

REASONS FOR NOT PROVIDING INFORMATION

An exemption applies

An exemption(s) under section(s) section 38(1)(b) (personal data of a third party) of FOISA applies to some of the information you have requested. This exemption applies to the names of third parties referenced throughout the documents within scope of the request. The Scottish Government has a policy of not disclosing the names of officials who are not Senior Civil Servants. The names of external stakeholders who are not board members have also been redacted to protect their privacy.

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

While our aim is to provide information whenever possible, in this instance an exemption under section 36(1) of FOISA (confidentiality in legal proceedings) applies to some of the information requested. This exemption applies because the information 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.

It is clearly in the public interest that decisions are taken by the Government in a fully informed legal context. Ministers and officials therefore need high-quality, comprehensive legal advice for the effective conduct of their business. That advice needs to be given in context, and with a full appreciation of relevant facts. Without such legal advice, which can only be provided frankly and comprehensively in the knowledge that it will be kept in confidence, the quality of the Government's decision-making would be much reduced since it would not be fully informed.

There is a public interest in ensuring that the Government's position on any issue is not undermined by the disclosure of legal advice. Legal advisers need to be able to present the full picture to each other and to their clients. This includes, not only arguments in support of their final conclusions, but also relevant counter-arguments. It is in the nature of legal advice that it often sets out the possible arguments both for and against a particular view, weighing up their relative merits.

An exemption under section 33(1)(b) of FOISA (commercial interests) applies to some of the information requested. This exemption applies because disclosure of this particular information would, or would be likely to, prejudice substantially the commercial interests of

the bidders involved. Disclosing this information would be likely to give their competitors an advantage in future similar tendering exercises, which would substantially prejudice their ability to submit competitive tenders and so could significantly harm their commercial business. Disclosing the information could provide market intelligence that otherwise would not be available thus impacting on the ability of the business to perform.

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 and transparent government. However, there is a greater public interest in protecting the commercial interests of companies which provide information to the Scottish Government to ensure the continued sharing of information with the Scottish Government. In turn this will ensure that the decisions taken by the Scottish Government are as robust as possible and obtain the best value for public money.