



Scottish Information
Commissioner
www.foi.scot

Decision Notice 021/2025

First Minister's briefing papers for specified First Minister's Questions

Authority: Scottish Ministers
Case Ref: 202200670

Summary

The Applicant asked the Authority for the First Minister's (FM) briefing papers for First Minister's Questions (FMQs) on a specified date. The Authority withheld the information requested under various exemptions in FOISA. The Commissioner investigated and found that the Authority had generally complied with FOISA, but he required it to disclose a small amount of information he found it had wrongly withheld.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(b)(i) 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" and "the UK GDPR") and (5A) (Personal information); 47(1) and (2) (Application for decision by Commissioner)

United Kingdom General Data Protection Regulation (the UK GDPR) Articles 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), (5), (10) and (14)(a), (c) and (d) (Terms relating to the processing of personal data).

Background

1. On 28 March 2022, the Applicant made a request for information to the Authority. They asked for the FM briefing papers for FMQs on 24 March 2022.
2. The Authority responded on 25 April 2022. It withheld the information requested under the exemption in section 30(b)(i) of FOISA. It also explained that some information was available via the [Official Report of the Scottish Parliament](#)¹. It provided the Applicant with a link to this information, which it considered was therefore exempt under section 25(1) of FOISA.
3. On 5 May 2022, the Applicant wrote to the Authority requesting a review of its decision. They stated that they were dissatisfied with the decision because they:
 - considered briefing papers contained information the Authority was prepared to make public in response to questions at FMQs, meaning that significant swathes of the information requested should be disclosed given its very purpose was to assist the FM to answer public questions
 - disputed the settled public opinion on a matter was that given by the FM in an answer at FMQs – they considered it was reached and presented in briefing papers ahead of FMQs
 - considered the public interest favoured disclosure of the information.
4. The Authority notified the Applicant of the outcome of its review on 25 May 2022, which fully upheld its original decision.
5. On 10 June 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. They stated that they were dissatisfied with the outcome of the Authority's review for the reasons set out in their requirement for review and because they considered that a significant amount of the withheld information would already be in the public domain.

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 1 July 2022, the Authority was notified in writing that the Applicant had made a valid application.
8. The Authority was also asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was subsequently allocated to an investigating officer.
9. 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.

¹ <https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=13664&i=124006>

10. During the investigation, the Authority changed its position and issued a revised response on 14 August 2023 in which it:
 - accepted that it had failed to signpost information that it had considered otherwise accessible, and provided two links to the Applicant containing information within the FM's briefing pack
 - confirmed that, in addition to its reliance on sections 25(1) and 30(b)(i) of FOISA, it was also applying the exemptions in sections 30(c) and 38(1)(b) to some of that information.
11. The Authority later changed position again and informed the Commissioner that it accepted that it had not been entitled to withhold the names of three senior officials under the exemption in section 38(1)(b) of FOISA.
12. During the investigation, the Applicant confirmed that, in relation to the information withheld under section 38(1)(b) of FOISA, they were content for the Commissioner's decision to be restricted to the personal information of senior Authority officials. The Commissioner will therefore not consider the application of the exemption in section 38(1)(b) as it relates to junior officials further in his decision.

Commissioner's analysis and findings

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

The Authority's change of position during the investigation

14. As rehearsed earlier, the Authority withheld some information from the Applicant in its revised response dated 14 August 2023 under the exemption in section 38(1)(b) of FOISA. However, the Authority later accepted that it should have disclosed this information (which related to the names of senior Authority officials) to the Applicant.
15. As the Authority withheld information from the Applicant that it accepted it had not been entitled to withhold, the Commissioner must find that the Authority failed to comply with section 1(1) of FOISA in this respect. He requires the Authority to disclose this information to the Applicant.

Section 30(b)(i) – substantial inhibition to free and frank provision of advice

16. The Authority is withholding some information comprising briefing material to the FM for FMQs within a "briefing pack" under section 30(b)(i) of FOISA.
17. Section 30(b)(i) of FOISA provides that the information is exempt if its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice. The exemption is subject to the public interest test in section 2(1)(b) of FOISA.
18. In applying this exemption, 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

19. The Authority explained that FMQs enabled MSPs and the leaders of the opposition to ask the FM a question in the chamber. While FMQs are combative and political in nature, the

Authority stated that FMQs served an important function in terms of scrutiny of the Authority's decisions and policies.

