

FOI Request – 202100165382

Annex

Reasons for not providing Information

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

An exemption under 30(b)(i) of FOISA (free and frank provision of advice) applies 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 candid discussions. This exemption recognises the need for officials to have a private space within which to discuss options candidly and to provide free and frank advice to Ministers before the Scottish Government reaches a settled public view. Disclosing the content of free and frank briefing material on whether or not the characteristic of sex should be included in Scottish hate crime legislation at a later date could substantially inhibit the provision of such advice in the future, particularly because this option is currently still being considered by the Working Group on Misogyny and Criminal Justice in Scotland, and further decisions may need to be taken.

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 the process of achieving collective responsibility in a private space within which officials can discuss and exchange and deliberate free and frank views before reaching a conclusion and to provide full and frank advice to Minister, as part of the process of exploring and refining the Government’s policy position. This private thinking space is essential to enable all options to be properly considered, based on the best available advice, so that good policy decisions can be taken. Premature disclosure is likely to undermine the full and frank discussion of issues between Ministers and officials, which in turn will undermine the quality of the decision making process, which would not be in the public interest.

Section 36(1) - legal professional privilege/confidentiality in legal proceedings

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.

Section 38(1)(b) – personal details

An exemption under section 38(1)(b) of FOISA (personal information) applies to some of the information requested because it is personal data of a third party, i.e. names/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.