

REASONS FOR NOT PROVIDING INFORMATION

An exemption applies

Section 38(1)(a) – own personal data

An exemption under section 38(1)(a) of FOISA (personal information) applies to a small amount of the information requested because it is personal information (your name) of which you are the data subject, and so it is subject to the General Data Protection Regulation and 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 38(1)(b) –personal data of a third party

An exemption under section 38(1)(b) of FOISA (personal information) applies to a small amount of the information requested because it is personal data of a third party, i.e. names/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.

An exemption applies, subject to the public interest test

Section 30(c) – substantial prejudice to the effective conduct of public affairs

An exemption under section 30(c) of FOISA (prejudice to effective conduct of public affairs) applies to a small amount of the information requested. This exemption applies because revealing the source of the Scottish Government’s legal advice on 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 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 consider the terms of a decision and right of appeal set out in section 56(b)(ii) of FOISA. This 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 source of legal advice would also be a

breach of the long-standing Law Officer Convention (reflected in [the Scottish Ministerial Code](#)) which 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.

Section 36(1) – Confidentiality

While our aim is to provide information whenever possible, in this instance we are unable to provide the information you have requested because an exemption under section 36(1) (confidentiality) applies to some of the information. This is 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.

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 created in contemplation of litigation, communications when litigation is either pending or being considered and communications relating to litigation which has been concluded.