



Scottish Information  
Commissioner  
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# Decision Notice 299/2024

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## First Minister's meetings

Authority: Scottish Ministers  
Case Ref: 202400483

### Summary

The Applicant asked the Authority for information relating to the First Minister's meetings over a specified period. The Authority considered some of this information was otherwise available to the Applicant and withheld other information under various exemptions in FOISA. During the investigation, the Authority changed position and disclosed further information to the Applicant and continued to withhold the remaining information under various exemptions in FOISA. The Commissioner investigated and found that the Authority was entitled to withhold a small amount of the remaining withheld information but had wrongly withheld the rest. He required the Authority to disclose the wrongly withheld information.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 29(1)(b) and (d) (Formulation of Scottish Administration policy etc.); 36(1) (Confidentiality); 47(1) and (2) (Application for decision by Commissioner)

### Background

1. On 2 February 2024, the Applicant made a request for information to the Authority. They asked for:
  - 1) a list of meetings attended by the First Minister between (and including) 1 October 2023 and 31 January 2024
  - 2) a list of these meetings that had minutes available

- 3) a list of these meetings that did not have minutes available or where minutes were not being provided for public viewing (and the reason why).
2. The Authority responded on 1 March 2024. Regarding part 1 of their request, the Authority advised the Applicant that:
  - some information relating to the First Minister's external meetings was already published or was scheduled for future publication, which was therefore exempt under sections 25(1) and 27(1) of FOISA, respectively
  - information relating the First Minister's internal meetings was exempt from disclosure under section 29(1)(d) of FOISA
  - some of the information relating to the First Minister's internal meetings was also exempt from disclosure under section 30(b)(i) of FOISA
  - for parts 2 and 3 of the request, it confirmed that a record of all formal meetings was taken, but that minutes were not routinely published.
3. On the same day, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that they were dissatisfied with the decision because they did not accept the Authority's reasons for failing to provide the information requested and they considered the public interest favoured disclosure.
4. The Authority notified the Applicant of the outcome of its review on 28 March 2024, which fully upheld its original decision for part 1 of their request but did not address parts 2 and 3 of their request.
5. On 3 April 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that they were dissatisfied with the outcome of the Authority's review because they had not been provided with the information requested.

## Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 20 May 2024, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant, and the case was subsequently 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.
9. During the investigation, the Authority changed its position and disclosed a full list of the First Minister's external meetings and a partially redacted list of his internal meetings, stating which meetings did, or did not, have minutes and whether these were publicly available. Where minutes existed but were not publicly available, the Authority explained why this was this case. The Authority continued to withhold the "subject" of 91 of the First Minister's internal meetings, which it now considered to be variously exempt in terms of sections 29(1)(d), 29(1)(b) and 36(1) of FOISA.

10. The Applicant subsequently confirmed that they were content for the Commissioner's decision to be restricted to part 1 of their request solely. The Commissioner will therefore not consider parts 2 and 3 of the Applicant's request further in his decision.

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

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

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

12. The Authority originally withheld information relating to the First Minister's external meetings in January 2024 under section 27(1) of FOISA as it considering that information would be published no later than 12 weeks after the date the Applicant's request was made. The Authority also withheld a small amount of further information relating to the subject of a number of the First Minister's internal meetings under the exemption in section 30(b)(i) of FOISA.
13. During the investigation, the Authority withdrew its reliance on these exemptions for that information, which it disclosed to the Applicant. The Authority accepted that it had not been entitled to rely on section 27(1) of FOISA for information relating to the First Minister's January 2024 meetings as that information had not been published until 30 May 2024.
14. During the investigation, the Authority also accepted that it had failed to adequately address parts 2 and 3 of the Applicant's request in either its initial or review response. The Authority disclosed information in response to these parts of the Applicant's request during the Commissioner's investigation.
15. As the Authority disclosed further information to the Applicant during the investigation that it either accepted it had not been entitled to withhold or that it should have disclosed sooner, the Commissioner must find that the Authority failed to comply with section 1(1) of FOISA in this respect.

