



Benjamin Harrop
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Our Reference: 202400428309

18 November 2024

Dear Benjamin Harrop,

I have now completed my review of our response to your request under the Freedom of Information (Scotland) Act 2002 (FOISA).

Your request

- 1) Why did the Scottish Government decide to issue a revised response?
- 2) Who within the Scottish Government decided/authorised to issue a revised response?
- 3) All communications between Scottish Government officials (civil servants, ministers, SPADs, all such employees) regarding the below case, particularly the lead-up/decision to issue a revised response (but not excluding all such communications outwith this decision).

Your request for review

I am dissatisfied with the response below that my request was vexatious, as well as the Government's response to points 1 and 2. Whilst, I am now aware of who authorised the revised response, the Government has not answered my initial points. That being, the Government at the start of the case refused to release the names of the individuals involved, but then did. Why did it change its mind from using exemptions to not disclose those names to then deciding to not utilise those exemptions (potentially highlights they were not correctly employed in the first place) and disclosing those names? This point has not been answered.

The response says "to ensure accuracy of the information released". Why was the request when initially answered not responded to accurately?

In response to my third request, in my opinion is clearly not vexatious. I have made requests in the past regarding the communications within the Scottish Government, and have not been told that they were vexatious. Especially considering the fact that the Government has changed its tune in regards to how to

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respond my request, it is in the public interest to see how this came to be, the discussions within the Government regarding this, as well as the background of the case itself to understand the decision which led to this.

Response

Question 1

In response to the first part of your review request I have reviewed the response that we provided in FOI 202400428309 and have concluded that the original response should be upheld, with a modification to provide some additional explanation.

In considering our submissions to the Scottish Information Commissioner following your appeal of our response to your request for details of who within the Scottish Government directed/oversaw the redactions made to Mr Hamilton's final published report we identified that we had incorrectly interpreted the scope of your request and had responded, in good faith, on the basis of who completed the task of redacting the report rather than who had directed/oversaw the redactions.

On reflection, we determined that the names of those involved in making the redactions to the report would not fall within the scope of your request as those individuals did not direct or oversee the redactions. As noted in our revised response to you, of 19 August 2024, redactions to the report were carried out with oversight from Gavin Henderson (Deputy Director – Organisational Continuity Team), Neil Rennick (Director – Organisational Continuity Team) and reporting to Lesley Fraser (Director General Corporate) as Senior Information Risk Owner (SIRO).

As these individuals are senior civil servants, we revised our position to withdraw our reliance on section 38(1)(b) and disclose the information you requested. I can only apologise that this information was not correctly identified when initially handling your request and for the delay the misinterpretation caused in providing you with this information.

I have concluded that the response provided in part three to this request was correct in its explanation that this change of position was to ensure the accuracy of the information released. However, we could have been clearer and provided a more detailed explanation, as I have above, of the reasons why our answer changed. I apologise that this fuller explanation was not provided in that response.

Question 2

In response to the second part of your review request, I have reviewed the response that we provided in FOI 202400428309 and have concluded that the original response should be upheld, without modifications. I am satisfied that the response provided the information you requested in this part by confirming who within the Scottish Government authorised the revised response.

Question 3

In response to the final part of your review request, I have carefully reviewed the response that we provided in FOI 202400428309 and have concluded that the original response that this request was vexatious is incorrect and should be substituted.

I have attached some of the information that you have requested.

While our aim is to provide information whenever possible, in this instance we are unable to provide some of the information you have requested because the following exemptions apply:

Section 25(1) (information otherwise accessible)

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Section 30(b)(ii) (free and frank exchange of views for the purposes of deliberation)
Section 30(c) substantial prejudice to effective conduct of public affairs
Section 36(1) (confidentiality of communications)
Section 38(1)(a) (personal data of the requester)
Section 38(1)(b) (personal information)

More detail on these exemptions is provided in the annex.

I would like to apologise for the delay in completing this review, which was due to the number of related requests and the volume of information to be reviewed in relation to part three of your request.

