consideration, the Commissioner is satisfied that the Authority correctly withheld the information under section 36(1) of FOISA.

***Section 30(b)(i) - Substantial inhibition to free and frank provision of advice***

86. As noted above, the Authority is withholding information in documents 7, 26 and 38 under this exemption.
87. Section 30(b)(i) provides that that information is exempt if its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
88. In applying the exemption in section 30(b)(i), the chief consideration is not whether the information constitutes advice, but whether the disclosure of that information would, or would be likely to, inhibit substantially the provision of advice. The inhibition in question must be substantial and therefore of real and demonstrable significance.

***The Authority's submissions***

89. The Authority argued that it was essential for officials to be able to communicate with each other, receive advice from specialists (including its FOI Unit) to fully consider all options when responding to decisions issued by the Scottish Information Commissioner. The Authority submitted that the information withheld under this exemption sets out officials' candid assessment of the status of the Decision Report, an assessment of how the Scottish

Information Commissioner may view the response and advice on the application of exemptions. It argued that officials would be reluctant to set out the potential options open and associated analysis of the potential consequences of actions taken as fully and in such candid terms, if they thought that their free and frank handling advice would be disclosed into the public domain.

90. It argued that if the full advice on which decisions on this request and review were to be made was disclosed, its ability to test robustly proposed positions before using them publicly would be compromised substantially if every preliminary thought that had been recorded had to be disclosed. The Authority submitted that officials would be far less likely to provide advice that fully tested all propositions if that advice was to be disclosed, particularly when decisions had not yet been made on the issue.
91. The Authority commented that it would be Scottish Government officials who would be inhibited from providing advice of this nature in future. It argued that disclosing the content of these communications was likely to result in discussions about FOI handling being less detailed, which would diminish the quality of the advice provided to officials.

*The Commissioner's views on 30(b)(i)*

92. The Commissioner has considered all the submissions made by the Authority and the Applicant, along with the withheld information under consideration.
93. While the Commissioner accepts that officials must (in appropriate circumstances) have a private space in which to share and discuss candid advice, he is not persuaded that disclosure of all of the withheld information would prevent this from continuing in future.
94. The Commissioner notes that the information being withheld under section 30(b)(i) is not attributed to any particular individual, as names have been withheld under section 38(1)(b) of FOISA. It is, therefore, not clear to the Commissioner why disclosure of all of this information would, or would be likely to, inhibit substantially the free and frank provision of advice in the future.
95. In particular, the Commissioner is not satisfied that disclosure of the information withheld in document 7 would result in the harm claimed by the Authority. This information refers to views the Commissioner, may or may not hold in relation to arguments that might be made and he cannot see the harm in its disclosure. The Commissioner does not uphold the application of section 30(b)(i) to the information withheld in document 7.
96. However, having considered the information that has been withheld in documents 26 and 38, he is satisfied that disclosure of this information would, or would be likely to, inhibit substantially the free and frank provision of advice by officials, in the future. He notes that the advice in document 26 is candid and detailed, and sets out an official's view as to how the Authority should respond to the request for review. In contrast, the information in document 38 is only a few lines, but it is very free and frank and relates to an official's understanding of previous arguments and discussions. In both cases, the Commissioner is satisfied of the sensitivity of the advice provided, and he finds that the exemption in section 30(b)(i) has been properly applied.
97. Given that the Commissioner does not accept the application of the exemption for the information withheld in document 7, under section 30(b)(i), he is not required to consider the application of the public interest in section 2(1)(b) for that information. As no further exemption has been claimed to justify the withholding of that information, the Commissioner requires the Authority to disclose it to the Applicant.

98. The Commissioner is satisfied that the information withheld in documents 26 and 38 is exempt from disclosure in terms of the exemption contained in section 30(b)(i) of FOISA. He will now go on to consider the application of the public interest test in section 2(1)(b) of FOISA.

