

## **ANNEX A**

### **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 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. 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.

#### **Section 38(1)(a) – applicant has asked for their own personal data**

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 the requester. When someone makes an information request for their own personal data, the data is exempt from disclosure under section 38(1)(a) of FOISA. This is an absolute exemption, which means it 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 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, i.e. names and contact details of staff at grades below SCS, 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 on 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(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 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 Ministers and officials to have a private space within which to discuss and explore options before the Scottish Government reaches a settled public view. Disclosing the content of free and frank discussions on the Scottish Government's deliberations on a referendum bill will substantially inhibit such discussions in the future, particularly because these discussions relate to a sensitive or controversial issue.

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 and officials a private space within which to explore and refine the Government's policy position on issues relating to a referendum Bill, 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, so that good policy decisions can be taken. Revealing the detail of these discussions 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 some of the information requested. It is essential for Ministers and officials to be able to communicate with each other, receive advice from specialists (including the FOI Unit) and agree an approach to the handling of FOI requests before making a decision which is then communicated to the requester.

Disclosing the content of these communications is likely to result in discussions about FOI handling being less detailed, which would diminish the quality of the advice provided to Ministers and officials. This is particularly the case where the Scottish Information Commissioner is carrying out an investigation into the handling of a request in accordance with section 47(1) of FOISA. It is for the Commissioner to decide whether authorities have dealt with requests in accordance with Part 1 of FOISA and he does so in light of the application for a decision made by the requester and any comments offered by the authority in accordance with section 49(3)(a) of FOISA. It would substantially inhibit authorities' ability to offer comments in support of their approach and to participate fully in the investigation if they were required to disclose the underlying advice on which that approach was based. Taken together, we consider that disclosing the content of communications about the approach to the handling of FOI requests while there is an ongoing investigation by the Commissioner would be substantially prejudicial to the effective conduct of investigations, and that 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. However, there is a greater public interest in ensuring that Ministers and officials are able to discuss and agree an approach to the handling of FOI requests before making a decision which is communicated to the requester, and in ensuring that authorities are able to participate fully in the Commissioner's investigation process.