Annex A

Item 1 –
From: Dornan B (Brian)
Sent: 18 March 2022 16:37
To: First Minister <firstminister@gov.scot>; Deputy First Minister and Cabinet Secretary for Covid Recovery <DFMCSCR@gov.scot>; Cabinet Secretary for Constitution, External Affairs and Culture <CabSecCEAC@gov.scot>; Cabinet Secretary for Finance and Economy <CabSecFE@gov.scot>; Minister for Culture, Europe and International Development and Minister with special responsibility for Refugees from Ukraine <MinisterCEID@gov.scot>
Cc: Rogers D (David) (Constitution and Cabinet Director) <David.Rogers@gov.scot>; Wightman S (Scott) <Scott.Wightman@gov.scot>; Barnes D (David) <David.Barnes@gov.scot>; McAllister C (Colin) <Colin.McAllister@gov.scot>; Crawford E (Ewan) <Ewan.Crawford@gov.scot>; Lloyd E (Elizabeth) <Elizabeth.Lloyd@gov.scot>
Subject: OFFSEN - Prospectus Policy Session 1: borders

PS/ First Minister
PS/ Deputy First Minister
PS/ Cabinet Secretary for Constitution, External Affairs and Culture
PS/ Cabinet Secretary for Finance and Economy
PS/ Minister for Culture, Europe and International Development and Minister with Special Responsibility for Refugees from Ukraine

Copy: as above

Please find attached an agenda and briefing note for Monday's Prospectus Policy Session on borders.

I am also attaching Professor Nicola McEwan's recent co-authored paper on borders as useful background reading.

I would be grateful if Private Office colleagues did not share these papers more widely.

Many thanks,

Brian

Brian Dornan | Deputy Director Constitutional Futures | Directorate for Constitution and Cabinet | Scottish Government

Mob: **[redacted]**

Item 2 –

Prospectus Policy Session 1: borders

Agenda

1. Session introduction (David Rogers)

2. Externals introduction (Prof Scott and Prof McEwen]

3. Briefing note introduction (Ewan Crawford)

4. Discussion:

[redacted]

5. Next steps

Item 3 –

[redacted]

Item 4-

Under section 25(1) of FOISA, we do not have to give you information which is already reasonably accessible to you. However, in the interests of being helpful, a link to the material is below:

An EU border across Britain: Scotland's borders after independence - UK in a changing Europe (ukandeu.ac.uk)

Item 5 –

From: Nicola McEwen <N.McEwen@ed.ac.uk>
Sent: 01 February 2023 13:22
To: [redacted]
Subject: Re: SG / NM meeting

Hi **[redacted]** and colleagues,

As discussed, please find attached the document with some comments.

Best wishes,
Nicola

Professor Nicola McEwen
School of Social and Political Science and Centre on Constitutional Change

University of Edinburgh
[redacted]

http://www.centreonconstitutionalchange.ac.uk
@CCC_Research
@mcewen_nicola

From: [redacted]
Sent: 31 January 2023 13:54
To: Nicola McEwen <N.McEwen@ed.ac.uk>; **[redacted]**
When: 01 February 2023 12:30-13:00.
Where: Microsoft Teams Meeting

This email was sent to you by someone outside the University.
You should only click on links or attachments if you are certain that the email is genuine and the content is safe.

Hi Nicola,
As per emails, look forward to catching up tomorrow.
Best wishes,
[redacted]

Microsoft Teams meeting

Join on your computer, mobile app or room device
[redacted]

Item 6 –

[redacted]

Item 7 –

From: [redacted]
Sent: 04 May 2023 15:18
To: Minister for Independence <MinisterforIndy@gov.scot>
Cc: Brian Dornan <Brian.Dornan@gov.scot>; **[redacted]**
Subject: Off Sen - Note on academic engagement - draft Constitution paper

Hi **[redacted]**

Here is the note on academic engagement requested by Mr Hepburn at our meeting last week -
File Note - Minister for Independence - academic engagement on draft Constitution prospectus paper May 2023 details - Objective ECM (scotland.gov.uk)

If you have any difficulties opening the ERDM link, please let me know. I have attached a Word version for ease of reference.

Kind regards

[redacted]

[redacted]
Directorate for Constitution

Scottish Government

[redacted]

Item 8 (attachment to item 7) –

Minister for Independence: Further advice on CFD engagement with academics on drafts of Building a New Scotland: Creating a modern constitution for an independent Scotland – file note

Background
At our briefing on 25 April 2023 the Minister asked officials for a note of the academics we have engaged with on the drafting of the prospectus paper "Creating a modern constitution for an independent Scotland."

Context for academic engagement
In order to provide the people of Scotland with the information they need to make an informed choice about their constitutional future, officials sought academic expertise to ensure the draft prospectus paper was informed by research-based knowledge and insight.

