ANNEX B - EXEMPTIONS

Section 25 – Information otherwise accessible

Section 25 of the Freedom of Information (Scotland) Act 2002 (FOISA) exempts information from disclosure where the requester can reasonably obtain the information without asking for it under FOISA.

The response above outlines how you can obtain the publicly available 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(b)(i) – free and frank provision of advice

Exemption under section **30(b)(i)** of FOISA (free and frank 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 and exchange of views for the purposes of deliberation. The exemption recognise the need for Ministers to have a private space within which to seek advice from officials before reaching the settled public position which will be given in whatever final SPQ are used. Disclosing the content of free and frank briefing material on Cass report and gender identity healthcare will substantially inhibit such briefing in the future, particularly because these discussions relate to on-going policy development and are sensitive and controversial area of policy and healthcare.

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 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 in briefing for questions from members of Parliament, to which they are accountable. They require full, robust and candid advice form officials to robustly defend the SG policies and decisions, and disclosure of such information, especially for a sensitive area that attracts significant public and political interest and generates misinformation, could lead to reduction in the comprehensiveness and frankness of such advice in the future, which would not be in the public interest.

Section 30(b)(ii) – free and frank exchange of views for the purposes of deliberation

An exemption under section 30(b)(ii) of FOISA (free and frank exchange of views) applies to some of the information requested. This exemption applies because

disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. This exemption recognises the need for Ministers to have a private space within which to discuss issues and options with appropriate external stakeholders on work and policy progressed. Disclosing the content of these discussions with stakeholders on Cass report will substantially inhibit such discussions in the future, because these stakeholders will be reluctant to provide their views fully and frankly if they believe that those views are likely to be made public, particularly as this area of healthcare remains a subject of intense public debate and discussion, largely negative in tone and often misinterpreted.

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 Ministers and officials a private space within which to communicate with appropriate external stakeholders as part of the process of exploring and refining the Government's position on gender identity healthcare. This private space is essential to enable all options to be properly considered, so that good decisions can be taken based on fully informed advice and evidence, such as that provided by external stakeholders. A disclosure is likely to undermine the full and frank discussion of issues between the Scottish Government and these stakeholders, which in turn will undermine the quality of the making process, which would not be in the public interest. This area of healthcare also attracts significant public and media interest, with very polarised and often incorrect/misinformed information, further fuelling the often-toxic debate and contributing towards the distress and fear of people with lived experience, their families and staff working hard to care for them. As the views of different stakeholders may not reflect the position of NHS or Scottish Government, releasing the documents in question may lead to circulation of further misinformation and confusion of the public.

Section 38(1)(b) – Personal information

An exemption under section 38(1)(b) of FOISA (personal information) applies some of the information requested because it is personal data of a third party, ie names, job titles, photos 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.