

## REASONS FOR NOT PROVIDING INFORMATION

### An exemption applies

#### Section 38(1)(b) – applicant has asked for personal data of a third party

An exemption under section 38(1)(b) of FOISA applies to some of the information you have requested because it is the personal data of a third party, i.e. names and contact details of individuals, and disclosing it would contravene the data protection principles in Article 5(1) of the General Data Protection Regulation and in section 34(1) of the Data Protection Act 2018. This exemption is not subject to the ‘public interest test’, so we are not required to consider if the public interest in disclosing the information outweighs the public interest in applying the exemption.

### An exemption applies, subject to the public interest test

Section 29 of the Freedom of Information (Scotland) Act 2002 (FOISA) exempts information from disclosure if it relates to: (i) the formulation or development of government policy (ii) Ministerial communications (iii) the provision of advice by any of the Law Officers (or any request for the provision of such advice) or (iv) the operation of any Ministerial private office.

#### Section 29 (1) (a) and 29(1)(b) – Formulation of Government policy and Ministerial communications

An exemption under section 29(1)(a) and 29(1)(b) of FOISA (Ministerial communications) applies to some of the information requested because it relates to communications between Scottish Ministers, and the formulation of government policy.

This exemption is subject to the ‘public interest test’. Therefore, taking account of all the circumstances of this case, we have considered if the public interest in disclosing the information outweighs the public interest in applying the exemption. We have found that, on balance, the public interest lies in favour of upholding the exemption. We recognise that there is a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. However, there is a greater public interest in allowing Ministers and officials a private space within which issues can be explored and refined, until the Government as a whole can reach a decision that is sound and likely to be effective. This private thinking space also allows for all options to be properly considered, so that good decisions can be taken. Premature disclosure is likely to undermine the full and frank discussion of issues between Ministers, which in turn will undermine the quality of the decision making process.

#### Sections 30(b)(i) and 30(b)(ii) – free and frank provision of advice and the exchange of views for the purposes of deliberation

Exemptions under sections 30(b)(i) and 30(b)(ii) of FOISA (free and frank advice and exchange of views) apply to some of the information requested. These exemptions apply because disclosure would, or would be likely to, inhibit substantially the free

and frank provision of advice and exchange of views for the purposes of deliberation. The exemptions recognise the need for officials to have a private space within which to seek advice and views from officials before reaching the settled position. In this case on the handling of communications surrounding the revocation of 1140 and the applicability of freedom of information legislation to that information. Disclosing the content of free and frank material will substantially inhibit discussions in the future.

These exemptions are subject to the 'public interest test'. Therefore, taking account of all the circumstances of this case, we have considered if the public interest in disclosing the information outweighs the public interest in applying the exemptions. We have found that, on balance, the public interest lies in favour of upholding the exemptions. We recognise that there is a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. However, there is a greater public interest in allowing a private space within which officials can provide free and frank advice and the exchange views. It is clearly in the public interest that officials can properly discuss these matters. Premature disclosure of this type of information could lead to a reduction in the comprehensiveness and frankness of such advice and views in the future, which would not be in the public interest.

### **Section 36(1) – legal advice**

An exemption under section 36(1) of FOISA (confidentiality in legal proceedings) applies to some of the information requested because it is legal advice and disclosure would breach legal professional privilege.

This exemption is subject to the 'public interest test'. Therefore, taking account of all the circumstances of this case, we have considered if the public interest in disclosing the information outweighs the public interest in applying the exemption. We have found that, on balance, the public interest lies in favour of upholding the exemption. We recognise that there is some public interest in release as part of open and transparent government, and to inform public debate. However, this is outweighed by the strong public interest in maintaining the right to confidentiality of communications between legal advisers and clients, to ensure that Ministers and officials are able to receive legal advice in confidence, like any other public or private organisation.