### ***Section 29(1)(d) – Operation of any Ministerial office***

16. Section 29(1)(d) of FOISA provides that information is exempt information if it relates to the operation of any Ministerial private office (i.e. any part of the Scottish Administration which provides personal administrative support to a Minister).
17. It is a class-based exemption, which means disclosure does not have to result in any kind of prejudice to engage the exemption, only that the request falls within the class of information which the exemption is designed to protect.
18. Having reviewed the withheld information, the Commissioner is satisfied that it relates to the operation of the First Minister's private office and therefore clearly falls within the terms of the section 29(1)(d) exemption in FOISA.
19. Section 29(1)(d) of FOISA is a qualified exemption, however, and the Commissioner therefore must go on to consider whether the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

*The Applicant's submissions on the public interest*

20. The Applicant submitted that the then First Minister had been reported to have held several "secret" meetings with various individuals. The Applicant considered that the First Minister was responsible to the people of Scotland, which meant there should be transparency regarding with whom the First Minister met and the date and purpose of any meetings.
21. The Applicant submitted that the public interest, therefore, favoured disclosure of the withheld information, particularly if the withheld information revealed:
  - impropriety in relation to the attendees, or substance, of any of the First Minister's meeting(s)
  - the First Minister had met groups or individuals for purposes which sat outwith his remit as First Minister
  - travel expenses were paid from the public purse for meetings which were outwith the First Minister's official remit.

*The Authority's submissions on the public interest*

22. The Authority recognised the public interest in disclosure of the withheld information to promote open, transparent and accountable government, to ensure its private offices operated efficiently and to inform public debate.
23. However, the Authority considered that there was a greater public interest in:
  - allowing the First Minister a private space and the necessary time to engage with officials and other Ministers to receive free and frank exchanges of advice
  - enabling the First Minister the private space and time to work on a wide range of ministerial duties and decisions, allowing for all options to be properly considered, to enable the effective operation of private office and to manage the First Minister's time in the most efficient way.
24. The Authority noted that a factual record of engagements is retained within the First Minister's diary, but it submitted that this did not capture all of the discussions and interactions that may have taken place on any given day between Ministers, officials and special advisers.
25. The Authority submitted that if Ministers were required to publish a daily diary (including the timings of all entries) it would diminish their privacy to discuss and develop policy, make decisions and to have open dialogue with policy areas, because there would be pressures on staff and Ministers to present a "version of the day" for publication.
26. The Authority also stated that releasing Ministerial diaries, either in real-time or in response to information requests, would change the way in which Ministerial private offices "narrated" the day and would inevitably lead to the "justification" of space within the diary. The Authority argued that this would risk a reduction in good quality decision-making and discussions through freedom to interact with officials and advisers, and would risk inaccurate assumptions being made about Ministerial workloads (e.g. a lot of internal work, like reviewing policy evidence and Ministerial boxes is not shown in diaries), which would be detrimental to the work of the Authority and would not be in the public interest.
27. The Authority also noted that disclosing Ministerial diaries would impose an administrative burden on all Ministerial private offices to publish explanations to place that information in

context and to correct actual or potential misunderstandings about Ministerial workloads and their use of time, which would be a distraction from the more important work of those private offices and would not be in the public interest.

28. In summary, and on balance, the Authority considered that the public interest favoured withholding the information requested in this case, given the detrimental impact of “potentially misleading” disclosures on the public, the reduced ability of private offices to offer an efficient and effective service to Ministers and the distraction of private offices from “more important work” that it forecast would result from disclosure of daily diaries.

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

29. The Commissioner has carefully considered the submissions from both parties, together with the withheld information.
30. The Commissioner recognises the context in which the Applicant’s request was made, to which the Applicant has referred, namely that the First Minister had around that time been reported to have held [various meetings with foreign leaders](#)<sup>1</sup>, with the nature and circumstances of these meetings being [the subject of some debate](#)<sup>2</sup>.
31. The Commissioner also recognises the general public interest in transparency, and he agrees with the Applicant that that this extends to transparency regarding with whom the First Minister met and the date and purpose of any meetings.
32. The Commissioner is not, however, persuaded by the public interest arguments provided by the Authority in this case.
33. The Commissioner notes that the request was for a list of the First Minister’s meetings, not a request for the First Minister’s diary (daily or otherwise). However, the Authority’s submissions are largely focused on the impact of disclosing the First Minister’s diary (or Ministerial diaries more generally).
34. The Commissioner does not accept that disclosure of the withheld information in this case would impact on the ability of the Ministerial private office to provide an effective service (either to the First Minister or to Ministers more generally). The meeting subjects are brief and, in some cases, do not reveal anything about the purpose of the meeting or what is being discussed.
35. To the extent that the Authority is concerned that disclosure of the withheld information would inaccurately reflect the First Minister’s workload (or Ministerial workloads more generally), it is open to it to provide a commentary to place that information in context (e.g. by explaining that a list of the First Minister’s meetings did not give a complete picture of how he spends his time or of the importance of any particular meeting or issue – the Commissioner would not envisage a need for anything at the level of detail described by the Ministers).
36. In any event, given what has been requested is not the First Minister’s diary and that the dates of relevant meetings have already been disclosed (absent the time of those meetings), the Commissioner does not accept that disclosure of the withheld information would have