20. The Authority submitted that preparation for FMQs was, therefore, important and involved the commissioning of briefings from relevant policy areas on topics identified as being likely to arise at FMQs. The issues identified as being the most likely to arise at FMQs were characterised as “top picks”, with the relevant briefings being provided to the FM in an “FMQ folder”.
21. The Authority further explained that the purpose of the briefings provided to the FM ahead of FMQs was to provide them with draft answers to questions that may be asked to enable the FM to defend existing policy in the context of a political debate.
22. The Authority submitted that these briefings did not constitute substantive policy advice – they instead focused on presentation and politics and did not form part of the Official Record or part of the decision making or governance of the Authority. However, it accepted that many “lines” contained within briefings would become part of the public record if used by the FM in response to questions.
23. The Authority noted that guidance on FMQ briefings confirmed that these should be brief and not used by officials to inform the FM of anything new. It explained that substantive policy advice, which included assessment of risks and benefits and stakeholder views, was contained within policy submissions outwith the FMQ process.
24. The Authority explained that each briefing comprised a background box providing context on an issue designed to provide the FM with insight into the challenges they might face at FMQs, including criticisms in the media, statistical information and a report or a quote from an MSP or stakeholder. It stated that the second and greater part of a briefing focused on how the FM might respond to predicted challenges and, by necessity, covered a wide range of arguments and draft responses for the FM to use, adapt or not use at all.
25. The Authority confirmed that officials contributed to the briefings, which were also informed by political advice provided by Special Advisers and the FM's personal preferences and communication style. It submitted that to fully prepare the FM for FMQs it was necessary to provide a free and frank assessment of the likely lines of attack from opposition leaders and to set these out within advice to the FM.
26. The Authority explained that these lines would be critical of the Authority's position or actions, but were presented without context or assessment of their validity and would not represent a full (or often accurate) reflection of the Authority's position, nor one that officials would present outwith the briefing process for FMQs. Where briefing papers included quotes already in the public domain, the Authority submitted that the manner in which such quotes were collated and presented would not reflect a fair or accurate representation of a position and consequently it would not wish to see these presented publicly.
27. The Authority argued that officials would be unwilling to present such critical arguments in FMQ briefings if it were thought likely that these would be disclosed into the public domain, for fear of being seen to give validity to these lines. It submitted that this inhibition would have a detrimental effect on the FM's ability to prepare for the questions directed at them and therefore their ability to robustly defend the Authority position. It argued this would compromise the quality of public debate at FMQs, which it recognised as an important means of holding the Authority to account.

28. The Authority also noted that opposition political parties regularly submitted requests under FOISA for the FM's FMQ briefings. It contended that if the information withheld in this case were disclosed it would receive a significant number of similar requests in future. It explained that it would be required to change its processes to reflect the "expected disclosure" of FMQ briefings into the public domain, which would result in less frank and candid advice being provided in briefing papers.
29. The Authority further submitted that if the "FMQ folder" were disclosed, this would be mischaracterised as a "worry list" even where material within a brief might appear uncontroversial.
30. In summary, the Authority submitted that disclosure of the withheld information would be likely to result in the following:
 - without "lines of attack", written briefings would become fuller, more balanced and high level – meaning they would be longer, less focussed and less suited to the adversarial nature of FMQs
 - the FM would, therefore, need additional verbal briefings with relevant policy areas to draw out lines of attack, resulting in the FM being reliant on recall of appropriate responses from discussions during FMQs rather than a written briefing
 - not every official contributing to a briefing paper could be present in such discussions, reducing the quality of the briefing and the FM's preparation for FMQs overall
 - given the demands on the FM's time, a requirement to consider fuller briefings would not be practical and could result in the narrowing of these briefings, which would result in the FM not being prepared for topics arising at FMQs
 - answers would become more high level and less substantive or evidence-based, which would be detrimental to the Parliamentary process.