### ***Public interest***

99. The "public interest" is not defined in FOISA, but has been described as "something which is of serious concern and benefit to the public", not merely something of individual interest. The public interest does not mean "of interest to the public" but "in the interest of the public", i.e. disclosure must serve the interests of the public.

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

100. In his submissions, the Applicant asked the Commissioner to take into account the public interest arguments that were recounted in decision 083/2021, particularly those set out in paragraph 30 of that decision. The Commissioner notes that the request and requirement for review that is the focus of this case, sought the decision report into complaints made against the former First Minister (Mr Salmond).
101. In decision 083/2021, the Applicant submitted that the decision report was at the heart of a parliamentary inquiry, it was at the heart of a judicial review, and it was included in evidence for the criminal trial of a former First Minister (Mr Salmond). The Applicant argued that, in order for the public to be fully informed and to be able to hold the Scottish Government to account, the report must be disclosed into the public domain, with appropriate redactions. The Applicant argued that this goes to the heart of the issue on transparency and accountability.
102. The Applicant submitted that as this request focused on internal correspondence, there was a clear public interest in how the Authority handled this FOI request and subsequent appeal to be made public. He argued that the disclosure would aid openness and transparency, and that it was in the public interest for the internal discussion of the Authority to be put in the public domain.

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

103. The Authority submitted that it had considered if the public interest in disclosure outweighed the public interest in applying the exemption, and it concluded that, on balance, the public interest lay in favour of upholding the exemption.
104. 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. It also acknowledged the public interest in how requests for information are dealt with by the Authority.
105. However, it argued that these factors were outweighed by the public interest in allowing Authority officials to have a private space where advice can be given in as free and frank a manner as possible. It submitted that it was important to protect some private space, while still acknowledging the general principle of openness, to allow all options to be fully and properly considered. The Authority commented that this was for the overall benefit of good decision making, and to ensure that the process for handling requests for information was developed with the best advice to ensure that sound decisions were taken.

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

106. The Commissioner has considered carefully all the public interest arguments he has received.
107. The Commissioner acknowledges that there is a public interest in transparency in relation to the processes the Authority followed when handling a FOI request, and how it sought to comply with its statutory duties under FOISA. He accepts that disclosure of the free and frank advice contained in the withheld information would shed some light on these actions and processes.
108. However, the Commissioner also accepts that disclosure of this information would have an adverse impact on such frank and free advice being provided in future. The Commissioner has considered the information that has been redacted from documents 26 and 38. He notes that the advice provided in document 26 relates to the arguments contained in a review outcome that he did not uphold in decision 083/2021. The Commissioner also notes that the advice redacted from document 38 discusses the reference to a legal understanding.
109. The Commissioner recognises that officials must be allowed to offer free and frank advice on how the Authority should respond to a FOI request or requirement for review, without fear that such advice is disclosed after the Commissioner has found it wanting. He considers that deviation from this would, or would be likely to, lead to less frank advice being provided in future and if this occurred, it would impede the Authority from effectively carrying out its statutory duties under FOISA.
110. In all of the circumstances of the case, therefore, the Commissioner finds that the public interest in maintaining the exemption in this case outweighed that in making the information available. He therefore concludes that the Authority was entitled to withhold the information under section 30(b)(i) of FOISA.

### ***Section 30(b)(ii) - Substantial inhibition to free and frank exchange of views***

111. The Authority is withholding certain information in documents 1, 3, 4, 14, 26a, 38, 39, 60, 61 and 63, and the entirety of the information in documents 38(b) and 54 under section 30(b)(ii) of FOISA. Section 30(b)(ii) provides that information is exempt if its disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
112. As is the case with the exemption contained in section 30(b)(i), the chief consideration when applying the exemption in section 30(b)(ii), is not whether the information constitutes opinion or views, but whether the disclosure of that information would, or would be likely to, inhibit substantially the exchange of views. The inhibition in question must be substantial and therefore of real and demonstrable significance.
113. The Authority submitted that officials must be able to exchange views in a free and frank manner to ensure that all options are properly considered, and that decisions taken on the handling and responses have taken account of all necessary issues. As with section 30(b)(i) of FOISA, the Authority argued that it was important that all propositions, including those that are likely to be discarded, are fully tested and discussed.
114. The Authority referred to the sensitivity of the information and argued that its ability to test robustly proposed positions before using them publicly would be compromised substantially if every preliminary thought that had been recorded had to be disclosed. The Authority argued

