

Annex

Section 38(1)(b)

An exemption under section 38(1)(b) of FOISA applies to some of the information you requested. Section 38(1)(b) applies because it is personal data of a third party, for example names of individuals or other personal data, 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.

Section 36(1)

An exemption under section 36(1) of FOISA applies to some of the information requested because information on this is only held in relation to the Court of Session case XA10.23. This exemption applies because this information is subject to legal professional privilege - specifically litigation privilege ("communications post litem motam") and legal advice privilege. Litigation privilege applies to information created in contemplation of litigation and to communications when litigation is either pending or being considered. The litigation in question is the appeal by the Scottish Ministers against the decision of the Office of the Scottish Information Commissioner dated 31 January 2023, which was subject to proceedings in the Court of Session. Litigation privilege continues to apply after any litigation has been concluded, therefore, disclosure of the information would breach legal professional privilege.

An exemption under section 36(1) of FOISA also applies to some of the information you have 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 and the right to confidentiality of communications created in contemplation of litigation. This includes communications when litigation is either pending or being considered and communications relating to litigation which has been concluded.