Basis of engagement
Individual academics and officials conducted Teams conversations or face-to-face meetings on the basis, communicated with all academics, that:

- Academics could participate in conversations without compromising any commitment to impartiality
- The conversations were a safe space for the sharing of knowledge and ideas, taking place on the understanding that exchanges would remain private and confidential (though the fact and the record of meetings could be disclosed through FOI, if a relevant request were received)
- Any sustained engagement and sharing of expertise would be acknowledged appropriately (e.g., a testimonial letter).

No testimonial letters have been requested or issued thus far.

List of academics
To date, officials engaged with the following academics:

- Professor Christine Bell, University of Edinburgh. Professor of Constitutional Law
- Dr Elliot Bulmer. Author of *Constituting Scotland: The Scottish National Movement and the Westminster Model* (2016) and Research Director of the Constitutional Commission (2009-13)
- Professor Nicola McEwen, University of Edinburgh. Professor of Territorial Politics
- Professor Aileen McHarg, University of Durham. Professor of Public Law and Human Rights
- Professor Alan Miller, University of Strathclyde. Professor of Practice in Human Rights Law

Constitutional Futures Division, 4 May 2023

Item 9 –

From: [redacted]> **On Behalf Of** Constitutional Futures
Sent: 13 July 2023 09:42
To: Nicola.McEwen@glasgow.ac.uk
Subject: Freedom of Information request

Good morning,

I am writing to advise you that the Scottish Government has received a request under the Freedom of Information (Scotland) Act 2002 (FOISA) for a list of names of any external individuals or organisations that members of staff working within the Constitutional Futures Division have met with since March 2021.

You have an interest in the information which has been requested because you have attended a meeting which included staff within the Constitutional Futures Division.

Therefore, I am writing to advise you that your name will be included in the list within the response to the FOISA request. We expect this to be issued in the coming days.

I should also explain that we can withhold information only if an exemption under FOISA applies to that information and, where applicable, the public interest in disclosure is not outweighed by the public interest in upholding the exemption. You can find detailed information about FOISA on our website at: https://www.gov.scot/about/contact-information/how-to-request-information/ or on the Scottish Information Commissioner's website at: https://www.itspublicknowledge.info/.

Kind regards

[redacted]Constitutional Futures Division
Directorate for Constitution
The Scottish Government
2W, St Andrew's House, Edinburgh, EH1 3DG

Item 10 –

Minutes of meeting between Minister for Independence and Professor Nicola McEwen, University of Glasgow
24 May 2023

Attendees

- Jamie Hepburn MSP
- Professor Nicola McEwen, University of Glasgow
- Officials: David Rogers, Audrey MacDougall, **[redacted]**

Background

Professor McEwen was invited to meet the Minister for Independence as part of an introductory round of engagement to hear about the work of academics working in his portfolio area.

Discussion
The meeting began with a discussion about the process to engage academics, civil society and the wider public in constitutional issues and areas for debate.

[redacted]

In terms of wider context, Professor McEwen noted the work of the Independent Commission on the Constitutional Future of Wales established by the Welsh Government, and the comparative perspective from academics working in Northern Ireland (including Katy Hayward, Queen's University Belfast, with whom she'd authored a paper on borders published by UK in a Changing Europe in 2022). The Scottish Council of Global Affairs was also noted for its work on broader international context issues (not necessarily through a constitutional lens).

[redacted]

Professor McEwen noted that outputs from the Royal Society of Edinburgh's autumn 2022 Constitutional Futures initiative were available online, and that their Scotland and Europe initiative is ongoing and will run into next year.

[redacted]

[redacted], Central Analysis Division, 24 May 2023

Item 11 –

-----Original Appointment-----
From: [redacted]
Sent: 15 June 2023 17:44
To: [redacted]Nicola McEwen
Cc: [redacted]; Brian Dornan
Subject: Catch-up about the constitution paper
When: 16 June 2023 16:00-16:30 (UTC+00:00) Dublin, Edinburgh, Lisbon, London.
Where: Microsoft Teams Meeting
Importance: High
Sensitivity: Private

Hi Nicola,

As promised, this is the Teams invitation for our call tomorrow.

Best regards and looking forward to speaking to you tomorrow,
[redacted]

Microsoft Teams meeting

Join on your computer, mobile app or room device
[redacted]
SCOTS Connect - Please note - You must have the explicit permission of the organiser to record this meeting and its attendees, using any technology.
Learn more | Help | Meeting options

Item 12 –

Note of meeting between Professor Nicola McEwen and SG officials
1 June 2022

Attendees

- Professor Nicola McEwen, University of Edinburgh
- Officials: **[redacted]**

Background
As part of the wider prospectus programme to provide the people of Scotland with the information they need to make an informed choice about their constitutional future, officials sought academic expertise to ensure the draft prospectus paper on the constitution, rights and equality was informed by research-based knowledge and insight.

Officials conducted a Teams conversation with Professor McEwen on the following basis as agreed in advance of the meeting:

- That we anticipate that academics would participate in conversations without compromising any commitment to impartiality
- That conversations would be a safe space for the sharing of knowledge and ideas, taking place on the understanding that exchanges would remain private and confidential
- That any sustained engagement and sharing of expertise could be acknowledged appropriately (e.g. through a testimonial letter)

Discussion
Discussion focused on the main arguments and policy proposals contained in the draft prospectus publication, which had been shared with Professor McEwen prior to the meeting.