that officials would be far less likely to engage in frank discussions that fully tested all propositions if the information it was withholding under section 30(b)(ii) of FOISA were to be disclosed.

115. The Authority argued that disclosing the content of these communications was likely to result in discussions about FOI handling being less detailed, which would diminish the quality of the advice provided to Ministers and officials. It noted that it would be Scottish Government officials who would be inhibited from providing their candid views in future.

#### *The Commissioner's views on 30(b)(ii) of FOISA*

116. The Commissioner has considered all of the information that the Authority is withholding under section 30(b)(ii) of FOISA. This information comprises correspondence between officials discussing the Authority's response to a FOI information request and the associated requirement for review.
117. The Commissioner considers that the exemption cannot be upheld in relation to the information withheld in documents 1, 54 and 63. Furthermore, the Commissioner finds that he cannot uphold the exemption in respect of some of the information withheld in documents 38 and 61. In each instance, he does not find the withheld information to be particularly sensitive, nor does he accept that its disclosure would prevent individuals from sharing their views in future.
118. As he finds that the exemption is not engaged, and as no other exemptions have been applied to this information, he requires the Authority to disclose the information that he has found not exempt under section 30(b)(ii) to the Applicant. The Commissioner will provide the Authority with guidance on the specific information to be disclosed.
119. The Commissioner does however accept that some information contained in documents 3, 4, 14, 26a, 38, 38b, 39, 60 and 61 would be exempt from disclosure under the exemption in section 30(b)(ii) of FOISA.
120. The Commissioner accepts that officials who are responsible for ensuring that an Authority complies with an information request, require a private space to discuss matters freely and frankly, particularly when those matters are of a sensitive nature. Considering how best to respond to a request, and weighing up the pros and cons of making specific arguments requires the exchange of free and frank views.
121. The Commissioner will not go into detail for each piece of information where he finds that the exemption applies, but he would note that, in each instance where he has upheld the exemption, it is because he is satisfied that disclosure would lead to the harm claimed by the Authority.
122. The Commissioner considers that disclosure of some of the information in documents 3, 4, 14, 26a, 38, 38b, 39, 60 and 61 would be likely to stifle the frankness and candour of comments on similarly sensitive issues in future and would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. The Commissioner is therefore satisfied that this information is exempt from disclosure under section 30(b)(ii) of FOISA. He will now go on to consider the application of the public interest test in section 2(1)(b) of FOISA.

#### **Public Interest**

123. The exemption in section 30(b)(ii) is subject to the public interest test required by section 2(1)(b) of FOISA. Where this exemption is correctly applied, the Commissioner must

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.

*The authority's submissions about the public interest*

124. 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. It also acknowledged the public interest in how requests for information, and reviews, were handled by the Scottish Government.
125. However, the Authority argued that these factors were outweighed by the public interest in allowing officials to have a private space where views may be exchanged in as free and frank a manner as possible. The Authority submitted that it was important to protect some private space, while still acknowledging the general principle of openness, to allow all options to be fully and properly discussed. The Authority argued that this was to the overall benefit of good decision making, and it would ensure that the handling of FOI requests is discussed and developed on as robust a basis as is possible.
126. The Authority maintained that the public interest lay in upholding the exemption.

*The Applicant's submissions about the public interest*

127. The Applicant argued that the public interest in transparency and in understanding how this specific FOI request was handled, outweighed the Authority's need for a private space to discuss how it should approach the request.