The Applicant's submissions

31. The Applicant submitted that briefing papers for FMQs should, by their nature, include information the Authority was prepared to make public as part of the FM's responses to questions. Given this purpose, "significant swathes" of the information used by the FM during FMQs should therefore be made available to the public.
32. The Applicant submitted that where information was included in a briefing pack for FMQs it was likely, if not guaranteed, to be part of the information available for the FM to give publicly.
33. The Applicant strongly disputed the Authority's position that the settled view was the one stated by the FM at FMQs (or otherwise in person) and considered that this was instead reached by advisers and Ministers in advance of FMQs and set out within briefing papers. They considered that the expression of a view publicly for the first time did not mean that it was not the view of the Authority before that announcement.
34. In support of their view that the settled position was reached prior to FMQs, the Applicant submitted that it was doubtful that briefing papers contained a "maelstrom" of opposing and contrasting viewpoints. They argued that, if the Authority's position were correct, no information held by it could be considered to represent its point of view, which was "incoherent" and ran contrary to common understanding of how government worked.

35. The Applicant further argued that it was likely that much of the information withheld was already in the public domain (included in the FM's responses) or was otherwise unlikely to contain highly sensitive views or information. They therefore argued the information requested should not have been withheld as disclosure would not cause the inhibition claimed by the Authority.

The Commissioner's view

36. The Commissioner has carefully considered all the arguments he has received, together with the withheld information. He has also considered:
- the [Scottish Parliament's guidance](#)² on the operation of FMQs
 - the questions selected by the Presiding Officer which were [published in advance](#)³ of the FMQs in question
 - the [Official Record](#)⁴ of the FMQs in question, which sets out the questions asked and responses given by the FM.
37. In line with the Scottish Parliament's guidance on the operation of FMQs, the Authority did not have advance sight of several of the questions asked at FMQs (as later captured in the Official Record). The Commissioner also notes that the specific questions selected and published in advance of the FMQs in question were asked in the chamber, and answers were provided by the FM at that time.
38. In what follows, the Commissioner has distinguished between withheld information relating to topics raised in questions pre-selected and published in advance of FMQs and that relating to FMQ questions not known to the Authority in advance of FMQs.

Pre-selected questions for FMQs

39. The Commissioner considers it to be a reasonable expectation that the FM would be briefed on any subject selected for discussion at FMQs. He does not consider that Authority officials would be concerned, or that any detriment would result, were it disclosed that the FM had received briefings on topics raised relevant to pre-selected questions for FMQs.
40. To the extent that the withheld information merely repeats a pre-selected question or comprises other anodyne information, the Commissioner cannot agree that any substantial inhibition would, or would be likely to, result from its disclosure under FOISA.
41. For these reasons, the Commissioner finds that disclosure of this information would not be likely to substantially inhibit the free and frank exchange of advice in future. He therefore finds that the exemption in section 30(b)(i) of FOISA has been wrongly applied by the Authority to this information.
42. Given that the exemption in section 30(b)(i) of FOISA was wrongly applied to this information, the Commissioner is not required to consider the public interest test in section

² <https://www.parliament.scot/chamber-and-committees/questions-and-answers/about-questions-and-answers/first-ministers-questions#:~:text=The%20First%20Minister%20usually%20answers%20questions%20from%20MSPs,questions%20from%20the%20leaders%20of%20other%20political%20parties.>

³ <https://www.parliament.scot/-/media/files/whats-on-bb/session-6-2022/2022/march/bb20220324.pdf>

⁴

<https://webarchive.nrscotland.gov.uk/20221125153012/https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=13664&i=124006>

2(1)(b) in terms of section 30(b)(i) in relation to this information. The Commissioner requires the Authority to disclose this specific information to the Applicant.

