

Reasons for not providing information

Section 36(1) – confidentiality in legal proceedings

An exemption under section 36(1) of FOISA (confidentiality in legal proceedings) applies to 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.

Sections 30(b)(i) and 30(b)(ii) – free and frank exchange of views for the purposes of deliberation

Exemptions under sections 30(b)(i) and 30(b)(ii) of FOISA (free and frank advice and exchange of views) apply 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 exchange of views for the purposes of deliberation. The exemptions recognise the need for Ministers to have a private space within which to seek advice and views from officials before reaching the settled public position which will be given in whatever final statements are used. Disclosing the content of free and frank briefing material on will substantially inhibit such briefing in the future, particularly because these discussions relate to a sensitive or controversial issue.

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 the 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 allowing a private space within which officials can provide free and frank advice and views to Ministers in relation to planned announcements. It is clearly in the public interest that Ministers can properly provide sound information to Parliament (to which they are accountable) and robustly defend the Government’s policies and decisions. They need full and candid advice from officials to enable them to do so. Premature disclosure of this type of information could lead to a reduction in the comprehensiveness and frankness of such advice and views in the future, which would not be in the public interest

Section 38(1)(b) - (Third Party Personal Data)

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, ie , 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.

Annex B- Information for release

From: [redacted]@gov.scot **On Behalf Of** First Minister

Sent: 16 June 2022 13:39

To: Lord Advocate <LordAdvocate@gov.scot>; First Minister <firstminister@gov.scot>

Cc: Solicitor General <SolicitorGeneral@gov.scot>; Legal Secretariat to the Lord Advocate <DLPCEALSLA@gov.scot>; McAllister C (Colin) [redacted]@gov.scot; Crawford E (Ewan) [redacted]@gov.scot; Rogers D (David) (Constitution and Cabinet Director) [redacted]@gov.scot

Subject: RE: Meeting with LA/FM - Fri 17 June

Hi [redacted],

It will be Colin McAllister, Ewan Crawford and David Rogers who will also be attending.

Many thanks,

[redacted]

[redacted]

Office of the First Minister

5th Floor | St Andrews House | Regent Road | Edinburgh | EH1 3DG | 0131 244 [redacted] | [redacted]

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From: Lord Advocate <LordAdvocate@gov.scot>

Sent: 16 June 2022 11:10

To: First Minister <firstminister@gov.scot>

Cc: Solicitor General <SolicitorGeneral@gov.scot>; Legal Secretariat to the Lord Advocate <DLPCEALSLA@gov.scot>; Lord Advocate <LordAdvocate@gov.scot>

Subject: RE: Meeting with LA/FM - Fri 17 June

Good morning [redacted],

Would you be able to let me know who else will be attending, please?

Many thanks,

[redacted]

Deputy Private Secretary – Lord Advocate

Crown Office, 25 Chambers Street, Edinburgh

E-mail: Lordadvocate@gov.scot

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From: Lord Advocate

Sent: 15 June 2022 17:48

To: First Minister <firstminister@gov.scot>

Cc: Lord Advocate <LordAdvocate@gov.scot>; Solicitor General <SolicitorGeneral@gov.scot>; Legal Secretariat to the Lord Advocate <DLPCEALSLA@gov.scot>

Subject: Meeting with LA/FM - Fri 17 June

Good afternoon [redacted],

Per our Teams exchange, I understand the First Minister would like to meet with the Lord Advocate in Glasgow at Atlantic Quay on Friday afternoon.

If possible, would we be able arrange the meeting for 14:00, please? The Lord Advocate asked that the Solicitor General and [redacted] join the meeting as well, please.

Many thanks,

[redacted]

Deputy Private Secretary – Lord Advocate

Crown Office, 25 Chambers Street, Edinburgh

E-mail: Lordadvocate@gov.scot

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NOTE OF MEETING BETWEEN THE FIRST MINISTER AND THE LAW OFFICERS: INDEPENDENCE REFERENDUM

17 JUNE 2022 (Atlantic Quay, Glasgow)

Attending:

