ANNEX A

Section 29(1)(a) – formulation or development of government policy

An exemption under section 29(1)(a) of FOISA (formulation or development of government policy) applies to the information requested because it relates to the development of the Scottish Government's policy on preparing an independence prospectus.

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 high quality policy and decision-making, and in the properly considered implementation and development of policies and decisions. This means that Ministers and officials need to be able to consider all available options and to debate those rigorously, to fully understand their possible implications. Their candour in doing so will be affected by their assessment of whether the work on preparing an independence prospectus will be disclosed in the near future, when it may undermine or constrain the Government's view on that policy while it is still under discussion and development.

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 to have a private space within which to provide free and frank advice to Ministers before the Scottish Government reaches a settled public view. Disclosing the content of free and frank advice will substantially inhibit the provision of such advice in the future.

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 Scottish Government staff can provide full and frank advice to Ministers 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 and officials, which in turn will undermine the quality of the policy making process, which would not be in the public interest

ANNEX B

Item 1 extract from briefing–

Stop and search

1. An independent advisory group, chaired by John Scott QC, is examining the use of stop and search powers in Scotland, in particular the continued use of consensual stop and search and whether the practice overall should be subject to a Code of Practice. The group will make its recommendations in August. It may be that those recommendations will include ending the practice of non-statutory (consensual) stop and search and the introduction of a new code of practice for Police Scotland. Also, where the Group believe there may be legislative gaps as a result of ending consensual stop and search they may recommend new powers of search for the police, for instance searching under 18s for alcohol or tobacco products in certain circumstances.

2. Alison McInnes has already lodged non-Scottish Government amendments which would end consensual stop and search and introduce a statutory code of practice.

3. Once the advisory group has reported, advice will be provided to you by police division colleagues. You have already signalled your intention to work with Alison McInnes and other members on any appropriate amendments.

Item 2 extract from briefing–

Stop and search

- An independent advisory group, chaired by John Scott QC, is examining the use of stop and search powers in Scotland, in particular the continued use of consensual stop and search and whether the practice overall should be subject to a code of practice. The group will make its recommendations in August. It is likely that the group will recommend the introduction of a new statutory code of practice and that the practice of non-statutory (consensual) stop and search should end. Also, where the Group believe there may be legislative gaps as a result of ending consensual stop and search they may recommend new powers of search for the police, for instance searching under 18s for alcohol on health, welfare and protection grounds, Alison McInnes has already lodged amendments which would end consensual stop and search and introduce a statutory code of practice.

- Once the advisory group has reported, I intend to give effect to its recommendations as far as possible by lodging appropriate amendments at Stage 2, subject to discussion and agreement by Cabinet.

Item 3 extract from letter–

Stop and Search

An independent Advisory Group, chaired by John Scott QC, is examining the use of stop and search powers in Scotland, in particular whether consensual stop and search should continue, whether the practice overall should be subject to a code of practice and whether any additional steps require to be taken, including any consequent legislation or change in practice that may be necessary. The group will make its recommendations by the end of August.

Alison McInnes has already lodged amendments which would end consensual stop and search and introduce a statutory code of practice.

Once I have considered the Advisory Group's report and recommendations, I intend to lodge any appropriate amendments at Stage 2. As the Advisory Group is not due to report until the end of August, it would be helpful if the Committee could take this into account when scheduling its consideration of Stop and Search.

Item 4 extract from tracking spreadsheet –

Amendments 1 and 2 would remove section D1 from the Bill. This contains the provisions that enable regulations to be laid to give police the power to search children for alcohol, should this be considered necessary after a consultation. Amendment 84 would oblige Ministers to lay a draft of the proposed regulations in parliament as part of a public consultation, and then only lay an SSI after considering all repsonses recieved over a period of a period of 60 sitting days. This will exclude periods when parliament is dissolved or in recess.
[redacted]

At Stage 2, Alison McInnes voted against the Government's amendments that added section D1 to the Bill. She was the only MSP that voted against. All other MSPs voted in favour. During the debate Elaine Murray asked whether the provision could be made subject to additional parliamentary scrutiny, which she referred to as "super affirmative" procedure. Mr Matheson said he was content to explore this and he subsequently handed Elaine Murray amendments which she has lodged.

[redacted]

Item 5 extract from briefing –

a potential issue has been raised about consensual search as a condition of entry to sports grounds and/or other events - it has been suggested that sometimes police officers are required to carry out this search - the Bill as it stands would make that unlawful

Item 6 extract from explanatory notes–

Chapter 1 – Search of person not in police custody

Lawfulness of search by constable

Section 65 – Limitation on what enables search

1. Section 65 provides that, where a person is not in police custody, it is unlawful for a search to be carried out by a police constable without express statutory authority, or without express authority conferred by a warrant. This provision will have the effect of ending the practice of 'consensual' stop and search.