43. The remaining withheld information in the briefing pack relating to pre-selected FMQs comprises substantive information in the form of the context or background that may have resulted in, or informed, the question being asked. In other words, the information does not simply repeat the pre-selected question, and it is not anodyne.
44. The Commissioner has considered the Applicant's submissions in full. He notes in particular their argument that:
 - much of the information is in the public domain, or is information the Authority is prepared to release into the public domain in response to a question
 - briefing papers were unlikely to contain highly sensitive views or information.
45. While some of the information will have been provided in the expectation that it would, by virtue of the FM referring it in their FMQ responses, be suitable to be disclosed into the public domain, the Commissioner is satisfied that this information comprises advice. In relation to FMQs, which is the context in which the withheld information is held, the Commissioner accepts that the "settled" public position in relation to the question being asked is the position affirmed by the FM in FMQs.
46. Having considered the content of the withheld information, the Commissioner is satisfied, on balance and in all of the circumstances, that disclosure would, or would be likely to, lead to officials being more circumspect when providing such advice to the FM in future.

"Live" questions for FMQs

47. As rehearsed earlier, the Commissioner has distinguished between briefings relating to pre-selected questions for FMQs and those created in anticipation of a variety of likely questions and associated points of debate.
48. The Commissioner has considered the Applicant's submissions in full, including their arguments as set out in paragraph 44 above.
49. However, on balance, the Commissioner accepts the Authority's characterisation of FMQs as a political and presentational arena. Accordingly, he recognises that the Authority requires a safe space in which full and frank advice can be provided in relation to a forthcoming political debate, which is distinct from other more substantive policy discussions.
50. The Commissioner also acknowledges that the specific nature of FMQs requires the Authority to anticipate numerous areas of challenge and criticism (whether justified or not) and to prepare accordingly. This preparation is underpinned by the free and frank provision of advice and supporting information by officials, as provided via written FMQ briefings.
51. While the Authority can anticipate likely questions at any given FMQs, it cannot (beyond those that have been pre-selected) be certain of what will be asked. The Commissioner accepts that the Authority must therefore prepare context, critical commentary and advice on several scenarios in relation to a wide range of anticipated topics and questions – some of which may never arise.
52. Having reviewed the withheld information the Commissioner is satisfied, on balance, that disclosure would, or would be likely to, lead to officials being more circumspect when providing such advice to the FM in future. If this occurred, he considers that it would be to

the detriment of a FM's preparedness for, and therefore the effective function of, FMQs for the reasons given by the Authority.

53. The Commissioner therefore considers that disclosure of this information would, or would be likely to, cause substantial inhibition to the free and frank exchange of advice and that the exemption in section 30(b)(i) was correctly engaged for this information.
54. As the Commissioner is satisfied that this information is exempt from disclosure under section 30(1)(b) of FOISA, he is required to go on to consider the application of the public interest test in relation to this information.

The public interest test

55. 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 Authority's submissions on the public interest

56. The Authority recognised the public interest in disclosure of the withheld information as part of open, transparent and accountable government. It also acknowledged the general public interest in understanding the content of the pack used by the FM to answer questions at FMQs and that the information would also be of great interest to political parties involved in FMQs.
57. However, the Authority submitted that there was a very strong public interest in maintaining the exemption in section 30(b)(i) of FOISA for the following reasons:
 - it remained important that the FMQ team can share a free and frank summary of criticisms (whether justified or not) so that the FM was fully prepared for FMQs
 - comprehensive briefing was vital for the FM to provide detailed, substantive answers to questions from MSPs on behalf of their constituents
 - should the quality of FMQs debate, or the substantive nature of the responses be diminished by changes to FMQ briefings, then an important function of the Scottish Parliament would be negatively impacted and the public accountability of the Authority reduced
 - FMQ briefings do not contain substantive policy information or advice, which was instead satisfied in part by the Authority's policy announcements.
58. On balance, the Authority considered that the public interest favoured upholding the exemption and protecting the private space in which officials briefed the FM to support the public function of FMQs.

The Applicant's submissions on the public interest

59. The Applicant submitted that it was fundamentally in the public interest to have a full understanding of the information available to the FM when judging their responses to questions of significant public interest relating to taxpayer value for money, accountability and transparency.

60. The Applicant argued that disclosure would aid the public's understanding of the FM's responses, enable the public to hold the FM to account and reveal whether relevant information was withheld from the public in aid of "political expediency and point scoring".
61. In all, the Applicant considered that it was a point of principle that the content of briefings should be available to the public and noted that other Ministerial briefing papers were accessible (albeit with redactions).

