

REASONS FOR NOT PROVIDING INFORMATION

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

Section 25 of the Freedom of Information (Scotland) Act 2002 (FOISA) exempts information from disclosure where the requester can reasonably obtain the information without asking for it under FOISA. It has a different focus from most other exemptions. It is not about withholding information from the public; it recognises that where information is already available, there is no need to provide an alternative right of access to it through FOISA.

Exemptions apply, subject to the public interest test

Exemptions under sections 30(b)(i) (free and frank exchange of advice) of FOISA (prejudice to effective conduct of public affairs) apply to some of the information requested. These exemptions apply because revealing the source of the Scottish Government's legal advice, would be likely to lead to conclusions being drawn from the fact that any particular professional representative has, or has not, provided advice, which in turn would be likely to impair the Government's ability to take forward its work now or in the future. This would constitute substantial prejudice to the effective conduct of public affairs in terms of the exemption.

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 these 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 enabling the Scottish Government to determine how and from whom it receives legal advice, without facing external pressure or concerns that particular conclusions may be drawn from the fact that any particular person or firm has or has not provided legal advice on a particular matter.

An exemption under section 33(1)(b) of FOISA also applies to some of the information you have requested because it relates to commercial information that may prejudice the company or the Scottish Government. This exemption is also 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 protecting the commercial interests of companies which enter into Scottish Government contracts, to ensure that we are always able to obtain the best value for public money.

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. Once again, 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.