FOI – 202400423596

Annex A

Exemption not subject to the public interest test

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 non-senior staff within the Scottish Government or other organisations' staff are in regular contact with, along with some infected or affected individuals, and disclosing it would contravene the data protection principles in data protection legislation. 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.

Exemptions subject to the public interest test

28(1) (Relations with the United Kingdom)

An exemption under section 28(1) of FOISA applies to some of the information you have requested. This exemption applies because disclosure would, or would be likely to, prejudice substantially relations between the Scottish Government, the UK Government and in some cases the other devolved administrations. Disclosure of this information would reveal candid internal discussion about other administrations' policies, including information shared in confidence with Scottish Government officials. It is essential for the effective administration of the UK as a whole that there should be regular, and often private, communications between the Scottish Government, the UK Government and the other devolved administrations. Disclosure of this information will mean that the UK Government are likely to be more reluctant to communicate with the Scottish Government in future on important matters like taking forward provision of infected blood compensation.

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 because as part of open, transparent and accountable government, and to inform public debate. However, this is outweighed by the public interest in maintaining close working relationships between the Scottish Government and the governments of the other three UK nations and in protecting the free exchange of information between the administrations to ensure that we keep each other fully and regularly informed about matters such as infected blood compensation. There is no public interest in disclosing information when that will damage relationships or mutual trust and disrupt future communications as that may impact on the effectiveness of future policy implementation work and ensuring the interests of those infected or affected in Scotland are fully considered as part of that.

29(1)(a) (formulation or development of Scottish Government policy)

An exemption under section 29(1)(a) of FOISA applies to some of the information you have requested because it is correspondence which relates to the development of policy on provision of compensation for infected blood victims or other matters relating to consideration of the Inquiry's recommendations and that policy development work remains ongoing.

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 officials and Ministers a private space to consider the information and evidence available on matters of such importance before reaching a settled public position.

Section 30(b)(i) and (ii) (Free and frank provision of advice and exchanges of views)

Exemptions under section 30(b)(i) and section 30(b)(ii)of FOISA apply to some of the information you have requested. These exemptions apply because disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchanges of views. The exemptions recognise 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 and also to be able to provide and receive free and frank opinions from colleagues and external stakeholders to inform their advice for Ministers. Disclosing the content of free and frank advice or exchanges of views on the Infected Blood Inquiry recommendations or infected blood compensation will substantially inhibit the provision of such advice in the future, particularly because these discussions are still ongoing and final decisions have not been taken.

These exemptions are 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 some public interest in release because as part of open, transparent and accountable government, and to inform public debate. However, this is outweighed by the public interest in allowing for private advice and debate both within the Scottish Government and with stakeholders as part of the process of exploring and refining the Government's policy position on infected blood compensation, 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, 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, officials and stakeholders, which in turn will undermine the quality of the policy making process, which would not be in the public interest.

30(c) (Otherwise prejudice effective conduct of public affairs)

An exemption under section 30(c) of FOISA applies to some of the information you have requested as disclosure would be likely to significantly impact on the effective conduct of public affairs by harming stakeholder trust in the views or opinions provided in confidence to the Scottish Government or disclosing drafts of advice for Ministers before they had been fully considered and finalised, taking account of input from officials and stakeholders.

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, transparent and accountable government, and to inform public debate. However, this is outweighed by the strong public interest in maintaining relationships with stakeholders who support the Scottish Government in the effective conduct of public affairs.

36(1) (Confidentiality of communications)

An exemption under section 36(1) of FOISA applies to some of the information you have requested because it is legal advice or emails seeking 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, transparent and accountable 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. The release of the content of such legal advice is likely to be appropriate only in highly compelling cases. This has been recognised by both the Scottish Information Commissioner and the courts - see, for example, the House of Lords case, Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48.