

REASONS FOR NOT PROVIDING INFORMATION

Section 26(a) – disclosure prohibited by an enactment

An exemption under section 26(a) of FOISA (disclosure prohibited by an enactment) applies to a small amount of the information requested because of a Restriction Order made by the UK Covid-19 Inquiry pursuant to section 19(2)(b) of the Inquiries Act 2005, read with section 19(3) of the Act which prohibits the disclosure of this information. 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(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 the information requested. This exemption applies because revealing the source of the Scottish Government’s legal advice on the Scottish Government’s Covid-19 response, 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 such matters in future. 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) – legal advice

An exemption under section 36(1) of FOISA (confidentiality in legal proceedings) applies to a small amount 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)(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 of individuals, 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.