From: [Redacted]@parliament.scot> **On Behalf Of** Ewing F (Fergus), MSP
Sent: 05 November 2024 12:09
To: Permanent Secretary <PermanentSecretary@gov.scot>
Subject: Joint Statement from the Independent Scottish Parliamentary Office Holders

Dear Permanent Secretary,

Re: Response given to the FOI Commissioner; Provision of false information.

FOI+202400394394+-+Information+Released+-+Annex.pdf

In the documents eventually released to the FOI Commissioner comprising legal advice received by the Scottish Government in taking the challenge of the previous decision by him to the Inner House, it was revealed that false information have been supplied to the Commissioner.

In his press release criticising the Scottish Government the Commissioner states that he has serious concerns which he is raising with you. I attach that press release.

As head of the civil service in Scotland, I am keen to obtain responses from you to some pretty serious questions.

I refer in particular to the contents of paragraphs numbered 12 of the second Opinion provided by James Mure QC to the Scottish Government in which it states that his submissions:

"…stated that information held on Scottish Government systems was only "accessible" to the secretariat"… is not strictly accurate..."

I am sure that you will agree that this provision of false information to the FOIC is a most serious failing and failure on the part of the Civil service and that the following questions I put are ones which merit serious answers. This opinion was issued in March 2023. This means that this information - this false information was provided by Scottish Government to the FOIC - was known to you and colleagues for over a year and a half before it was eventually made public and then only because the Scottish Government were forced to do so.

First, should you not have instructed that this information should have been made public, in other words ensured that the Commissioner was told that this false assertion had been made?

Second, will you be issuing an apology for this serious error. Surely that is the very least that should be expected here ?

Third, do you agree that in his work, the Commissioner is heavily reliant on the veracity, accuracy and reliability of the information which he gets mostly from the Scottish

Government. Therefore, do you accept that this is a very serious failing, in that it obstructs the Commissioner in the performance of his work, and ultimately thwarts the purpose of the FOI legislation enacted by Parliament?

Fourth, can you explain why you did not make public this serious failure in the information - misinformation given to the Commissioner?

Fifth, why was this revelation only made as a result of the eventual release of the legal advice?

Sixth, what action are you taking to avoid any repetition?

Finally, are you satisfied that the whole approach by the Scottish Government in relation to the provision of information on the James Hamilton Report and on matters relating to the pursuit of Alex Salmond is not now tainted by continued apparent bias - the verdict of Lord Pentland in the decision in favour of Mr Salmond?

Will you review this matter and issue a statement as Permanent Secretary as to whether you consider that the approach is correct, or if it should be altered, and whether information withheld from the public and FOIs should now be made public?

Yours sincerely,

Fergus Ewing MSP.

Permanent Secretary
John-Paul Marks

E: perm.sec@gov.scot

Scottish Government
Riaghaltas na h-Alba
gov.scot

Fergus Ewing MSP
Scottish Parliament
Edinburgh
EH99 1SP

Email: Fergus.Ewing.msp@parliament.scot

22 November 2024

Dear Mr Ewing,

Thank you for your email of 5 November regarding documentation provided by the Scottish Government to the Scottish Information Commissioner to inform his consideration of the FOI appeal case 004/2023.

As you are aware, in compliance with the Commissioner's Decision, on 26 October 2024 the Scottish Government released legal advice provided to Ministers in relation to a Court of Session appeal.

The Commissioner has noted publicly his intent to write to me about this case. I look forward to receiving his letter and then hopefully meeting to discuss the considerations for the future.

I have met the Commissioner a number of times since he took up role and value his and his team's professionalism and support on our comprehensive FOI improvement plan.

I am pleased to say that the Scottish Government is now delivering against its FOI targets, responding to an increasing volume of FOI requests on time in the vast majority of cases. We will continue to work with the Commissioner and his team on this, including improving quality and proactive publication wherever we can.