The Commissioner's view on the public interest

62. The Commissioner has carefully considered all of the public interest arguments he has received, together with the withheld information in question.
63. The Commissioner acknowledges that there is a public interest in transparency in relation to the actions and decision-making processes of both the Authority and the FM. He also accepts that disclosure of the withheld information in question would shed light on the FM's preparations for FMQs.
64. The Commissioner has considered the Applicant's argument that disclosure of the withheld information would enable public inspection and comparison of the information deployed by the FM at FMQs against that provided to them in briefings, which the Applicant considered would enhance the accountability of the FM.
65. While there is a public interest in transparency in how the FM is briefed in advance of FMQs, this must be balanced against the public interest in the Authority being able to provide the FM with advice in a private space in relation to how to respond to both pre-selected questions and anticipated questions at FMQs. The Commissioner recognises that there is a substantial public interest in ensuring that officials can advise and brief the FM in candour for FMQs.
66. The Commissioner considers that if all such preparatory material required to be routinely disclosed this would substantially inhibit the production of the FMQs briefing, with the result that the FM would be less able to participate fully in FMQs. He accepts that the public interest does not lie in disclosing information that would limit such future provision of advice, where to do so would substantially inhibit the quality of that advice or the ability of the FM to participate fully in FMQs.
67. On balance, having examined the withheld information and the submissions from the Applicant and the Authority, the Commissioner is not satisfied that the public interest arguments in favour of making the information available are sufficiently strong as to outweigh the public interest in maintaining the exception.
68. Consequently, the Commissioner finds that the public interest in maintaining the exemption outweighs that in making the information available. He therefore accepts that the information was properly withheld under the exemption in section 30(b)(i) of FOISA.

Section 30(c) – the effective conduct of public affairs

69. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b).
70. Section 30(c) of FOISA is a broad exemption and the Commissioner expects any public authority citing 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. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.

71. The standard to be met in applying the tests contained in section 30(c) is high: the prejudice in question must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).

The Authority's submissions

72. The Authority withheld some information comprising briefing material to the FM (for FMQs) within a "briefing pack" under section 30(c) of FOISA. In its submissions to the Commissioner, the Authority characterised this information as relating to "lines and tactics".
73. The Authority submitted that the purpose of the briefings provided to the FM was to give them "draft" answers to questions that might be asked in the chamber, with the lines within a briefing becoming part of the public record (and publicly available) once delivered by the FM. It explained that the FM may choose to use some, all or none of the lines contained within briefings to aid their responses.
74. The Authority submitted that disclosure of the information withheld under section 30(c) of FOISA would substantially prejudice the effective conduct of public affairs by undermining the FM, leading to a decline in the quality of answers given at FMQs and, consequently, diminishing the effectiveness of a key process in the scrutiny of the Authority.
75. Specifically, the Authority explained that if opposition parties were aware in advance of how the FM would respond to their challenges, the FM's position in FMQ debates would be undermined. It submitted that this would have a consequential and detrimental impact on the FM's ability to robustly defend the position of Authority.
76. The Authority stated that it was not possible to predict what lines will be used in the future as not all questions to the FM were known in advance and some may be on any topic. It also contended that many of the briefings will be reused if the subjects remain topical.
77. The Authority accepted that it was often the case that "lines" within briefings would be repackaged and reused multiple times, but it submitted that there was no way to know in advance what might be required again. It explained that it did not wish to be in a position where opposition parties had access to these lines ahead of a specific FMQs as this would undermine the FM's position (e.g. opposition leaders would have the advantage of knowing what the FM was likely to say, but the FM would not know what the opposition parties were going to ask).
78. The Authority submitted that it also considered there was a risk that, if the FMQ folder itself were disclosed, opponents would gain insight into the FM's debate tactics, including how the FM prepares and formulates responses, which would further serve to undermine the FM's position.
79. As rehearsed earlier, the Authority considered that disclosure of the content of the FMQ folder would also, given the high level of political interest, necessitate changes to FMQ processes on the basis that it would not be able to tolerate a position where the lines used by

the FM would be available to the opposition leader (thus preventing officials from providing such lines as part of a written FMQ briefing).

