

REASONS FOR NOT PROVIDING INFORMATION

An exemption applies

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, ie contact details of Scottish Government staff members and names of Scottish Government staff members below Senior Civil Service level (with the exception of my own name, which I have released), 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.

An exemption applies, subject to the public interest test

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.

In the documents enclosed with this response we have withheld advice to Ministers which relates to issues which remain under consideration, and where the Government has not yet reached a clear public position. We have also withheld some briefing material provided to prepare Ministers for fielding questions in public fora, where that material may be deployed in similar settings in the future and material that might prejudice the Scottish Government's relationships with external stakeholders.

I consider that disclosing such information would substantially inhibit the provision of free and frank advice in the future, particularly because implementing the detail of the Scottish Government's recent commitments in response to its recent consultation on Access to Information Rights in Scotland will require further policy development and engagement with stakeholders. We continue to require a reasonable degree of private space in which to advise Ministers in relation to that 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. 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 access to information rights in Scotland, so that 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 36(1) – confidentiality in legal proceedings

An exemption under section 36(1) of FOISA (confidentiality in legal proceedings) applies to a small amount 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 30(c) - prejudice to 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 FOI policy issues, 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 FOI policy matters. 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.