As the First Minister set out in his statement to Parliament, the FOI appeal you raise was considered carefully with Ministers deciding not to appeal and to release the legal advice. You will be aware that the release of legal advice is, for good reasons relating to the rule of law and reflected in the Ministerial Code, an unusual step for any Government to take.

You also asked specifically about information that was provided to the Commissioner in June 2022 in relation to the Hamilton investigation secretariat arrangements. This information was provided at the appeal stage, based on the understanding at that time. As the documents published on 26 October 2024 show, the position was clarified during discussions with Counsel and in preparation for the Court of Session case. The Scottish Government was then rightly open with the Court about this matter, as reflected in the Court's written judgment (paragraph 28) in December 2023.

I am satisfied with the approach taken to publish the relevant materials in this case, informed by expert advice and properly assured. I am also satisfied by the chronology and processes as set out above. I will happily discuss the case further with the Commissioner as we sustain our activities to improve FOI further in partnership.

I hope that this letter is helpful.

Best wishes,

JP Marks
Permanent Secretary to the Scottish Government

From: [Redacted]@parliament.scot> **On Behalf Of** Ewing F (Fergus), MSP
Sent: Wednesday, September 11, 2024 12:40 PM
To: First Minister <firstminister@gov.scot>
Subject: Legal costs incurred by Scottish Government

John Swinney MSP
First Minister

Dear John,

Legal costs incurred by Scottish Government.

Fergus Ewing urges ministers not to appeal watchdog ruling | The Herald (heraldscotland.com)

I attach an article which appeared in the Herald today. This focuses on the costs - the legal costs of the various legal actions and challenges outlined in the piece.

I am writing to ask if you can please furnish me with full details of the costs incurred by the Scottish Government to date in respect of legal costs.

These are those in respect of the various actions and challenges.

In referring to costs I mean the costs paid out to third party solicitors and the Advocates, but also the costs of SGLD - an estimate of the costs of SGLD staff.

These include:

1. The costs of the SG in defending the action of Judicial Review.
2. The legal costs of the challenge taken to the Court of Session to the decision of the FOI Commissioner in respect of release of the Hamilton Report - the full one.
3. The further costs of opposing the release of the legal advice regarding 2 which led to the further defeat at the hands of the FOI Commissioner on Monday the 9th September, 2024.
4. Further costs, which may be estimated costs, of making a further court challenge to the said decision of the FOI Commission on 9th September, in the event that the

Scottish Government appeal to the Inner House of the Court of Session.
What is the estimate of these expenses if incurred? Has any estimate been made? If not, will these now be estimated.
Finally, can consideration be given as to whether to incur such further costs would be a waste of money and a breach of the Ministerial Code in respect of the rules in the Finance Manual and in the requirement of Financial propriety.
Thank you.
Yours sincerely,
Fergus Ewing MSP
Inverness and Nairn
****

****

Rt Hon John Swinney MSP
An Fhìor Urr John Swinney BPA
First Minister of Scotland
Am Prìomh Mhinistear

St Andrew's House, Regent Road, Edinburgh EH1 3DG
Taigh Naomh Anndrais, Rathad Regent, Dùn Èideann EH1 3DG

Scottish Government
Riaghaltas na h-Alba

Fergus Ewing MSP
By Email: Fergus.Ewing.msp@parliament.scot

8 October 2024

Dear Fergus,

Thank you for your letter of Wednesday 11 September regarding expenditure on legal advice.

You asked about the net cost of external legal fees in relation to defending the Judicial review. This figure, which is already in the public domain, was £118,523.

The net cost of external legal fees relating to the appeal against decision 004/2023 of the Scottish Information Commissioner were £73,024.00. It is however important that I clarify that this appeal did not concern disclosure of the Hamilton Report. As noted in the appeal judgement, the appeal against the decision of the Scottish Information Commissioner raised a sharp and important question of statutory interpretation: what does it mean for a public authority to "hold" information for the purposes of the Freedom of Information (Scotland) Act 2002 (FOISA). As you are aware, the judgment found that while the information in question was held by the Scottish Government, it did not give a determination to order disclosure of any information.