80. In addition to the detriment set out at paragraph 30, the Authority submitted that the disclosure of the withheld information in question (which would result in the removal of similar information from future written FMQ briefings) would have the following effects:
- the briefing pack would be substantially longer and difficult for the FM to manage within the limited window for preparation
 - the FM would be required to draft their own lines, without the input of policy officials who hold the relevant knowledge, which could lead to inaccuracies
 - the FM would no longer have easy access to a reference document whilst participating in FMQs in the chamber.
81. The Authority explained that the net effect of disclosure would be that the FM would be less well prepared for substantive debate or on any particular topic and that answers would likely be less detailed to reduce risk of any inaccuracies.
82. The Authority contended that FMQs performed an important function in enabling Parliament to hold the Authority to account, which would be impaired if the FM was not fully prepared to answer the questions that may be posed.
83. The Authority submitted that disclosing the FM's tactical choices and preferences would also provide opposition parties with political insight which could be used against the FM in future. It argued that, given the public nature of the debate and the extent to which it is reported, this would have political implications and would affect public perception.
84. In summary, the Authority argued that allowing the FM's lines and tactics to be disclosed ahead of them being used would substantially prejudice the effective conduct of public affairs, given its impact on the functioning of FMQs and thereby its effectiveness at facilitating scrutiny of the government.

The Applicant's submissions

85. The Applicant's submissions are largely set out at paragraphs 31-35. The Commissioner will not reproduce those submissions here, but he will fully consider them in what follows.

The Commissioner's view

86. In what follows, the Commissioner has again distinguished between withheld information relating to topics raised in questions pre-selected and published in advance of FMQs and that relating to FMQ questions not known to the Authority in advance of FMQs.

Pre-selected questions for FMQs

87. Where the withheld information (described as "lines" by the Authority) sits within a briefing paper relating to a pre-selected FMQ question and that information either wholly matches or is virtually identical to responses then provided by the FM at FMQs to that pre-selected question, the Commissioner cannot agree that disclosure would, or would be likely to, otherwise prejudice substantially the effective conduct of public affairs.
88. For this reason, the Commissioner finds that disclosure of this information would not be likely to substantially inhibit the effective conduct of public affairs. He therefore finds that the

exemption in section 30(c) of FOISA has been wrongly applied by the Authority to this information.

89. Given that the exemption in section 30(c) of FOISA was wrongly applied to this information, the Commissioner is not required to consider the public interest test in section 2(1)(b) in terms of section 30(c) in relation to this information. He requires the Authority to disclose this specific information to the Applicant.
90. Where the withheld information sits within a briefing paper relating to a pre-selected FMQ question and that information does not match with a response then provided by the FM at FMQs to that pre-selected question, the Commissioner accepts that disclosure would, or would be likely to, otherwise prejudice substantially the effective conduct of public affairs.
91. The Commissioner has considered the Applicant's argument that that any information which is in the public domain should not be withheld in response to a request for information simply by virtue of being present within a confidential briefing pack presented to the FM. He has also had regard to their argument that information within the briefing pack must be information the Authority was prepared to make public in as part of the FM's responses to questions.
92. While some of the information will have been provided in the expectation that it would, by virtue of the FM referring it in their FMQ responses, be suitable to be disclosed into the public domain, the Commissioner is satisfied that the withheld information in question comprises options, which are advisory, for the FM to consider using, rather than a "script" to be used.
93. In relation to FMQs, which is the context in which the withheld information is held, the Commissioner accepts that the FM has the power to deliver, amend or simply not use the briefing information provided when responding to a question at FMQs. As stated above, he considers that the "settled" public position in relation to the question being asked is the position affirmed by the FM in FMQs.
94. The Commissioner is therefore satisfied, for similar reasons as rehearsed in relation to the exemption in section 30(b)(i) of FOISA, that disclosure would, or would be likely to, otherwise prejudice substantially the effective conduct of public affairs.
95. As the Commissioner is satisfied that this information is exempt from disclosure under section 30(c) of FOISA, he is required to go on to consider the application of the public interest test in relation to that information.