First Minister

Lord Advocate

Solicitor General

David Rogers, Director Constitution

[redacted], LSLA

Colin McAllister, SPAD

Ewan Crawford, SPAD

[redacted], FMPO

1. The meeting was to take stock of work on a possible direct reference to the Supreme Court.
[redacted]
2. [redacted]
3. It was noted that a written case would not be lodged along with the reference on 28 June. Normally a written case would need to be lodged within 14 days but that time limit could potentially be extended.
4. [redacted]
5. The FM indicated that, if the reference went ahead, she would write to the PM on the same day that she would make a statement to Parliament, 28 June, saying that she stands ready to discuss a section 30 order.
6. [redacted]

Actions

[redacted]

Engagement with Minister for Parliamentary Business on timing of the statement (Colin McAllister)
FM's Statement to Parliament to be drafted and shared with Law Officers (Directorate for Constitution and Cabinet and SPADs)

Cabinet and Constitution Directorate
June 2022

NOTE OF MEETING BETWEEN THE FIRST MINISTER AND THE LAW OFFICERS: INDEPENDENCE REFERENDUM

9 JUNE 2022 (Scottish Parliament)

Attending:

First Minister

Lord Advocate

Solicitor General

David Rogers, Director Constitution

[redacted], LSLA

Colin McAllister, SPAD

1. [redacted]

2. The First Minister requested the Lord Advocate now consider making such a reference.

3. Fuller drafts of the materials were to be provided by Wednesday 15 June, and FM would meet the Law Officers again that week.

4. [redacted] The proposed reference would include a Bill which, separately, would be published and would include the proposed date for the referendum.

5. [redacted]

6. [redacted] The intention would be to make the reference on 28 June, and that the First Minister would inform Parliament with a statement on the same day.

Constitution and Cabinet Directorate

June 2022

NOTE OF MEETING BETWEEN THE FIRST MINISTER AND THE SOLICITOR GENERAL: INDEPENDENCE REFERENDUM

31 MAY 2022 (St Andrews House, Edinburgh)

Attending:

First Minister

Solicitor General

David Rogers, Director Constitution

1. [redacted]

2. [redacted]

3. [redacted] If a such a reference is made, the First Minister noted that she envisaged making a statement to the Scottish Parliament.

June 2022

Constitution and Cabinet Directorate

From: Curtis PS (Penelope) [redacted]@gov.scot

Sent: 27 June 2022 16:26

To: First Minister <firstminister@gov.scot>

Cc: Fisher G (Graham) [redacted]@gov.scot; McAllister C (Colin) [redacted]@gov.scot; Deputy First Minister and Cabinet Secretary for Covid Recovery <DFMCSCR@gov.scot>; Crawford E (Ewan) [redacted]@gov.scot; [redacted]@gov.scot; Macniven R (Ruaraidh) [redacted]@gov.scot; Rogers D (David) (Constitution and Cabinet Director) [redacted]@gov.scot; Lord Advocate <LordAdvocate@gov.scot>; Solicitor General <SolicitorGeneral@gov.scot>; [redacted]@gov.scot

Subject: RESTRICTED - CONFIDENTIAL - STATEMENT - DRAFT LETTER FM TO PM

PS/First Minister

Copy Lord Advocate

I attach a draft letter for FM to send the PM for consideration. The letter has had [redacted] and SPAD input.

Penny

Penny Curtis
Deputy Director Elections and FOI
Directorate for Constitution and Cabinet
Scottish Government
[redacted] | St Andrew's House | Regent Road | Edinburgh | EH1 3DG
0131 244 [redacted] | Mobile [redacted]

From: [redacted]@gov.scot **On Behalf Of** First Minister

Sent: 28 June 2022 14:01

To: [redacted]@gov.scot; First Minister <firstminister@gov.scot>

Cc: Nicolson S (Stuart) (Special Adviser) [redacted]@gov.scot ; Ingebrigtsen R (Ross)

[redacted]@gov.scot; McAllister C (Colin) [redacted]@gov.scot; Crawford E (Ewan)

[redacted]@gov.scot; [redacted]@gov.scot; Rogers D (David) (Constitution and Cabinet Director)

[redacted]@gov.scot; [redacted]@gov.scot; [redacted]@gov.scot; Solicitor General

<SolicitorGeneral@gov.scot>; Lord Advocate <LordAdvocate@gov.scot>; John-Paul Marks

[redacted]@gov.scot

Subject: RE: IMMEDIATE - Draft News Release

[redacted],

Content for this to be issued.