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<sup>1</sup> <https://www.independent.co.uk/news/uk/alister-jack-humza-yousaf-recep-tayyip-erdogan-scottish-government-president-b2462219.html>

<sup>2</sup> <https://www.heraldscotland.com/news/23980439.yousaf-triggered-diplomatic-row-meeting-turkeys-president-erdogan/>

any impact on the public view of the First Minister's workload (or on Ministerial workloads more generally).

37. In all the circumstances, and based on the submissions received in this case, the Commissioner is satisfied that the public interest in disclosing the information outweighs that in maintaining the exemption in section 29(1)(d) of FOISA. He therefore finds that the Authority was not entitled to withhold this information under section 29(1)(d) of FOISA.
38. Where the Authority has also relied on the exemptions in sections 29(1)(b) and 36(1) of FOISA (variously) to withhold some of this information, the Commissioner considers this further below.

### ***Section 29(1)(b) – Ministerial communications***

39. Under section 29(1)(b) of FOISA, information is exempt information if it relates to Ministerial communications. These are defined in section 29(4) of FOISA as communications between Ministers, including, in particular, communications relating to proceedings of the Scottish Cabinet or any committee of that Cabinet. "Minister" means a member of the Scottish Executive or a junior Scottish Minister (section 29(5) of FOISA).
40. The exemption covers information "relating to" Ministerial communications, so it covers more than just direct communications between Ministers. It can also cover information like:
  - records of discussions between Ministers
  - drafts of letters, whether or not the letters were finalised or sent.
41. For the exemption to apply, communication must be between two or more Ministers. However, communications between private secretaries when corresponding on their respective Minister's behalf are covered by the exemption.
42. Having reviewed the withheld information, the Commissioner is satisfied that it relates to Ministerial communications and therefore clearly falls within the terms of the section 29(1)(b) exemption in FOISA.
43. Section 29(1)(b) of FOISA is a qualified exemption, however, and the Commissioner therefore must go on to consider whether the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

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

44. The Applicant's submissions on the public interest were set out earlier. The Commissioner will not reproduce those submissions here, but he will fully consider them in what follows.

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

45. The Authority again recognised the public interest in disclosure of the withheld information to promote open, transparent and accountable government and to inform public debate.
46. However, the Authority argued that there was a greater public interest in allowing Ministers a private thinking space within which issues and policy positions can be explored and refined, until the Authority can reach a decision or adopt a policy that is sound and likely to be effective. The Authority submitted that this private thinking space also allows for all options to be properly considered, so that good decisions can be taken. The Authority argued that disclosure of the withheld information would be likely to undermine the full and frank

discussion of issues between Ministers, which in turn would undermine the quality of the decision-making process.

47. The Authority considered that disclosure of the withheld information would reveal details of the topics discussed and the frequency and time the First Minister had dedicated to each discussion, which would be substantially detrimental to the way in which Ministers would engage with other Ministers in future. The Authority argued that disclosure of the withheld information would significantly undermine Ministerial unity and effectiveness and result in less robust, well-considered debates and decisions, which would not be in the public interest.