The Scottish Government is currently reviewing the Scottish Information Commissioner's decision reference 193/2024 which issued on 9 September 2024. I can offer my assurance that careful consideration is being given to the terms of that decision. As I am sure you will understand, it would not be appropriate for me to comment further on a live case.

I believe that it is an important principle for Ministers to retain the right to test issues in court. However, I am also clear that in choosing to exercise that right, Ministers are clear on the utmost importance of the efficient use of public money.

I respect your interest in these issues and your commitment to ensuring that public money is spent appropriately. You will know from your legal background that there is a clear legislative

framework around disclosure of certain legal information and what I am able to share. That framework includes remedies for you in the event that you are dissatisfied with the response given. Where a case can be made to withhold information under the Freedom of Information (Scotland) Act that has been done, and the associated statutory notifications are attached at annex 1 for completeness.

I trust that this answers your questions in this regard.

JOHN SWINNEY

Annex 1

Net cost of external legal fees in relation to defending the Judicial review

These costs have been previously released in case FOI/19/01942. This can be found on the gov.scot website at: https://www.gov.scot/publications/foi-19-01942/

Estimate of the costs of SGLD staff.

In relation to the work done by Scottish Government Legal Directorate, as the staff involved in these cases are civil servants employed by the Scottish Ministers, dealing with these cases was part of the normal range of duties undertaken. Civil servants receive a salary rather than being separately remunerated for dealing with particular matters. In addition, they do not record the proportion of their time that they spend working on particular matters as a matter of course. It is therefore not possible to say how much was paid to lawyers employed by the Scottish Government for dealing with these matters. The Scottish Government does not have any business need to hold that information and therefore this is a formal notice under section 17(1) of FOISA that these costs are not held.

The further costs of opposing the release of the legal advice regarding 2 which led to the further defeat at the hands of the FOI Commissioner on Monday the 9th September, 2024.

An exemption under section 30(c) of FOISA (prejudice to effective conduct of public affairs) applies to the information requested. This exemption applies because revealing the source of the Scottish Government's legal advice on our approach to the handling of FOI requests would be likely to lead to conclusions being drawn from the fact that any particular lawyer has, or has not, provided advice, which in turn would be likely to impair the Government's ability to take forward its work on responding to information request in compliance with FOISA. Releasing information about the cost of legal advice, which would in turn disclose the source of that advice, particularly whilst the matter to which that advice relates remains live 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 cost of legal advice would in turn disclose the source of legal advice which would also be a breach of the long-standing Law Officer Convention (reflected in the Scottish Ministerial Code). The Law Officers Convention 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.

Further costs, which may be estimated costs, of making a further court challenge to the said decision of the FOI Commission on 9th September, in the event that the Scottish Government appeal to the Inner House of the Court of Session.
What is the estimate of these expenses if incurred? Has any estimate been made? If not, will these now be estimated.

The Scottish Government has received decision 193/2024 and is considering its terms. As noted in the decision the right to appeal to the Court of Session extends 42 days after the date of the decision. As such, this is a formal notice under section 17(1) of FOISA confirming that we do not hold costs, or estimated costs related to our response to decision 193/2024 as we are still considering the terms of that decision.

Your right to request a review

If you are unhappy with this response in terms of the application of FOI to your request, you may ask us to carry out an internal review of the response, by writing to Andrew Bruce, Director of Communications & Ministerial Support at foi@gov.scot.

Your review request should explain why you are dissatisfied with this response and should be made within 40 working days from the date when you received this letter.
We will complete the review in accordance with FOISA as soon as possible, and not later than 20 working days from the day following the date we receive your review request.

