

From: [Redacted]
To: [Deputy First Minister and Cabinet Secretary for Covid Recovery](#); [Redacted]; [Minister for Parliamentary Business and Veterans](#)
Cc: [Redacted]; [Internal Communications](#); [Redacted]; [Redacted]; [Redacted]; [Henderson G \(Gavin\)](#); [News Desk](#); [Redacted]; [Redacted]; [Rennie M \(Michelle\)](#); [Redacted]; [Redacted]; [Redacted]; [Freedom of Information](#); [McAllister C \(Colin\)](#); [FoI SpAds PO](#); [Permanent Secretary](#)
Subject: RE: LINE FOR CLEARANCE: Harassment complaints report line for Scotsman - breaching FOI
Date: 27 May 2021 19:40:02

Thank you. I'll issue now.

[Redacted]

[Redacted]
[Redacted]

Scottish Government, St Andrew's House, Edinburgh.

[Redacted]

[Redacted]

From: [Redacted]@gov.scot> **On Behalf Of** Deputy First Minister and Cabinet Secretary for Covid Recovery
Sent: 27 May 2021 19:33
To: [Redacted]@gov.scot>; Deputy First Minister and Cabinet Secretary for Covid Recovery <DFMCSCR@gov.scot>; Minister for Parliamentary Business and Veterans <MinisterPBV@gov.scot>
Cc: [Redacted]@gov.scot>; Internal Communications <InternalCommunications@gov.scot>; [Redacted]@gov.scot>; [Redacted]@gov.scot>; [Redacted]@gov.scot>; Henderson G (Gavin) <Gavin.Henderson@gov.scot>; News Desk <Newsdesk@gov.scot>; [Redacted]@gov.scot>; [Redacted]@gov.scot>; Rennie M (Michelle) <Michelle.Rennie@transport.gov.scot>; [Redacted]@gov.scot>; [Redacted]@gov.scot>; [Redacted]@gov.scot>; Freedom of Information [Redacted]; McAllister C (Colin) <Colin.McAllister@gov.scot>; FoI SpAds PO <FoI.SpAdsPO@gov.scot>; [Redacted]@gov.scot>; Permanent Secretary <PermanentSecretary@gov.scot>
Subject: RE: LINE FOR CLEARANCE: Harassment complaints report line for Scotsman - breaching FOI

DFM has cleared.

Many thanks

[Redacted]

[Redacted]

Private Secretary to the Deputy First Minister and Cabinet Secretary for Covid Recovery – John Swinney MSP

The Scottish Government

St Andrew's House | Regent Road | Edinburgh | EH1 3DG

[Redacted]

Email: DFMCSCR@gov.scot

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From: [\[Redacted\]@gov.scot](#)>

Sent: 27 May 2021 18:20

To: Deputy First Minister and Cabinet Secretary for Covid Recovery <[DFMCSCR@gov.scot](#)>; Minister for Parliamentary Business and Veterans <[MinisterPBV@gov.scot](#)>

Cc: [\[Redacted\]@gov.scot](#)>; Internal Communications

<[InternalCommunications@gov.scot](#)>; [\[Redacted\]@gov.scot](#)>; [\[Redacted\]@gov.scot](#)>; [\[Redacted\]@gov.scot](#)>; Henderson G (Gavin) <[Gavin.Henderson@gov.scot](#)>; News Desk <[Newsdesk@gov.scot](#)>; [\[Redacted\]@gov.scot](#)>; [\[Redacted\]@gov.scot](#)>; Rennie M (Michelle) <[Michelle.Rennie@transport.gov.scot](#)>; [\[Redacted\]@gov.scot](#)>; [\[Redacted\]@gov.scot](#)>; [\[Redacted\]@gov.scot](#)>; Freedom of Information <[foi@gov.scot](#)>; McAllister C (Colin) <[Colin.McAllister@gov.scot](#)>; FoI SpAds PO <[FoI.SpAdsPO@gov.scot](#)>; [\[Redacted\]@gov.scot](#)>; Permanent Secretary <[PermanentSecretary@gov.scot](#)>

Subject: LINE FOR CLEARANCE: Harassment complaints report line for Scotsman - breaching FOI

PS/DFM

We have received this media enquiry from [Redacted] at The Scotsman and suggest the line highlighted below.