*The Commissioner's view on the public interest*

128. The Commissioner considered all of the arguments presented to him in relation to the public interest in withholding or disclosing the information withheld under section 30(b)(ii) in documents 3, 4, 14, 26a, 38, 38b, 39, 60 and 61.
129. The Commissioner recognises the significant public interest that exists in the Authority's exercise of its functions under FOISA, and its decision-making processes that result in any specific response being issued.
130. In relation to this particular request, the Authority significantly changed its position between issuing the response and the review outcome. In particular, the Authority applied exemptions to the information in its original response to the FOI request, but in its review outcome argued that the information was not in fact held. The Commissioner considers this to be a significant change in position, and he accepts that there is a public interest in understanding why the Authority changed its response so completely, and in seeing the emails and discussions which led to this change. The Commissioner also accepts that disclosure of the information would go some way towards meeting the general FOISA requirement for transparency and openness.
131. However, against this the Commissioner accepts that there is a public interest in ensuring that officials considering an Authority's response to a FOI request on a sensitive subject can put forward their views freely and frankly, and in confidence that these views, which may not be acted upon, will not be disclosed. The Commissioner accepts that disclosure of this information, in light of the public scrutiny of the Authority's handling of the complaints made against Mr Salmond, would have a detrimental impact on its ability to obtain the views of its staff. The Commissioner accepts that it is in the public interest that the Authority obtains the frank views of officials when complying with its duties under FOSIA, and that that staff are not inhibited from giving their free and frank views in the future.

132. Following an appeal to his office on the subject matter of the FOI in this particular case, the Commissioner issued Decision 083/2021 which examined the Authority's handling of the request, including its change of position at review, which the Commissioner did not uphold. In the circumstances, the Commissioner considers that this decision goes some way to meeting the public interest in ensuring authorities comply with their duties under FOISA. Decision 083/2021 outlines the Authority's reasons for concluding that the report was not held, and it explains why the Commissioner did not share this view. Disclosure of the information withheld under section 30(b)(ii) of FOISA in this case may disclose more detailed information about the Authority's decision-making processes, but the Commissioner is of the view that the information already in the public domain goes some way to fulfilling the public interest in this case.
133. On balance, therefore, the Commissioner finds that the public interest in disclosing the withheld information is outweighed by that in maintaining the exemption in section 30(b)(ii) of FOISA. Consequently, he is satisfied that the Authority was entitled to maintain the exemption.

***Section 30(c) – Prejudice to effective conduct of public affairs***

134. The Authority is withholding information in documents 2, 3 and 7 under section 30(c) of FOISA.
135. 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.
136. 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.
137. 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***

138. The Authority explained that the exemption was applied to sources of legal advice because its disclosure would breach the long-standing Law Officer Convention (reflected in the Scottish Ministerial Code) which prevents the Scottish Government from revealing whether Law Officers either have or have not been asked to provide legal advice on any matter. It noted that the Ministerial Code states at paragraph 2.38 that Ministers must not divulge who provided the advice whether it is from the Law Officers or anyone else. The Authority submitted that the Convention has been given particular recognition in FOISA through section 29 so as to preserve it, subject to it being outweighed by greater considerations of public interest.
139. The Authority argued that breach of the Convention itself substantially prejudices the effective conduct of public affairs. It referred to a specific court case, [HM Treasury V IC](#)

[\[2009\] EWHC 1811\(Admin\)](#) [\[2010\] QB 56](#)<sup>8</sup> and argued that the Courts have noted that Parliament intended real weight should be afforded to the Law Officers' Convention, and that the general considerations of good government underlining the history and nature of the convention are capable of affording weight to the interest in maintain an exemption even in the absence of evidence of particular damage.