Shared paper:
[redacted]

Item 13 –

Note of meeting between Professor Nicola McEwen and SG officials
2 September 2022

Attendees

- Professor Nicola McEwen, University of Edinburgh
- Officials: **[redacted]**

Background

As part of the wider prospectus programme to provide the people of Scotland with the information they need to make an informed choice about their constitutional future, officials sought academic expertise to ensure the draft prospectus paper on the constitution, rights and equality was informed by research-based knowledge and insight.

Officials conducted a Teams conversation with Professor McEwen on the following basis as agreed in advance of the meeting:

- That we anticipate that academics would participate in conversations without compromising any commitment to impartiality
- That conversations would be a safe space for the sharing of knowledge and ideas, taking place on the understanding that exchanges would remain private and confidential
- That any sustained engagement and sharing of expertise could be acknowledged appropriately (e.g. through a testimonial letter)

Discussion

Discussion focused on the main arguments and policy proposals contained in the latest draft of the prospectus publication (which had been shared with Professor McEwen prior to the meeting) as well as the latest developments in territorial politics and wider UK intergovernmental relationships.

Annex B

Section 29(1)(a) – Formulation or Development of Government Policy

An exemption under Section 29(1)(a) of FOISA (Formulation or Development of Government Policy) applies to some of the information requested because it relates to the formulation of the Scottish Government's policy on independence.

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, transparent and accountable government, and to inform public debate. However, there is a greater public interest in high quality policy and decision-making, and in the properly considered implementation and development of policies and decisions. This means that Ministers and officials need to be able to consider all available options and to debate those rigorously, to fully understand their possible implications. Their candour in doing so will be affected by their assessment of whether the discussions on policy development for an independent Scotland will be disclosed in the near future, when it may undermine or constrain the Government's view on that policy while it is still under discussion and development.

Section 30(b)(i) – free and frank provision of advice

An exemption under section 30(b)(i) of FOISA (free and frank provision of advice) applies to some of the information requested. This exemption applies because disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice.

This exemption recognises the need for officials to have a private space within which to provide free and frank advice to Ministers before the Scottish Government reaches a settled public view. Disclosing the content of free and frank advice on independence policy will substantially inhibit the provision of such advice in the future, particularly because these discussions are still ongoing and decisions have not been taken, and these discussions relate to a sensitive or controversial issue such as Scotland's constitutional future.

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, 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 full and frank advice to Ministers, as part of the process of exploring and refining the Government's position on independence, until the Government as a whole can adopt a policy that is sound and likely to be effective. This private thinking space is essential to enable all options to be properly considered, based on the best available advice, so that good policy decisions can be taken. Premature disclosure is

likely to undermine the full and frank discussion of issues between Ministers and officials, which in turn will undermine the quality of the policy making process, which would not be in the public interest.

Section 30(b)(ii) – Free and Frank Exchange of Views for the Purposes of Deliberation

An exemption under section 30(b)(ii) of FOISA (Free and Frank Exchange of Views) applies to some of the amount of the information requested. This exemption applies because disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. This exemption recognises the need for a private space to discuss and explore options with stakeholders. Disclosing the content of free and frank discussions will substantially inhibit such discussions in the future and may deter stakeholders from entering into discussions with the Scottish Government if they believe their comments will be published.

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, transparent and accountable government, and to inform public debate. However, there is a greater public interest in allowing a private space within which to engage with stakeholders and external experts. This private thinking space is essential to enable all options to be properly considered, so that good policy decisions can be taken. Premature disclosure is likely to undermine the full and frank discussion of issues, which in turn will undermine the quality of the policy making process, which would not be in the public interest.

Section 30(c) (Prejudice to the Effective Conduct of Public Affairs)

The reason why this exemption applies is because releasing draft plans for and content of Scottish Government publications, which do not reflect final decisions taken, would result in inaccurate information on the Scottish Government's proposals for an independent Scotland being published, thereby undermining the Scottish Government's ability to effectively and accurately engage and communicate with the public.

This in turn would be likely to impair the Government's ability to take forward its work on policy development for an independent Scotland. This would constitute substantial prejudice to the effective conduct of public affairs in terms of the exemption.

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, transparent and accountable government, and to inform public debate. However, there is a greater public interest in enabling the Scottish Government to effectively and accurately engage and communicate with the public on its proposals for an

independent Scotland without the risk of these proposals being prejudiced by inaccurate information, which doesn't reflect final decisions taken, being released while the Scottish Government's work was still under development on a matter of significant political relevance and controversy.

S.38(1)(b) (Personal Information)

We are unable to provide some of the information you have requested because an exemption under section 38(1)(b) (Personal Information) of FOISA applies to that information. This is because it is personal data of a third party, specifically the personal details of individuals below Senior Civil Service grade, 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.