If you are not satisfied with the result of the review, you then have the right to appeal to the Scottish Information Commissioner. More detailed information on your appeal rights is available on the Commissioner's website at:
What can I do if I'm unhappy? | Scottish Information Commissioner (itspublicknowledge.info)

Email 1 - Out of Scope

From:[Redacted]@parliament.scot> **On Behalf Of** Ewing F (Fergus), MSP
Sent: 20 November 2024 14:32
To: Freedom of Information <FOI@gov.scot>
Subject: FOI Review - FAO Mr Andrew Bruce
Importance: High

FAO Andrew Bruce
Director of Communications and Ministerial Support

Dear Mr Bruce,

Re: FOI request Wednesday 11th September and response dated 8th October, 2024.

I am writing to request a review of the attached response that I have received.

Ground 1.

I sought in relation to each of the four specific "asks" that the costs information I sought was not only costs paid to third party solicitors and advocates (external costs) but also the costs of SGLD - the internal costs.

In the response from the FM, in Annex 1, he stated:

"In relation to the work done by Scottish Government Legal Directorate, as the staff involved in these cases are civil servants employed by the Scottish Ministers, dealing with these cases, was part of the normal range of duties undertaken. Civil servants receive a salary rather than being separately remunerated for dealing with particular matters. In addition they do not record the proportion of their time that they spend working on particular matters as a matter of course. It is therefore not possible to say how much was paid to lawyers employed by the Scottish Government for dealing with these matters. The Scottish Government do not have any business need to hold that information and therefore this is a formal notice under FOISA that these costs are not held."

I would suggest that there the Scottish Government is involved in litigation, as was the case in my requests, there is a business need to retain proper detailed records of work done in the case, and time spent thereon, for the simple reason that this is a necessary foundation for the Scottish Government to be in a position to recover its expenses (in the event of success) from the unsuccessful party in the litigation.

Since one never can predict whether such outcome will or will not be successful, it is accordingly necessary for records of work done and time taken to do it, to be retained, in order for there to be the evidential basis for the preparation of an account of judicial expenses.

If these records are not kept, and there is no detail, then it may prove either impossible to recover costs, or be unable to recover all costs due under the award of expenses.

I see that there is a careful caveat which tempers the statement that such records are not kept. That caveat is that such records as "not kept AS A MATTER OF COURSE"

That does imply that some records ARE kept, and does not clarify whether that was the case in the instances I have set out.

I would further argue that if such records are not kept then that would amount to negligence because it may prevent the recovery of monies due to the Scottish Government. All solicitors in Scotland have for decades now kept records of the work they do.

Therefore my first ground is (a) that records should have been kept; (b) it is unclear, perhaps because of intended ambiguity, whether records WERE kept in these cases and therefore the Scottish Government must disclose whether records were kept, and if so disclose them (c) in any event the time of SGLD staff does involve cost to the public

as is stated, namely their salary and other costs of employing them, and therefore it cannot be said that there is no cost to the taxpayer of the legal work done in each case.

Ground 2.

The second argument set out in the response to me (in Annex 1) is headed:

"The further costs of opposing the release of the legal advice regarding 2 which led to the further defeat at the hands of the FOI Commissioner on Monday the 9th September, 2024."

This sets out the basis of an exemption. The reason given is that the exemption applies because:

"revealing the source of the Scottish Government's legal advice on our approach to the handling of FOI requests would be likely to lead to conclusions being drawn from the fact that any particular lawyer has, or has not, provided advice, which in turn would be likely to impair the Government's ability to take forward its work on responding to information request in compliance with FOISA."

I contend that this argument is wholly irrelevant and inapplicable.

It is irrelevant because my request (in para numbered 2) asked NOT for the identity of the firm of lawyers (or names of lawyers) employed by the Scottish Government but asked for the disclosure of the Legal costs.

So I never sought the information - who were the external solicitors employed. I only asked how much they were paid or due to be paid for the work described.

I cannot see that by disclosing the costs that would in any way allow anyone examining this information to work out which firm of solicitors were employed.

That was not what was asked for. So, to refuse to provide information because to do so would disclose something that was not asked for is plainly irrelevant.

Secondly, even were it possible, why would it be harmful or damaging for that information to be disclosed?