*The Commissioner's view on the public interest*

48. The Commissioner has carefully considered the submissions from both parties, together with the withheld information.
49. As rehearsed earlier, the Commissioner recognises the general public interest in transparency, and he agrees with the Applicant that that this extends to transparency regarding with whom the First Minister met and the date and purpose of any meetings.
50. Again, the Commissioner is not persuaded by the public interest arguments provided by the Authority in this case.
51. The Commissioner cannot envisage a circumstance where disclosure of the withheld information would reduce, diminish or impact upon the private thinking space referred to by the Authority.
52. The Commissioner is also not persuaded that disclosure of the withheld information would be substantially detrimental to the way in which Ministers would engage with other Ministers in future or that it would significantly undermine Ministerial unity.
53. As rehearsed earlier, the meeting subjects are brief and, in some cases, do not reveal anything about the purpose of the meeting or what is being discussed. The Commissioner also notes that, as part of its arguments in support of the application of the section 29(1)(d) exemption in FOISA, the Authority submitted that the withheld information did not fully reflect the First Minister's workload (or Ministerial workloads more generally) as it did not capture all of the discussions and interactions that may have taken place on any given day between Ministers, officials and special advisers.
54. The Commissioner considers that Ministers are, therefore, particularly unlikely to be affected by disclosure of the withheld information, given that they will be more familiar with the day-to-day work of the First Minister (and other Ministers more generally) than the public. Certainly, he cannot envisage a circumstance where disclosure of the withheld information would negatively affect in any meaningful way the relationship between Ministers or Ministerial unity more generally.
55. In all the circumstances, and based on the submissions received in this case, the Commissioner is satisfied that the public interest in disclosing the information outweighs that in maintaining the exemption in section 29(1)(b) of FOISA. He therefore finds that the Authority was not entitled to withhold this information under section 29(1)(b) of FOISA.
56. Where the Authority has also relied on the exemption in section 36(1) of FOISA to withhold a small amount of this information, the Commissioner considers this further below

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

57. 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.
58. Legal advice privilege applies to communications in which legal advice is sought or provided. For legal advice privilege to apply, certain conditions must be fulfilled:
- (i) The information must relate to communications with a professional legal adviser, such as a solicitor or advocate;
  - (ii) The legal adviser must be acting in their professional capacity; and
  - (iii) The communications must occur in the context of the legal adviser's professional relationship with the client.
59. There is a further matter to be considered, however, before the Commissioner can determine whether, or the extent to which, the section 36(1) exemption in FOISA is applicable in the circumstances of this case. The information cannot be privileged unless it is also confidential.
60. For the section 36(1) exemption in FOISA to apply, the withheld information must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. In other words, the claim must have been capable of being sustained at the time the exemption is claimed.
61. A claim of confidentiality cannot be maintained where, prior to a public authority's consideration of an information request or conducting a review, information has been made public, either in full or in a summary sufficiently detailed to have the effect of disclosing the advice. Where the confidentiality has been lost in respect of part or all of the information under consideration, any privilege associated with that information is also effectively lost.

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

62. The Authority submitted that section 36(1) of FOISA applied to the subject of three of the First Minister's internal meetings as they related to legal advice being sought by the Scottish Government and that the subject of these meetings evidenced the specific legal issues about which advice had been sought. The Authority confirmed that the advice had been requested from legal advisers acting in their professional capacity and that it (the Authority) was the client.
63. The Authority explained that the information withheld was either made or affected for the principal or dominant purpose of seeking legal advice or evidenced by those communications and further submitted that disclosure of the material would breach legal professional privilege by divulging information about the points being considered by lawyers.
64. Consequently, the Authority considered that the withheld information was subject to legal advice privilege and submitted that all the necessary conditions for legal advice privilege to apply were satisfied.
65. The Authority further argued that a claim to confidentiality in legal proceedings could be maintained because the withheld information was only shared between the Authority and its legal advisers. Therefore, the information remained confidential at the time it responded to



the Applicant's request (and that it remained so). Accordingly, the Authority considered legal professional privilege in relation to this information had not been waived.

*The Commissioner's view*

66. Having considered the withheld information and the Authority's submissions, the Commissioner is satisfied that it meets the conditions for legal advice privilege to apply.
67. The Commissioner is also satisfied that the confidentiality of the legal advice has not been lost or waived and that the information in question remained confidential at the time the Authority relied on the exemption in section 36(1) of FOISA (and that it remains so now).
68. The Commissioner is therefore satisfied that the exemption in section 36(1) of FOISA is engaged for this information.
69. Section 36(1) of FOISA is a qualified exemption, however, and the Commissioner therefore must go on to consider whether the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

*The Applicant's submissions on the public interest*

70. The Applicant's submissions on the public interest were set out earlier. As stated above, the Commissioner will not reproduce those submissions here, but he will fully consider them in what follows.

