

From: [Redacted]@gov.scot

Sent: 19 January 2021 09:33

To: [Redacted]@gov.scot

Cc: [Redacted]@gov.scot; [Redacted]@gov.scot; [Redacted]@gov.scot>;
[Redacted]@gov.scot

Subject: RE: FOI - 202000094934 - appeal - Stage 2 - request for submissions - notification to reviewer

Hi [Redacted]

Your proposed approach sounds good and I am happy to join a call this week. Also copying in [Redacted] in relation to initial case handling ahead of the review. Speak soon.

[Redacted]

Deputy First Minister and Cabinet Secretary for Covid Recovery

FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

202000094934 – [REDACTED]

DECISION BY SCOTTISH INFORMATION COMMISSIONER (083/2021)

Purpose

1. To make you aware that we have received a Decision by the Scottish Information Commissioner which relates to a request made by [Redacted] for information in connection with the Scottish Government's procedure for the handling of harassment complaints involving current or former ministers.

Priority

2. *Routine.* We are required to comply with the Decision by **12 July 2021**. Any appeal against the Decision, which can only be brought on a point of law, would need to be lodged at the Court of Session by **8 July 2021**.

Background

3. On 19 August 2020, [Redacted] asked the Scottish Government:

“Since the introduction of the Handling Harassment Complaints procedure in the Scottish Government detailed here:

<https://www.gov.scot/publications/handling-of-harassment-complaints-involving-current-or-former-ministers/>, please provide the below information.

1) *The date, nature of allegation, and the name of the person alleged to have harassed someone for each complaint dealt with using this procedure.*

2) *The outcome of each complaint including any official report.*

2a) *If a meeting took place as part of the outcome of the investigation into the complaint, I request the date, time, location, attendance record, agenda, minutes and any handouts provided to attendees.*

3) *Whether the harassment procedure has been used since the judicial review in 2018 won by the former First Minister Alex Salmond?*

3a) *If not, why not?”*

4. On 17 September 2020, we provided a response to [Redacted] which answered questions 1, 3 and 3a. In relation to questions 2 and 2a, we advised [Redacted] that the requested information was exempt information under a variety of exemptions.

5. [Redacted] asked for a review in relation to questions 2 and 2a, as he considered that the exemptions had been wrongly applied. On 26 November 2020, we responded to the request for review and substituted a different decision in relation to these two questions:

instead of applying exemptions, we advised [Redacted] that we did not hold any information that would enable us to respond to these queries, in accordance with section 17 of FOISA.

6. The basis for this revised approach was that the complaints in question were the complaints made by Ms A and Ms B against Mr Salmond, in respect of which the Permanent Secretary reached decisions on 22 August 2018. Those decisions were subsequently reduced by the Court of Session on 8 January 2019, at the conclusion of the judicial review proceedings brought against the Scottish Ministers and the Permanent Secretary by Mr Salmond. We took the view that the reduction of the decisions meant that they had no legal effect, that the complaints returned to the position before the Permanent Secretary reached decisions on them, and that they could not therefore be said to have reached an outcome. This appeared to us to be consistent with the First Minister's statement to the Scottish Parliament on 8 January 2019, when she indicated that it would be open to the Scottish Government to reinvestigate the complaints once the ongoing police investigation had concluded.

7. [Redacted] was dissatisfied by this decision and appealed to the Scottish Information Commissioner on 1 December 2020. We made detailed submissions to the Commissioner in amplification of the position set out in paragraph 6 above. The Commissioner issued his Decision yesterday (27 May 2021) and a copy accompanies this minute.

8. The Commissioner did not accept that we were entitled to tell [Redacted] that we did not hold the information need to answer his requests for the reasons set out above. We are now required to carry out a fresh review, and to provide a response other than advising that we do not hold the information.

Discussion

9. Detailed consideration of the Decision is now underway by policy officials and the FOI Unit. The Decision appears to address a novel point about the interaction between the reduction of documents by the Court of Session and the FOI regime. Accordingly, detailed consideration will be required before we can make any recommendation about whether an appeal to the Court of Session should be considered. We will provide further briefing in due course.

Handling

10. [Redacted] received a copy of the Decision at the same time as the Scottish Government yesterday. He contacted Communications colleagues yesterday to advise that he intended to publish an article about the Decision in today's edition of *The Scotsman*. A copy of the article is in the Annex to this minute. You agreed last night that we would issue our standard line in the event of media interest in a Commissioner's decision: "We have received the Decision and are considering its terms."

Recommendation

11. You are invited to note the Commissioner's Decision, and to note that further briefing will be provided once the Decision has been considered in detail.

[Redacted]
FOI Unit
[Redacted]

28 May 2021

OFFICIAL – SENSITIVE

Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constit Interest	General Awareness
Minister for Parliamentary Business					X
Lord Advocate					X
Solicitor General					X

Permanent Secretary DG Corporate DG Constitution and External Affairs Nicky Richards David Rogers Penny Curtis Gavin Henderson Caroline Beattie Legal Secretary to the Lord Advocate [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] Internal Communications [Redacted] [Redacted] [Redacted] Michelle Rennie PS/SpAds Colin McAllister
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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.

"We have received the Decision and are considering its terms."

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]