"As discussed, looking for a response to a decision notice (Decision 083/2021, let me know if you need a copy but your FOI team should have received it at the same time as me) from the Scottish Information Commissioner today which states that the Scottish Government breached freedom of information legislation twice in attempts to block the release of the report into harassment complaints against Alex Salmond.

The commissioner said the approach by the ministers was "overly pedantic" and was based on an "overly legalistic interpretation", and criticised them for the delay in responding.

He said: "The Commissioner does not accept the Ministers' overly legalistic interpretation of the Applicant's request and he cannot see any reason for the Ministers' decision to apply section 17(1) in their review outcome, when the original response indicated that the Ministers understood the request and had identified the withheld information."

1. What is the Scottish Government's response to this decision from the commissioner?
2. Does the Scottish Government regret its approach to this FOI request given it claimed to not hold a document it clearly does hold?

I'll need a response ASAP, please. It's down to go in tomorrow's paper."

We've worked with the FOI Unit on the following response and spads are content.

[Redacted]_____

I would be grateful if you could let me know if DFM is content and I will arrange for the Newsdesk to issue.

Copying the Minister of Parliamentary Business.

The Decision is attached for completeness.

Many thanks

[Redacted]

[Redacted]

From: [Redacted]
To: Fraser L (Lesley); [Redacted]; DG Corporate
Cc: Mitchell IM (Ian); [Redacted]
Subject: RE: URGENT - FOI - 20200094934 - appeal - decision - draft submission to DFM - draft for SIRO views
Date: 15 July 2021 17:20:47
Attachments: [Redacted]

Lesley,

Ian and I had a conversation following your discussion with him, and I agreed to pick up two immediate points in advance of tomorrow's meeting:

- first, to provide you with the [Redacted] that [Redacted] prepared when disclosure to the Committee was in contemplation. Ian has agreed that I should forward this to you, reiterating [Redacted]

A copy is attached.

- secondly, to produce a high level note summarising the risks attached to each of the potential outcomes to help focus tomorrow's meeting and subsequent advice to DFM

We will need [Redacted] input in the morning in order to [Redacted], and [Redacted] is likely to be key to any timetable for next steps. I think we will probably be in a better position to prepare an indicative timetable after tomorrow's call.

Matters have moved on in relation to the second point in the past few minutes, as News Desk has had an approach from [Redacted] asking for comment on our non-compliance. I have forwarded that query separately, but it does add another dimension to the handling issues, and it looks like they will want a line tonight.

[Redacted]

[Redacted] | Head of Policy and Casework | Freedom of Information Unit

[Redacted]

I am currently working from home, and can be contacted by email, Skype for Business, Microsoft Teams, or on my mobile.

I do not work on Fridays at present – please contact foi@gov.scot if you need assistance in my absence.

From: Fraser L (Lesley) <Lesley.Fraser@gov.scot>
Sent: 15 July 2021 16:16
To: [Redacted]@gov.scot>; [Redacted]@gov.scot>; DG Corporate <dgcorporate@gov.scot>
Cc: Mitchell IM (Ian) <Ian.Mitchell@gov.scot>; [Redacted]@gov.scot>
Subject: RE: URGENT - FOI - 20200094934 - appeal - decision - draft submission to DFM - draft for SIRO views

[Redacted]

I am grateful again, and your explanation about the challenges of this procedure when working from home make sense. Thank you for the arrangements you are putting in place.