140. The Authority submitted that revealing whether or not Law Officers had been asked to advise on this matter would encourage people to draw conclusions regarding the importance placed by government on the subject. This would significantly harm the effective conduct of public affairs by placing undue pressure on Ministers and officials in future when they are considering seeking legal advice, and the suitability of who should be asked to provide that advice, in particular when considering seeking advice from the Law Officers.

*The Commissioner's view on 30(c)*

141. Information can only be exempt under section 30(c) of FOISA if its disclosure would prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. Having considered the nature and content of the withheld information, together with the Authority's submissions, the Commissioner accepts that disclosure of he withheld information would be likely to cause substantial prejudice to the effective conduct of public affairs.
142. The Commissioner has also considered the Authority's arguments on withholding the source of its legal advice. The Commissioner notes that the Law Officers Convention is reflected in the Scottish Ministerial Code, and that it prevents the Scottish Government from revealing whether Law Officers have or have not provided legal advice on any matter. The Commissioner has considered this issue in previous decisions, most recently in [Decision 121/2019](#)<sup>9</sup>, and in each case he has accepted the importance of the Law Officer Convention and the risks posed by its breach. The Commissioner takes a similar approach in this case, and find that the exemption contained in section 30(c) of FOISA is engaged, with respect to this information.
143. The Commissioner will now go on to consider the public interest test in relation to the information that he has found to be correctly withheld under section 30(c) of FOISA.

***Public interest***

144. As noted above the exemption in section 30(c) is subject to the public interest test required by section 2(1)(b) of FOISA.

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

145. The Authority recognised that there was some public interest in release in order to promote transparency and inform public debate, and it acknowledged that releasing the details of who provided legal advice may be of interest to some people.
146. However, it maintained that the public interest arguments for disclosure do not, in this particular case, outweigh the public interest arguments for maintaining the Law Officer Convention. The Authority submitted that it would not, in any way, add to the public's understanding of the issues that are relevant in relation to the Scottish Government's policy

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<sup>8</sup> <https://www.bailii.org/ew/cases/EWHC/Admin/2009/1811.html>

<sup>9</sup> <https://www.itspublicknowledge.info/decision-1212019>

position on this matter. It argued that the public interest in upholding the exemption outweighs any public interest in the release of the information.

*The Applicant's submissions on the public interest test*

147. Referring to the Authority's general points around legal advice and the Law Officer's convention, the Applicant argued that there was a strong public interest in the Authority's arguments being overruled on the same basis as then-deputy First Minister, John Swinney, did so in parliament when he published significant swathes of legal advice around the Salmond inquiry.
148. The Applicant argued that as this request covers substantially the same issue as raised by MSPs during this time, namely transparency of government in its handling of these complaints (he argued that this appeal ultimately relates back to the complaints process within government around the Salmond allegations), the same arguments in favour of disclosure apply here.
149. The Applicant submitted that as the Scottish Information Commissioner has also ruled against the Authority (in Decision 083/2021) and the Authority did not appeal the decision, there is no justifiable reason for maintaining secrecy on why these exemptions were applied in the way they were. In fact, the Applicant argued that there was an overwhelming public interest in what lawyers advised the Scottish Government on. He submitted that if the Authority was advised by law officers that it's proposed review outcome was the wrong approach, but it carried on regardless, the public should be allowed to know and hold it to account.

*The Commissioner's view on the public interest*

150. The Commissioner is satisfied that the public interest lies in protecting the source of the Authority's legal advice.
151. The Commissioner has taken account of the strong public interest arguments put forward by the Applicant, but he is not persuaded that disclosure of the source of the Authority's legal advisers would be in the public interest. He acknowledges that disclosure of this information would reveal whether or not the Law Officers have advised the Scottish Government, and this may increase transparency around the source of the legal advice that underpinned the Scottish Government's actions.
152. However, in the particular circumstances of this case, the Commissioner has identified no further public interest in disclosure of the source of legal advice. On the other hand, he accepts that there are public interest arguments of substance which support maintaining the Law Officer Convention.
153. As noted above, the Commissioner has already acknowledged that disclosure of the information would, or would be likely to, substantially prejudice the effective conduct of public affairs. Having balanced the public interest arguments for and against disclosure, he is satisfied that, on balance, the public interest in maintaining the exemption in section 30(c) outweighs that in disclosure, in respect of this particular information.
154. The Commissioner therefore concludes that the Authority was entitled to withhold the information under the exemption in section 30(c) of FOISA.