*The Authority's submissions on the public interest*

71. The Authority recognised the public interest in disclosure of the withheld information as part of open, transparent and accountable government. The Authority also acknowledged the strong public interest in relation to the First Minister's engagements.
72. However, the Authority considered that the public interest favoured withholding the information because of the very strong public interest in maintaining the exemption to ensure confidentiality of communications, for the following reasons:
  - it was important in all cases that Ministers could seek legal advice from lawyers and that lawyers could provide free and frank legal advice which considered and discussed all issues and options, without fear that the topic of the advice being sought or the advice itself may be disclosed and, as a result, potentially taken out of context
  - in areas such as this, which are the subject of public scrutiny, an expectation that legal advice would be released would inevitably lead to the legal advice being much more circumspect and therefore less effective
73. The Authority therefore submitted that there was a strong public interest in protecting the confidentiality of the withheld information, to ensure that the Authority could discuss and take policy decisions in full possession of thorough and candid legal advice, ensuring that it could take decisions in a fully informed legal context having received legal advice in confidence as any other client would.
74. The Authority also observed that disclosure of the withheld information would be a breach of the longstanding Law Officers' Convention (reflected in the [Scottish Ministerial Code](https://www.gov.scot/publications/scottish-ministerial-code-2023-edition/)<sup>3</sup>) which prevents the Authority from revealing whether Law Officers either have or have not been asked to provide legal advice on any matter. The Authority noted that the Ministerial Code

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<sup>3</sup> <https://www.gov.scot/publications/scottish-ministerial-code-2023-edition/>

states, at paragraph 2.38, that Ministers must not divulge who provided the advice, whether it is from the Law Officers or anyone else.

75. The Authority submitted that the public interest in withholding the information also outweighed the public interest in favour of disclosure because of the very strong public interest in upholding the Law Officers' Convention.
76. While the Authority accepted that there was a public interest in disclosure as part of open, transparent and accountable government, and a public interest in the First Minister's engagements specifically, it considered that this was outweighed by the strong public interest in upholding the Law Officers' Convention.
77. In summary, and on balance, the Authority concluded that the public interest in maintaining the exemption outweighed that in disclosure, given the overriding public interest in maintaining the Law Officers' Convention and in maintaining the confidentiality of communications between lawyers and their clients, given the public interest in allowing full and detailed internal consideration of the legal issues on which this advice was being sought.

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

78. The Commissioner has considered carefully the representations made by both the Applicant and the Authority when assessing and balancing the public interest in this case. He has also fully considered the information withheld in this case.
79. The Commissioner acknowledges the public interest in the transparency and accountability expected of all authorities, which he agrees extends to transparency regarding with whom the First Minister met and the date and purpose of any meetings. He recognises that disclosure of the withheld information would go some way towards satisfying that interest.
80. However, the Commissioner also acknowledges that there is a strong inherent public interest, recognised by the courts, in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds.
81. 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>4</sup>. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
82. The Commissioner acknowledges that there will be occasions where the significant in-built public interest in favour of withholding legally privileged communications may be outweighed by the public interest in disclosing the information. For example, disclosure may be appropriate where (the list is not exhaustive):
  - the privileged material discloses wrongdoing by/within an authority
  - the material discloses a misrepresentation to the public of advice received
  - the material discloses an apparently irresponsible and wilful disregard of advice
  - a large number of people are affected by the advice

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<sup>4</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+)))

- the passage of time is so great that disclosure cannot cause harm.

83. While the Commissioner accepts, having examined the withheld information, that it would be of some interest to the Applicant and to the general public, he does not consider that any of the above categories would apply (or that there is any other compelling public interest that would favour disclosure).
84. The Commissioner must also take account of the important inherent public interest in legal professional privilege itself and in allowing public authorities to obtain confidential legal advice.
85. On balance, the Commissioner considers that greater weight should be afforded to the arguments which would favour maintaining the exemption. Consequently, the Commissioner is satisfied that the Authority correctly withheld the information under section 36(1) 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.

The Commissioner finds that by relying on section 36(1) of FOISA for withholding certain information from the Applicant, the Authority complied with Part 1.

However, the Commissioner finds that the Authority failed to comply with Part 1 of FOISA by:

- wrongly withholding information under the exemptions in sections 27(1) and 30(b)(i) of FOISA (which it disclosed during the investigation)
- wrongly withholding information under the exemptions in sections 29(1)(b) and (d) of FOISA.

The Commissioner requires the Authority to provide the Applicant with the information wrongly withheld under the exemptions in sections 29(1)(b) and (d) of FOISA, by **4 February 2025**.

## 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.

**Euan McCulloch**  
**Head of Enforcement**

**19 December 2024**