

Annex A

Section 29(1)(b) – Ministerial communications

An exemption under section 29(1)(b) of FOISA (Ministerial communications) applies to some of the information requested because it relates to communications between Scottish Ministers. 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 Ministers a private space within which issues can be explored and refined, until the Government as a whole can reach a decision that is sound and likely to be effective. This private thinking space also allows for all options to be properly considered, so that good decisions can be taken. Premature disclosure is likely to undermine the full and frank discussion of issues between Ministers, which in turn will undermine the quality of the decision making process.

Section 38(1)(b) – applicant has asked for personal data of a third party

An exemption under section 38(1)(b) of FOISA (personal information) applies to a small amount 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 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 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, namely the independence referendum.

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 policy position on the details and timing of an independence referendum, until the Government as a whole can adopt a decision 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 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(c)- substantial prejudice to the effective conduct of public affairs

An exemption under section 30(c) of FOISA (prejudice to effective conduct of public affairs) applies to a small amount of the information requested. This exemption applies because revealing the source of the Scottish Government's legal advice on , would be likely to lead to conclusions being drawn from the fact that any particular lawyer has, or has not, provided advice, which in turn would be likely to impair the Government's ability to take forward its work on an independence referendum Bill and associated activity. 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 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 lawyer has or has not provided legal advice on a particular matter. Releasing information about the source of legal advice would also be a breach of the long-standing Law Officer Convention (reflected in the Scottish Ministerial Code) which prevents the Scottish Government from revealing whether Law Officers either have or have not provided legal advice on any matter. There is no public interest in breaching that Convention by divulging which lawyers provided advice on any issue.

Section 36(1) – confidentiality in legal proceedings

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