

ANNEX

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 the information requested because it relates to the formulation/development of the Scottish Government's policy on handling of the case of former neurosurgeon, Sam Eljamel.

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.

Section 29(1)(b) – Ministerial Communication

An exemption under section 29(1)(b) Ministerial communications of FOISA applies to some of the information you have requested. The information that applies to the exemption above relates to sensitive discussions between Ministers in relation to important matters regarding handling of the Sam Eljamel and NHS Tayside Public Inquiry.

The exemption in relation to Section 29(1)(b) is subject to the 'public interest test'. Therefore, taking account of all the circumstances of this case, we must consider 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 exemptions.

Section 30 (a) (Scottish Ministers' collective responsibility)

An exemption under Section 30(a) (Scottish Ministers' collective responsibility) applies to cabinet Papers. The weekly meeting of the Scottish Cabinet is the highest decision-making forum within the Scottish Government, and it follows that all information considered by Cabinet must be handled with great care. Properly functioning Cabinet processes are generally recognised to be of vital public interest.

Section 30(a) (Scottish Ministers' collective responsibility) recognises the need to protect the convention of collective responsibility and allow Ministers some private space for discussion. The ability to protect collective responsibility and allow Ministers some private space for discussion would be compromised if the full details of the paper was released.

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.

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 you have requested. This exemption applies because disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views.

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. However, there is also a public interest in ensuring that officials and Ministers are able to engage in free and frank discussions that inform high quality policy development. Release of the exempt information would be likely to inhibit such free and frank discussions and result in less informed decision-making regarding this and other related key policy initiatives. On balance, we consider that the public interest test falls in favour of maintaining the exemptions.

Section 30 (c) – prejudice to effective conduct of public affairs

An exemption under section 30(c) of FOISA applies to some of the information requested because it relates to the ongoing conduct of appointing and establishing both the public inquiry and independent clinical review process.

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. There is a public interest in ensuring that confidential discussions can take place and allow for appointment and further progress to be made with free and frank discussions. Release of the exempt information would be likely to inhibit such free and frank discussions and potentially result in the individuals not being appointed, ultimately delaying the commencement of both processes. On balance, we consider that the public interest test falls in favour of maintaining the exemptions.

Section 36 (2) – Actionable breach of confidence

An exemption under section 36(2) of FOISA (confidentiality) applied to some of the information requested because it was obtained from NHS Tayside and disclosure would be an actionable breach of confidence. This is because the information is confidential, was provided in circumstances which imposed an obligation on the Scottish Government to maintain that confidentiality, and unauthorised disclosure would be to the detriment of NHS Tayside who provided the 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 38(1)(b) – requestor has asked for personal data of a third party

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, i.e. names and contact details 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.