Many thanks,

[redacted]

[redacted]

Office of the First Minister

5th Floor | St Andrews House | Regent Road | Edinburgh | EH1 3DG | 0131 244 [redacted] |

[redacted]

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From: [redacted]@gov.scot

Sent: 28 June 2022 13:55

To: First Minister <firstminister@gov.scot>

Cc: [redacted]@gov.scot; First Minister <firstminister@gov.scot>

Cc: Nicolson S (Stuart) (Special Adviser) [redacted]@gov.scot; Ingebrigtsen R (Ross)

[redacted]@gov.scot; McAllister C (Colin) [redacted]@gov.scot; Crawford E (Ewan)

[redacted]@gov.scot; [redacted]@gov.scot; Rogers D (David) (Constitution and Cabinet Director)

[redacted]@gov.scot; [redacted]@gov.scot; [redacted]@gov.scot; Solicitor General

<SolicitorGeneral@gov.scot>; Lord Advocate <LordAdvocate@gov.scot>; John-Paul Marks

[redacted]@gov.scot

Subject: IMMEDIATE - Draft News Release

Importance: High

FMPO,

Please find below draft news release which we intend to issue to accompany the FM's statement to Parliament.

This has been agreed by policy colleagues, SpAds, [redacted] and the Permanent Secretary.

Can you confirm the First Minister is content?

Many thanks,

[redacted]

From: [redacted]@gov.scot **On Behalf Of** First Minister

Sent: 28 June 2022 09:47

To: First Minister <firstminister@gov.scot>; McAllister C (Colin) [redacted]@gov.scot; Crawford E (Ewan) [redacted]@gov.scot; [redacted]@gov.scot; Lord Advocate <LordAdvocate@gov.scot>; Rogers D (David) (Constitution and Cabinet Director) [redacted]@gov.scot

Cc: Fisher G (Graham) [redacted]@gov.scot; Deputy First Minister and Cabinet Secretary for Covid Recovery <DFMCSCR@gov.scot>; Curtis PS (Penelope) [redacted]@gov.scot; Macniven R (Ruaraidh) [redacted]@gov.scot; [redacted]@gov.scot; Solicitor General <SolicitorGeneral@gov.scot>; Nicolson S (Stuart) (Special Adviser) [redacted]@gov.scot; [redacted]@gov.scot; John-Paul Marks [redacted]@gov.scot; Lloyd E (Elizabeth) [redacted]@gov.scot; [redacted]@gov.scot; [redacted]@gov.scot.

Subject: RE: RESTRICTED: HIGHLY CONFIDENTIAL

Apologies, attached is the correct version (with all cited typo corrections now incorporated).

From: [redacted]@gov.scot **On Behalf Of** First Minister

Sent: 28 June 2022 09:29

To: First Minister <firstminister@gov.scot>; McAllister C (Colin) [redacted]@gov.scot; Crawford E (Ewan) [redacted]@gov.scot; [redacted]@gov.scot; Lord Advocate <LordAdvocate@gov.scot>; Rogers D (David) (Constitution and Cabinet Director) [redacted]@gov.scot

Cc: Fisher G (Graham) [redacted]@gov.scot; Deputy First Minister and Cabinet Secretary for Covid Recovery <DFMCSCR@gov.scot>; Curtis PS (Penelope) [redacted]@gov.scot; Macniven R (Ruaraidh) [redacted]@gov.scot; [redacted]@gov.scot; Solicitor General <SolicitorGeneral@gov.scot>; Nicolson S (Stuart) (Special Adviser) [redacted]@gov.scot; [redacted]@gov.scot; John-Paul Marks [redacted]@gov.scot; Lloyd E (Elizabeth) [redacted]@gov.scot; [redacted]@gov.scot; [redacted]@gov.scot.

Subject: RE: RESTRICTED: HIGHLY CONFIDENTIAL

Attached is the final final version, as approved by FM.

FM did make one small and further change (not sure where, sorry!) - but this is the finalised text that will be used.

[redacted]

Deputy Private Secretary to the First Minister

Office of the First Minister

5th Floor | St Andrews House | Regent Road | Edinburgh | EH1 3DG | 0131 244 [redacted]



Office of the First Minister of Scotland

FirstMinister.gov.scot

Prìomh Mhinistear na h-Alba

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