I have spoken to Ian M in the margins of another meeting about your further

advice below, and he will discuss further with you. [Redacted]

I do understand the timetable challenges here, and Ian will discuss that further. I would be happy for Perm Sec and DFM to see this advice this week [Redacted]. It would also be helpful for me to see a likely timetable to release including when we would consult Mr Salmond, consider his response, then respond. Happy too to discuss managing the relationship with the Commissioner if that would be helpful.

Thanks again

L

Lesley

Lesley Fraser | Director General Corporate
Scottish Government | [Redacted]

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From: [\[Redacted\]@gov.scot](mailto:[Redacted]@gov.scot)>

Sent: 15 July 2021 14:07

To: Fraser L (Lesley) <Lesley.Fraser@gov.scot>; [\[Redacted\]@gov.scot](mailto:[Redacted]@gov.scot)>; DG Corporate <dgcorporate@gov.scot>

Cc: Mitchell IM (Ian) <ian.Mitchell@gov.scot>; [\[Redacted\]@gov.scot](mailto:[Redacted]@gov.scot)>

Subject: RE: URGENT - FOI - 20200094934 - appeal - decision - draft submission to DFM - draft for SIRO views

Lesley,

On the procedural point, this has highlighted that our procedural checks for appeals within the Unit have been weakened since we moved to working from home. For example, in the office we had a whiteboard which displayed prominently all the appeal cases, their latest stage, and highlighted key deadlines, meaning that any of the team could tell at a glance when deadlines were impending or progress was required. We are exploring with the team what we can do to strengthen checks generally, particularly as we may be moving to an extended period of hybrid working. The risk is also heightened with OCT-related cases, because, in order to minimise the amount of information being shared about potentially very sensitive cases, advice comes almost exclusively from [Redacted] or me rather than the wider team: when only a small number of people are aware of a matter then the risk of something being missed is heightened. This is fortunately the first such incident since we began supporting OCT in this way, and we will certainly consider what else can be done to avoid the risk of a repeat.

On the substantive points that you mention:

- [Redacted]
- The decision not to disclose to the Committee is not obviously relevant to the question of whether the information must now be disclosed under FOISA: as noted, the Ministers must disclose unless an exemption applies. The exemptions in question (section 26(c) if the undertaking were to catch the report; section 38(1)(b) were we to conclude that Mr Salmond's interests outweigh the requester's) are absolute and so under FOISA the public interest test does not apply.
- [Redacted]
- In relation to Mr Salmond, he has no right to be consulted before the information is disclosed in response to an FOI request. The Ministers' own section 60 Code of Practice (Part 7) is clear that consultation is good practice, but it is merely a courtesy and cannot impede the disclosure of information. The purpose of consultation is to elicit the third party's views to help us determine whether or not an exemption applies, and interestingly it goes on to say that consultation may not be appropriate where "where the authority holds evidence of earlier consultation on the status and sensitivity of the information and nothing (including the views of the third party) has changed". The Code goes on to say that where consultation is not possible, then persons with an interest in the disclosed information should be notified of the outcome if possible. [Redacted]
- For the avoidance of doubt, under FOISA we are not weighing Mr Salmond's views against the public interest in disclosure. We can only use his views to ascertain whether an exemption applies. Unless an exemption applies, the information falls to be disclosed as a matter of law and as noted above the public interest only comes into play once we have established that a qualified exemption applies (when the next stage is then to test whether the public interest in upholding the exemption outweighs the public interest in disclosure). There is no general exemption on the basis that disclosure might not be in the public interest.

[Redacted]

Happy to discuss.

[Redacted]

[Redacted] | Head of Policy and Casework | Freedom of Information Unit

[Redacted]

I am currently working from home, and can be contacted by email, Skype for Business, Microsoft Teams, or on my mobile.

I do not work on Fridays at present – please contact foi@gov.scot if you need assistance in my absence.