## **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(s).

The Commissioner finds that by correctly withholding information under sections 30(b)(i) and (ii), 30(c), 36(1) and 38(1)(b) of FOISA, the Authority complied with Part 1.

However, by wrongly withholding some information under sections 30(b)(i) and (ii), 30(c), 36(1) and 38(1)(b) of FOISA, the Authority failed to comply with Part 1.

The Commissioner requires the Authority to provide the Applicant with the information it wrongly withheld in documents 1, 7, 38, 54, 59, 61 and 63 by **17 June 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.

## **Enforcement**

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

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

**1 May 2024**

## 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.

...

- (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 –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (e) in subsection (1) of section 38 –

...

- (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied.

...

#### 30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-
  - (i) the free and frank provision of advice; or
  - (ii) the free and frank exchange of views for the purposes of deliberation; or
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

## 36 Confidentiality

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

...

## 38 Personal information

- (1) Information is exempt information if it constitutes-

...

- (b) personal data and the first, second or third condition is satisfied (see subsections (2A) to (3A);

...

- (2A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act -

- (a) would contravene any of the data protection principles, or  
(b) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.

...

- (5) In this section-

"the data protection principles" means the principles set out in –

- (a) Article 5(1) of the UK GDPR, and  
(b) section 34(1) of the Data Protection Act 2018;

"data subject" has the same meaning as in the Data Protection Act 2018 (see section 3 of that Act);

...

"personal data" and "processing" have the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(2), (4) and (14) of that Act);

"the UK GDPR" has the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(10) and (14) of that Act).

- (5A) In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted.

...

## 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).

## UK General Data Protection Regulation

### Article 5 Principles relating to processing of personal data

- 1 Personal data shall be:
  - a. processed lawfully, fairly and in a transparent manner in relation to the data subject (“lawfulness, fairness and transparency”)

...

### Article 6 Lawfulness of processing

- 1 Processing shall be lawful only if and to the extent that at least one of the following applies:

...

  - f. processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data, in particular where the data subject is a child.

## Data Protection Act 2018

### 3 Terms relating to the processing of personal data

...

- (2) “Personal data” means any information relating to an identified or identifiable living individual (subject to subsection (14)(c)).
- (3) “Identifiable living individual” means a living individual who can be identified, directly or indirectly, in particular by reference to –
  - (a) an identifier such as a name, an identification number, location data or an online identifier, or
  - (b) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
- (4) “Processing”, in relation to information, means an operation or set of operations which is performed on information, or on sets of information, such as –
  - ...
  - (d) disclosure by transmission, dissemination or otherwise making available,
  - ...
- (5) “Data subject” means the identified or identifiable living individual to whom personal data relates.
  - ...
- (10) “The UK GDPR” means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (United Kingdom General Data Protection Regulation), as it forms part of the law of England and Wales, Scotland and Northern Ireland by virtue of section 3 of the European Union (Withdrawal) Act 2018 (and see section 205(4)).

...

- (14) In Parts 5 to 7, except where otherwise provided –
  - (a) references to the UK GDPR are to the UK GDPR read with Part 2;
    - ...
  - (c) references to personal data, and the processing of personal data, are to personal data and processing to which Part 2, Part 3 or Part 4 applies;
  - (d) references to a controller or processor are to a controller or processor in relation to the processing of personal data to which Part 2, Part 3 or Part 4 applies.