"Live" questions for FMQs

96. As rehearsed earlier, the Commissioner has distinguished between briefings relating to pre-selected questions for FMQs and those briefings created in anticipation of a variety of questions and associated points of debate.
97. While acknowledging that the information in question here relates to briefings created in anticipation of likely questions rather than pre-selected questions, the Commissioner is satisfied, for the same reasons as set out above in relation to pre-selected questions, that disclosure would, or would be likely to, otherwise prejudice substantially the effective conduct of public affairs.
98. As the Commissioner is satisfied that this information is exempt from disclosure under section 30(c) of FOISA, he is required to go on to consider the application of the public interest test in relation to that information.

The public interest test

99. As stated above, 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 Authority’s submissions on the public interest

100. The Authority’s submissions on the public interest are largely set out at paragraphs 56-58. The Commissioner will not reproduce these submissions here, but he will fully consider them in what follows.
101. The Authority further submitted that the focus of the withheld information was on defensive lines used for political debate as opposed to forming part of its decision-making process. It explained that the withheld information differed substantially from other advice and briefings provided to Ministers (e.g. those providing detailed consideration of an issue and/or inviting the Ministers to make a decision).
102. To the extent that it identified a public interest in disclosure of material provided to the FM, the Authority considered that some of that interest was satisfied by the publication of statistical data on various websites and the answers provided by the FM during FMQs (which were published on the Scottish Parliament’s website).

The Applicant’s submissions on the public interest

103. The Applicant’s submissions on the public interest are set out at paragraphs 59-61. The Commissioner will not reproduce those submissions here, but he will fully consider them in what follows.

The Commissioner’s view on the public interest

104. The Commissioner has carefully considered all of the public interest arguments he has received, together with the withheld information in question.
105. The Commissioner recognises that there is a public interest in transparency and accountability concerning the FM’s preparation for FMQs and the information available to them when providing answers in the chamber. He accepts that disclosure of the withheld information would allow public scrutiny and assessment of the FM’s answers, which would not only inform public debate, but also satisfy the public interest in openness, transparency and accountability.
106. The Commissioner considers that the public interest in disclosure is already met, to some extent, by the FM’s responses during FMQs (which are published online) and the Authority’s substantive policy announcements.
107. On the other hand, the Commissioner accepts, as rehearsed earlier, that there is a significant public interest in the Authority’s officials and the FM having a private space in which to properly prepare for FMQs to support its effective functioning as a key component of the nation’s democratic system. He finds that disclosure of the withheld information in question would, or would be likely to, lead to officials being more circumspect when providing advice to the FM in relation to FMQs in future. If this occurred, he considers it would be to the detriment of the FM’s preparedness for, and therefore the effective function of, FMQs. This would not be in the public interest.

108. As set out above, the Commissioner has already accepted that disclosure of the remaining information being withheld under section 30(c) of FOISA would otherwise, or 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 of the remaining withheld information.
109. The Commissioner therefore concludes that the Authority was entitled to withhold the remaining information under the exemption in section 30(c) of FOISA.

Section 38(1)(b) – personal information

110. Section 38(1)(b) of FOISA, 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.
111. 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.
112. To rely on the exemption in section 38(1)(b), the Authority must show that the information is personal data for the purposes of the DPA 2018 and that disclosure of the information into the public domain (which is the effect of disclosure under FOISA) would contravene one or more of the data protection principles in Article 5(1) of the UK GDPR.

Is the information personal data?

113. 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, i.e. any information relating to an identified or identifiable individual. “Identified living individual” is defined in section 3(3) of the DPA 2018. (This definition reflects the definition of personal data in Article 4(1) of the UK GDPR.)
114. Information will “relate to” a person if it is about them, is linked to them, has biographical significance for them, is used to inform decisions affecting them, or has them as its main focus.
115. As rehearsed earlier, the Authority accepted that it was not entitled to withhold some of the information it had withheld under the exemption in section 38(1)(b) of FOISA. Having considered the remaining withheld information (which comprises the mobile phone numbers of senior officials), the Commissioner accepts that it “relates to” identifiable living individuals. He therefore concludes that the withheld information is personal data for the purposes of section 3(2) of the DPA 2018.