From: Fraser L (Lesley) <Lesley.Fraser@gov.scot>

Sent: 15 July 2021 13:02

To: [Redacted]@gov.scot>; [Redacted]@gov.scot>; DG Corporate <dgcorporate@gov.scot>
Cc: Mitchell IM (Ian) <ian.mitchell@gov.scot>; [Redacted]@gov.scot> **Subject:** RE: URGENT - FOI
- 20200094934 - appeal - decision - draft submission to DFM - draft for SIRO views

[Redacted],

Many thanks indeed to you and colleagues for all of the work on this potential release, and the advice. Much appreciated. I note the apology about the delay in processing this which is regrettable. I am sure that lessons will have been learned and that processes are now in place that would avoid that happening again?

On the substance of the issue, I am persuaded that we should not recommend a (late) appeal at this stage. However, I do have further questions in relation to the impact of the Undertaking, and the interaction with Mr Salmond's GDPR rights.

From the helpful advice, having decided against appeal, I note:

- That we now need to decide whether or not to release the document against the criteria helpfully set out.
- [Redacted]

- [Redacted]

- The Committee and ultimately Ministers decided not to go to the Court to seek its release, and this matter was extensively tested in correspondence. Could this imply a view on its public interest, given the nature of the Committee inquiry?? [Redacted]

[Redacted]

[Redacted]

Can we speak to the ICO about timescales? It feels important to get this right, and the steps including with Ministers and, Mr Salmond and staff may yet take a few more days.

I am very happy to meet quickly to discuss.

Thanks

L

Lesley

Lesley Fraser | Director General Corporate
Scottish Government | [Redacted]

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[Redacted]

From: [\[Redacted\]](#)
To: [DG Corporate; Fraser L \(Lesley\)](#)
Cc: [Mitchell IM \(Ian\); \[Redacted\]](#)
Subject: URGENT - FOI - 20200094934 - appeal - decision - draft submission to DFM - draft for SIRO views
Date: 14 July 2021 17:44:00
Attachments: [FOI - 20200094934 - appeal - Decision 083-2021 - further minute to DFM.docx](#)
[JR - decision report and covering letter - INV088 - 4 - redacted for disclosure to committee.pdf](#)

Lesley,

I understand that Ian Mitchell has spoken to you about the urgent work we are taking forward to deal with the Scottish Information Commissioner's decision in the above appeal. We are now seeking your input and views as SIRO, given the data protection considerations raised below, before finalising the attached submission for DFM. The Commissioner has indicated that he requires to receive evidence of our compliance with his decision by Wednesday 21 July, and we apologise for the very short timescales involved, which are addressed more fully in the draft submission.

The request is about the procedure for the handling of harassment complaints involving current or former Ministers: the requester first asked for details about each complaint dealt with using the procedure (which was answered by reference to a PQ response that was already public) and secondly asked for the outcome of each such complaint, including any official report.

The Commissioner's decision finds that we were not entitled to take the approach we did on review (to tell the requester that we did not hold the requested information, because the Permanent Secretary's decision in the two complaints by Ms A and Ms B had been reduced by the Court). Authorities can either comply with the Commissioner's decision, or appeal it to the Court of Session if they identify an error in law. [Redacted]

[Redacted]

[Redacted]

In your role as SIRO, we would be grateful for your comments on the draft submission as a whole, and in particular the data protection aspects canvassed at paragraphs 27 to 40 and in the Annex. We also understand that you are likely to wish to comment on the handling arrangements, and that Ian will be discussing this further with you.

I would be happy to discuss the FOI aspects if that would be helpful.

[Redacted]

[Redacted] | Head of Policy and Casework | Freedom of Information Unit

Scottish Government | 2W | St Andrew's House | Regent Road | Edinburgh | EH1 3DG

[Redacted]

I am currently working from home, and can be contacted by email, Skype for Business, Microsoft Teams, or on my mobile.

I do not work on Fridays at present – please contact foi@gov.scot if you need assistance in my absence.

[47 pages redacted (2 attachments)]