

Annex

Exemptions applied

Question 1

Section 25(1)

Under section 25(1) of FOISA, we do not have to give you information which is already reasonably accessible to you.

Sections 30(b)(i) and (ii)

Exemptions under sections 30(b)(i) and (ii) of FOISA (free and frank provision of advice; free and frank exchange of views for the purposes of deliberation) apply to some of the information requested. These exemptions apply because disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice and exchange of views for the purposes of deliberation. The exemptions recognise the need for Ministers to have a private space within which to seek advice and views from officials before reaching the settled public position; to inhibit this could negatively impact the quality of decision-making. In this particular instance, disclosing the content of free and frank briefing material will substantially inhibit such advice being provided in the future, particularly because these discussions relate to a sensitive 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 exemptions. We have found that, on balance, the public interest lies in favour of upholding the exemptions. 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 free and frank advice and views to Ministers. It is clearly in the public interest that Ministers can properly answer Parliamentary questions, provide sound information to Parliament (to which they are accountable), and robustly defend the Government's policies and decisions. They need full and candid advice from officials to enable them to do so. Premature disclosure of this type of information could lead to a reduction in the comprehensiveness and frankness of such advice and views in the future, which would not be in the public interest.

Section 30(c)

An exemption under section 30(c) of FOISA (prejudice to effective conduct of public affairs) applies to some of the information requested. This exemption applies because revealing the source of the Scottish Government's advice would be likely to lead to conclusions being drawn from the fact that any particular official has, or has not, provided advice, which in turn would be likely to impair the Government's ability to take forward its work on matters concerning complaints against ministers. 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)

An exemption under section 36(1) of FOISA (confidentiality of communications - confidentiality in legal proceedings) applies to some of the information requested because litigation and legal advice privilege protects the confidentiality of communications between a client and their legal adviser. Litigation privilege applies to documents created in contemplation of litigation and to communications when litigation is either pending or being considered, to expert reports prepared on their behalf and to legal advice given in relation to potential legal action.

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, and to maintaining the right to confidentiality in legal proceedings, like any other public or private organisation.

There is a very strong public interest in maintaining confidentiality of communications between legal adviser and client, and in considering litigation. It is clearly in the public interest for lawyers to be able to provide free and frank legal advice to their clients, considering and discussing all issues and options, without fear that the advice might be disclosed and potentially taken out of context. It is also in the public interest that decisions are taken by the Government in a fully informed legal context. Ministers and officials therefore need high-quality, comprehensive legal advice for the effective conduct of their business. That advice needs to be given in context, and with a full appreciation of relevant facts. Without such legal advice, which can only be provided frankly and comprehensively in the knowledge that it will be kept in confidence, the quality of the Government's decision-making would be much reduced since it would not be fully informed.

Section 36(2)

An exemption under section 36(2) of FOISA (actionable breach of confidence) applies to some of the information requested because the information was obtained

by a Scottish public authority and disclosing it would constitute an actionable breach of confidence. Disclosure would constitute 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 the person 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)

An exemption under section 38(1)(b) of FOISA (the personal data of a third party) applies to some of the information you have requested.

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.

Question 2

Section 25(1)

Under section 25(1) of FOISA, we do not have to give you information which is already reasonably accessible to you.

Section 30(c)

An exemption under section 30(c) of FOISA (prejudice to effective conduct of public affairs) applies to some of the information requested. This exemption applies because revealing the source of the Scottish Government's legal advice would be likely to lead to conclusions being drawn from the fact that any particular official has, or has not, provided advice, which in turn would be likely to impair the Government's ability to take forward its work on matters concerning complaints against ministers. 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)

An exemption under section 36(1) of FOISA (confidentiality of communications - confidentiality in legal proceedings) applies to some of the information requested because litigation privilege applies to documents created in contemplation of litigation and to communications when litigation is either pending or being considered. Litigation privilege applies to documents created by the party contemplating legal action, to expert reports prepared on their behalf and to legal advice given in relation to potential legal action.

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, and to maintaining the right to confidentiality in legal proceedings, like any other public or private organisation.

There is a very strong public interest in maintaining confidentiality of communications between legal adviser and client, and in considering litigation. It is clearly in the public interest for lawyers to be able to provide free and frank legal advice to their clients, considering and discussing all issues and options, without fear that the advice might be disclosed and potentially taken out of context. It is also in the public interest that decisions are taken by the Government in a fully informed legal context. Ministers and officials therefore need high-quality, comprehensive legal advice for the effective conduct of their business. That advice needs to be given in context, and with a full appreciation of relevant facts. Without such legal advice, which can only be provided frankly and comprehensively in the knowledge that it will be kept in confidence, the quality of the Government's decision-making would be much reduced since it would not be fully informed.

Section 37(1)(b)(i) and 37(1)(b)(ii)

An exemption under sections 37(1)(b)(i) (lodged with a person conducting an inquiry or arbitration, for the purposes of that inquiry or arbitration) and 37(1)(b)(ii) (created by a person conducting an inquiry or arbitration, for the purposes of that inquiry or arbitration) of FOISA applies to that information that is contained in a document lodged with, or otherwise placed in the custody of, a person conducting an inquiry or arbitration, for the purposes of that inquiry or arbitration.

As correspondence between the Scottish Government, Ms Evans and the Scottish and UK Covid-19 Inquiries has been created by or lodged in the custody of the Scottish Government for the purpose of those public inquiries, it is subject to these absolute exemptions and therefore cannot be released at this time.

These exemptions are 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)

An exemption under section 38(1)(b) of FOISA (the personal data of a third party) applies to some of the information you have requested.

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.

Question 3

Section 25(1)

Under section 25(1) of FOISA, we do not have to give you information which is already reasonably accessible to you.

Question 4

Section 36(1)

An exemption under section 36(1) of FOISA (confidentiality of communications - confidentiality in legal proceedings) applies to some of the information requested because litigation privilege applies to documents created in contemplation of litigation and to communications when litigation is either pending or being considered. Litigation privilege applies to documents created by the party contemplating legal action, to expert reports prepared on their behalf and to legal advice given in relation to potential legal action.

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, and to maintaining the right to confidentiality in legal proceedings, like any other public or private organisation.

There is a very strong public interest in maintaining confidentiality of communications between legal adviser and client, and in considering litigation. It is clearly in the public interest for lawyers to be able to provide free and frank legal advice to their clients, considering and discussing all issues and options, without fear that the advice might be disclosed and potentially taken out of context. It is also in the public interest that decisions are taken by the Government in a fully informed legal context. Ministers and officials therefore need high-quality, comprehensive legal advice for

the effective conduct of their business. That advice needs to be given in context, and with a full appreciation of relevant facts. Without such legal advice, which can only be provided frankly and comprehensively in the knowledge that it will be kept in confidence, the quality of the Government's decision-making would be much reduced since it would not be fully informed.