Thirdly, even if this exemption were applicable, I would respectfully suggest that the public interest in obtaining this information is very high and must surely outweigh any damage (even though I cannot see there could be any) caused thereby.

As an indication of public interest, these matters have received considerable publicity including front page stories in the Herald Newspaper by Kathleen Nutt their journalist.

In addition, I would point to the fact that these matters, collectively, have resulted in the issue by the FOI Commissioner himself of a press release criticising the Scottish Government for in effect opposing his ruling, and using up his scarce resource in time and money and staff.

I can produce these newspaper articles and Press release if required.

They do prove that the public interest in these matters is very high.

Ground 3.

The third heading in Annex 1 of the FOI response to me states that the information sought (in para number 4) on the basis that the Scottish Government "do not hold costs or estimated costs related to our response to decision 193/2024 as we are still considering the terms of that decision."

Since replying to me on 8th October the Scottish Government has responded to that decision and therefore is inapplicable.

I would therefore suggest that the reason given at the time for not complying with the request is no longer applicable and that the information requested should be provided.

Again, I would cite the same arguments as to the high level of public interest in support of this ground as I did for ground 2 incorporating these arguments here *mutatis mutandis*.

Please acknowledge receipt of this review request.

Thank you.

Yours sincerely,

Fergus Ewing MSP
Inverness and Nairn

Director, Communications and Ministerial Support
Andrew Bruce

Scottish Government
Riaghaltas na h-Alba
gov.scot

T: [Redacted]
E: Andrew.Bruce@gov.scot

Fergus Ewing MSP
Scottish Parliament
Edinburgh
EH99 1SP

Email: Fergus.Ewing.msp@parliament.scot

Your ref: FOI Review - FAO Mr Andrew Bruce
Our ref: 202400441996

19 December 2024

Dear Mr Ewing,

Thank you for your email dated 20 November, in which you set out three grounds for a review of the information provided in a letter from the First Minister dated 8 October. That letter was issued in response to your earlier request for information dated 11 September regarding the Scottish Government's legal costs (our ref: 202400431690).

A member of the senior management team within the FOI Unit, which sits within my Directorate, has carried out a review of the response dated 8 October and I provide the Scottish Government's position in relation to each of your three grounds below.

Ground 1

You set out your concern that the First Minister's response to you provided information only in relation the costs paid to third party solicitors and advocates (external costs) but not to the costs of work carried out by staff within the Scottish Government Legal Directorate (SGLD).

In his letter of 8 October the First Minister set out the position in relation to this matter in the following terms:

"In relation to the work done by Scottish Government Legal Directorate, as the staff involved in these cases are civil servants employed by the Scottish Ministers, dealing with these cases, was part of the normal range of duties undertaken. Civil servants receive a salary rather than being separately remunerated for dealing with particular matters. In addition they do not record the proportion of their time that they spend working on particular matters as a matter of course. It is therefore not possible to say how much was paid to lawyers employed by the Scottish Government for dealing with these matters. The Scottish Government do not have any business need to hold that information and therefore this is a formal notice under FOISA that these costs are not held."

In response to this you have suggested that wherever the Scottish Government is involved in litigation there should be a requirement for detailed records of work carried out, including time spent, in order to serve as a basis for the recovery of the Scottish Government's expenses in the event that such expenses are recoverable following success in litigation. You have also expressed concern about the phrasing used in the letter that time spend working on particular matters is not recorded 'as a matter of course' and have suggested this may carry an implication that some such records may in fact have been made in this particular case.

In relation to the second of these points, the review officer has sought further advice from the relevant team within SGLD on this point, and I can confirm no such records are held.

Turning to the point about whether such records ought to be held, it may be helpful if I explain a little further about the Scottish Government's approach to recovering costs following any successful litigation.