Which of the data protection principles would be contravened by disclosure?

116. The Authority stated that disclosure of the personal data would contravene the first data protection principle (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.
117. In terms of section 3(4)(d) of the DPA 2018, disclosure is a form of processing. In the case of FOISA, personal data is processed when it is disclosed in response to a request for information.

118. The Commissioner must now consider if disclosure of the personal data would be lawful (Article 5(1)(a)). 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.
119. The Authority concluded that it could not identify a lawful basis for disclosure under Article 6 of the UK GDPR.
120. The Commissioner considers that condition (f) in Article 6(1) is the only one which could potentially apply in the circumstances of this case.

Condition (f): legitimate interests

121. Condition (f) states that the processing will be lawful if it is necessary for the purposes of the legitimate interests pursued by the controller or 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.
122. 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 makes it clear that public authorities can rely on Article 6(1)(f) when responding to requests under FOISA.
123. The 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 obtaining the personal data?
 - (ii) If so, would the disclosure of the personal data be necessary to achieve that legitimate interest?
 - (iii) Even if processing would be necessary to achieve that legitimate interest, would that be overridden by the interests or fundamental rights and freedoms of the data subjects?

Does the Applicant have a legitimate interest in obtaining the personal data?

124. While the Applicant explained that he was content for the names and contact details of junior Authority officials to be excluded from the Commissioner's decision, he confirmed that he required a decision on the personal information of senior officials. Beyond this, the Applicant did not provide specific submissions on his legitimate interest in obtaining the personal data – nor did the Authority.
125. Given the remaining withheld information comprises the mobile phone numbers of senior Authority officials, the Commissioner cannot accept that the Applicant has a legitimate interest in obtaining the withheld personal data.
126. As the Commissioner has concluded that the Applicant does not have a legitimate interest in receiving the personal data redacted in this case, he finds that condition (f) of Article 6(1) of the GDPR cannot be satisfied. Accordingly, he accepts that making the personal data available would be unlawful.
127. Given that the Commissioner has found that the processing (i.e. making the information available, in response to the Applicant's request) would be unlawful, he is not required to go on to consider separately whether disclosure of the personal data would be necessary to fulfil any legitimate interest, or consider the data subject's interests or fundamental rights and freedoms, and balance them against any legitimate interest in disclosure.

128. In all the circumstances of the case, in the absence of a condition in Article 6(1) of the GDPR being met, the Commissioner must conclude that making the withheld personal data available would be unlawful and would breach the data protection principle in Article 5(1)(a) of the GDPR. Consequently, he is satisfied that disclosure of the personal data is not permitted by section 38(1)(b) of FOISA.

Handling of the request

129. The Authority initially relied on the exemption in section 25(1) of FOISA for some of the information requested as it considered it was otherwise accessible to the Applicant.
130. During the investigation, the Authority changed position in relation to some of this information and withdrew its reliance on the exemption in section 25(1) of FOISA for that information, either in full or in part. It explained it had done so after reconsidering the terms and scope of the request.
131. Requesters are entitled to a robust and comprehensive response to information requests. A review outcome must list all of the exemptions an authority is seeking to apply and explain, in detail, why these exemptions are considered relevant. In this case, the Authority failed to interpret the Applicant's request correctly. This is evident from its change in position in respect of its application of the exemption in section 25(1) of FOISA to a significant number of documents to, by the end of the investigation, only two documents.
132. The Commissioner would urge the Authority to respond to information requests carefully, clearly identifying any and all exemptions that may be applied to withhold information, in order to maintain the confidence of requesters (and the Commissioner) in its responses.

Decision

The Commissioner finds that the Authority generally 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 the exemptions in sections 30(b)(i) and 30(c) to withhold certain information, the Authority complied with Part 1 of FOISA.

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

The Commissioner therefore requires the Authority to disclose to the Applicant the information it wrongly withheld by **17 March 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.

David Hamilton
Scottish Information Commissioner

29 January 2025