

FREEDOM OF INFORMATION REQUEST – CASE REFERENCE 202000090391

This annex outlines the exemptions that have been applied to some of the information you requested in respect of “any papers and/or briefings that were circulated to the Scottish Government Cabinet from civil servants, special advisors and/or otherwise in preparation for the Cabinet meeting on 30 June 2020” and the reasons for applying them.

1. 30 June 2020 Cabinet Agenda

An exemption under Section 30(a) (Scottish Ministers’ collective responsibility) applies to the Agenda of the Scottish Cabinet meeting on 30 June.

As set out in Annex A, the weekly meeting of the Scottish Cabinet is the highest decision-making forum within the Scottish Government, and it follows that all information considered by Cabinet must be handled with great care. Properly functioning Cabinet processes are generally recognised to be of vital public interest: Cabinet government is based on the principle of collective responsibility, which the Scottish Ministerial Code, and the UK Ministerial Code, define in the following terms:

“The principle of collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed and advice offered within the Government should be maintained. ... The internal processes through which a Government decision has been made should not normally be disclosed.” (*Scottish Ministerial Code, 2018 edition, paragraphs 2.1 and 2.4*)

Cabinet papers, including Cabinet Agendas, are invariably drafted on the basis of the working assumption that they will not be disclosed until a significant amount of time has elapsed.

Section 30(a) (Scottish Ministers’ collective responsibility) recognises the need to protect the convention of collective responsibility and allow Ministers some private space for discussion. The ability to protect collective responsibility and allow Ministers some private space for discussion would be compromised if the full details of what was on the Cabinet agenda each week was disclosed.

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 maintaining collective responsibility and in allowing Ministers a private space within which policy positions 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 policy 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 policy-/decision-making process.

2. Minutes of the 23 June Cabinet Meeting

The minutes of the 23 June Cabinet meeting were tabled at the 30 June Cabinet meeting for comment. An exemption under Section 30(b)(ii) (the free and frank exchange of views for the purposes of deliberation) applies to these minutes. The reasons for applying this exemption are exactly the same as set out in Annex A in relation to the minutes to the 30 June Cabinet meeting.

3. Scottish Cabinet Analysis of News and Current Events (SCANCE) paper

An exemption under Section 30(b)(ii) (the free and frank exchange of views for the purposes of deliberation) applies to the SCANCE paper considered at Cabinet on 30 June 2020. The weekly SCANCE paper is a tool through which Cabinet members can share the latest policy and legislative developments within their portfolios with their Cabinet colleagues.

Releasing the SCANCE paper would inhibit Ministers' ability to have a free and frank exchange of views for the purposes of deliberation at future Cabinet meetings because its release would affect their willingness to share sensitive information and developing policy positions with their colleagues for discussion at Cabinet meetings and would, thereby, prejudice the effective conduct of public affairs.

The weekly meeting of the Scottish Cabinet is the highest decision-making forum within the Scottish Government, and it follows that all information considered by Cabinet must be handled with great care.

Cabinet papers, including SCANCE papers, are invariably drafted on the basis of the working assumption that they will not be disclosed until a significant amount of time has elapsed.

Section 30(b)(ii) (the free and frank exchange of views for the purposes of deliberation) recognises the need to protect the convention of collective responsibility and allow Ministers some private space for discussion. The ability to protect collective responsibility and allow Ministers some private space for discussion would be compromised if the full details of what Cabinet discussed each week was disclosed.

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 maintaining collective responsibility and in allowing Ministers a private space within which policy positions 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 policy 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 policy-/decision-making process.

4. Other Cabinet papers

An exemption under Sections 29(1)(a) (formulation or development of government policy) applies to the three papers that were considered at Cabinet on 30 June 2020 (other than the standing items), because they are all subject to continuing policy development.

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 not disclosing the early development of options and priorities being considered by Scottish Ministers before final decisions have been taken and before final policy positions have been settled. Premature disclosure is likely to undermine the full and frank discussion of issues between Ministers, which in turn will undermine the quality of the policy-/decision-making process.

An exemption under Section 36(1) (confidentiality of communications) also applies to much of one of the papers considered at Cabinet on 30 June because the information it contains is subject to legal professional privilege. A large proportion of this paper constitutes confidential information which derives from communications with a legal adviser on legislative proposals that are still in development.

In applying the exemption under Section 36(1) we have considered the public interest in relation to the information. On balance, our view is that the public interest is best served by withholding the information in this paper in order to protect legal professional privilege in relation to legal advice on legislative proposals that are still in development.

Finally, an exemption under Section 25(1) (otherwise accessible) applies to parts of one of the papers considered at Cabinet on 30 June because this information is now available on the Scottish Parliament website¹ and the Scottish Government website². Links to this information are supplied in the footnotes.

¹ See information on the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill on the Scottish Parliament website at: <https://beta.parliament.scot/bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill#main>

² Business and Regulatory Impact Assessment: <https://www.gov.scot/publications/united-nations-convention-rights-child-incorporation-scotland-bill-business-regulatory-impact-assessment/>

Child Rights and Wellbeing Impact Assessment: <https://www.gov.scot/publications/united-nations-convention-rights-child-incorporation-scotland-bill-child-rights-wellbeing-impact-assessment-crwia/>
Equality and Fairer Scotland Impact Assessment: <https://www.gov.scot/publications/united-nations-convention-rights-child-incorporation-scotland-bill-equality-fairer-scotland-impact-assessment-efsia/>
UNCRC Incorporation Bill leaflet: <https://www.gov.scot/publications/united-nations-convention-rights-child-incorporation-scotland-bill-leaflet/>

A version of the UNCRC and options protocols showing all words that have been “carved out”:
<https://www.gov.scot/publications/united-nations-convention-on-the-rights-of-the-child-bill-rights-and-requirements/>