Item 7 extract from explanatory notes –

Section 1 – Power of a constable

1. Section A1 provides that, where a person is not in police custody, it is unlawful for a search to be carried out without express statutory authority, or without express authority conferred by a warrant. This provision will have the effect of ending the practice of 'consensual' stop and search.

Item 8 extract from list of amendments–

I asked the Advisory Group to consider whether consensual stop and search should end – and whether any additional steps would require to be taken – including any consequent legislation or change in practice. I also asked the group to develop a draft Code of Practice to underpin the use of stop and search in Scotland.

Amendment 223 will end consensual stop and search of persons who are not in police custody. The effect of this will be that police officers will only be able to search such a person where they are explicitly permitted to do so by an enactment or a warrant. This is what has become known as statutory search.

Amendment 227 ensures that consensual stop and search will end **under amendment 223** at the point at which the original code of practice comes into effect. Subsection (1) in amendment 227 achieves this by stating that commencement of the provisions in amendment 223 is to be on the same day as the original code of practice takes effect under the provisions in amendment 233. This will implement Advisory Group recommendation 8.

Amendment 224 addresses potential, but limited, gaps in statutory powers that we have identified. There is a possible lack of clarity in current law. And there is a risk that the complete abolition of consensual stop and search under amendment 223 might mean that the police lack the power that they need to search persons in certain circumstances. In particular, persons who have not been arrested but who are nevertheless in the hands or safekeeping of the police under some other legal authority.

We have identified several circumstances where the police have statutory power to hold and/or transport a person from one place to another to safeguard that person's safety and wellbeing. In order to look after that person, and also protect the police officers looking after that person, the police need to

be able to search that person before holding and/or transporting that person.

Amendment 226 – Concerns raised by Scotland's Commissioner for Children and Young People

I agree with Tam Baillie, and with the Advisory Group report, in that this is a complex issue that needs to be carefully considered. I have not formed a concluded view on whether such a power is desirable or necessary. I will make a decision after the consultation. As part of that consultation I will listen carefully to the views of Scotland's Commissioner for Children and Young People, and other organisations that represent the interests of Children.

However, Amendment 226 provides a prudent approach, given the removal of the power of consensual stop and search. Parliament will be able to act relatively quickly, should it be considered necessary, but with appropriate safeguards.

Amendment 227 provides commencement provisions. The provisions in Amendments 223 (ending of consensual search) and 224 (searches when removing a person) will commence on the date that the code of practice first comes into effect. If no regulations are laid under the provisions in Amendment 225 (power to search children under the age of 18 for alcohol) within 2 years of the date that the code of practice first comes into effect, the provisions in Amendment 226 will lapse.

8. That the policing tactic known as "consensual" or non-statutory stop and search of the person in Scotland should end when the Code of Practice comes into effect. All searches by police officers in Scotland of persons not in custody should be thereafter be undertaken on the basis of statutory powers exercised in accordance with the Code of Practice referred to in Recommendation 1.

ADVISORY GROUP REMIT

The remit of the advisory group is to advise Ministers on the long-term policy which should be in place for stop and search, in particular to:

- consider and report to Scottish Ministers on whether a presumption against consensual stop and search goes far enough or, alternatively, if there should be an absolute cessation of the practice. The group should advise on the steps that require to be taken in the light of the conclusion it reaches, including any consequent legislation or change in practice that might be necessary.

Item 9 extract from briefing –

Reason for taking this power

2. This new power is required in consequence of the abolition of "consensual stop and search" under section A1 of the Bill. It originates with a recommendation by the independent advisory group on stop and search, which was chaired by John Scott QC. The group identified a potential gap in the law, which means that while the police have powers to confiscate alcohol from children, they do not have a statutory power to search them for alcohol and have instead been relying on consensual searches as a means of doing so. The Advisory Group were not able to form a concluded view on whether such a power was necessary or desirable. The Group therefore recommended that the Scottish Government should hold an early consultation on whether to legislate to create a specific power for police officers to search children under the age of 18 for alcohol.

3. It was considered appropriate to include an enabling power in the Bill to ensure that the power to search children for alcohol can be introduced by regulations, should it be considered necessary and appropriate after a public consultation. The regulations will be subject to statutory consultation requirements and affirmative procedure. The sunset clause will ensure that the enabling power will only be used if the consultation demonstrates that it is necessary to do so following the abolition of consensual search.