SGLD does not charge internal clients within the Scottish Government for work carried out. In the event that the Scottish Government is in a position to recover judicial expenses of a litigation from an unsuccessful opponent, those costs are calculated by an appointed Law Accountant on the basis of the work done in the file. The Law Accountant looking at the full file, including correspondence and steps taken in any court process will assess what can be recovered in terms of a scale of charges set out in SSIs produced by the courts. The calculation of recoverable judicial expenses is not dependent on staff time records.

In relation to the matters addressed in your original information request, no such assessment of costs has in fact been undertaken. The Scottish Information Commissioner's guidance on section 17 of FOISA (information not held) makes clear that a Scottish public authority is not required to create new information for the purposes of responding to an information request. It also sets out that an authority should not be considered to hold particular information if it would require complex skill and judgement in order to generate that information (see para 46). The review officer is therefore satisfied that the First Minister's letter of 8 October was accurate in explaining that such information is not held by the Scottish Government.

Ground 2

You set out your concerns regarding the basis on which information regarding legal costs in relation to the matters considered in Scottish Information Commissioner's Decision 193/2024, was withheld from you. The response to your request indicated that this information was withheld under section 30(c) (substantial prejudice to the effective conduct of public affairs), on the basis that release of such information would reveal information about the source of the Scottish Government's legal advice.

You have indicated your dissatisfaction with this position on the basis that revealing the cost of such legal advice would not in fact have the effect of revealing which solicitor or firm provided the advice and that - even if it were to have such an effect - it is not clear that any harm would be caused by the disclosure. Furthermore, you have argued that the public interest in release of the information is particularly strong, and likely to override any harm that might be caused.

The review officer has considered these points. On 8 October the Scottish Government was still considering its response to Decision 193/2024. The Scottish Government took the view

that to reveal information regarding costs of legal advice at that time would have had the effect of confirming whether external legal advice had been sought. This information may have been of interest to the other party in any prospective litigation, contrary to both the Scottish Government's interests as a public authority and to the wider public interest in terms of the effective functioning of the judicial process. The provisions of section 30(c) were rightly applied at that time in order to avoid that outcome.

The review officer considers that, on reflection, section 30(c) should have been applied in conjunction with the provisions of section 18 of FOISA in order to neither confirm nor deny whether relevant information was held.

Now that the Scottish Government has complied with Decision 193/2024, and no litigation has in fact taken place, the review officer considers that neither section 30(c) or section 18 are any longer applicable to the relevant information. I am therefore happy to confirm that external legal advice was received on these matters. At the date of your request on 11 September, the Scottish Government had been invoiced £3000 for such advice. However, in the interests of openness I should explain that this does not represent the final costs of advice subsequently received in relation to these matters. At the time of writing, final costs remain to be confirmed.

Ground 3

Part 4 of your original request dated 11 September sought, 'Further costs, which may be estimated costs, of making a further court challenge to [Decision 193/2024], in the event that the Scottish Government appeal to the Inner House of the Court of Session'.

The Annex to the First Minister's letter of 8 October set out that the Scottish Government was still considering the terms of Decision 193/2024 at that time, and therefore provided a formal notice in terms of section 17 of FOISA that such information was not held.

You have expressed the view that the reasons for providing you with that notice no longer apply, since the situation has moved on and the Scottish Government has now complied with Decision 193/2024. The situation has indeed moved on. However, the Scottish Government still holds no information relevant to this part of your request.

Since no litigation was in fact taken forward the Scottish Government holds no information regarding its costs, as there were none. I can also confirm that the Scottish Government did not undertake any estimate or assessment of prospective costs of any such litigation.

Your right of appeal

If you are unhappy with the outcome of this review you have the right to appeal to the Scottish Information Commissioner about our decision within 6 months of receiving this letter. Information on how to make an appeal, along with an application form, is available on the Commissioner's website at:

What can I do if I'm unhappy? | Scottish Information Commissioner

You can also contact the Commissioner by email at: enquiries@foi.scot, telephone: 01334 464610 or by post:

Scottish Information Commissioner
Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS

Yours sincerely,

Andrew Bruce
Director of Communications & Ministerial Support