If you are unhappy with the outcome of this review, you have the right to appeal to the Scottish Information Commissioner about the decision within six 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:

<https://www.itspublicknowledge.info/YourRights/Unhappywiththeresponse/AppealingtoCommissioner.aspx>.

You can also contact the Commissioner:
The Scottish Information Commissioner
Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS
Email: enquiries@itspublicknowledge.info
Telephone: 01334 464610

Should you then wish to appeal against the Commissioner's decision, there is a right of appeal to the Court of Session on a point of law only.

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Annex A - REASONS FOR NOT PROVIDING INFORMATION

Exemptions applied, all in relation to question 3 of the review request

Section 25(1)

Some of the information you have requested is available from: Ministerial code investigation: FOI release - gov.scot (www.gov.scot)

The exemption in Section 25(1) FOISA applies to some of the information that you have requested. Under section 25(1) of FOISA, we do not have to give you information which is already reasonably accessible to you. If, however, you do not have internet access to obtain this information from the website(s) listed, then please contact me again and I will send you a paper copy.

Section 30(b)(ii)

An exemption in Section 30(b)(ii) FOISA applies to some of the information that you have requested. Section 30(b)(ii) applies where disclosure would, or would be likely to, substantially inhibit the free and frank exchange of views for the purposes of deliberation with respect to FOI handling. This exemption recognises the need for a private space in which views can be exchanged and considered before reaching a settled public position.

This exemption is subject to the public interest test. I recognise that there is public interest in the disclosure of information relating to the consideration of FOI requests as part of open, transparent and accountable government. There is also public interest in allowing a private space in which officials can deliberate and exchange views, including in relation to the development of a public position. Having carefully considered the application of the exemption in Section 30(b)(ii) I consider that in this instance the public interest lies in favour of upholding the exemption.

Section 30(c)

Exemptions under section 30(c) of FOISA (substantial prejudice to the effective conduct of public affairs) apply to some of the information requested.

This exemption applies because revealing the information, would be likely to lead to conclusions being drawn from the fact that any particular lawyer has, or has not, been sighted or provided advice, which in turn would be likely to impair the Government's ability to take forward its work on this and other legal issues. 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, I have considered if the public interest in disclosing the information outweighs the public interest in applying the exemption. I have found that, on balance, the public interest lies in favour of upholding the exemption. I 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.

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This exemption also applies because it is essential for Ministers and officials to be able to communicate with each other, receive advice from specialists (including the FOI Unit) and agree an approach to the handling of FOI requests before making a decision which is then communicated to the requester. Disclosing the content of these communications is likely to result in discussions about FOI handling being less detailed, which would diminish the quality of the advice provided to Ministers and officials. This is particularly the case where the Scottish Information Commissioner is carrying out an investigation into the handling of a request in accordance with section 47(1) of FOISA. It is for the Commissioner to decide whether authorities have dealt with requests in accordance with Part 1 of FOISA and he does so in light of the application for a decision made by the requester and any comments offered by the authority in accordance with section 49(3)(a) of FOISA. It would substantially inhibit authorities' ability to offer comments in support of their approach and to participate fully in the investigation if they were required to disclose the underlying advice on which that approach was based before the Commissioner has completed his investigation and reached a conclusion. Moreover, if the Commissioner requires an authority to issue a new review response as part of his decision, it would unduly constrain authorities' ability to decide what that response should be (in light of the Commissioner's decision) if they have already had to disclose the underlying advice on handling that they have received. Taken together, we consider that disclosing the content of communications about the approach to the handling of FOI requests while there is an ongoing investigation by the Commissioner would be substantially prejudicial to the effective conduct of that investigation, and that 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. However, there is a greater public interest in ensuring that Ministers and officials are able to discuss and agree an approach to the handling of FOI requests before making a decision which is communicated to the requester, and in ensuring that authorities are able to participate fully in the Commissioner's investigation process.

Section 36(1) – confidentiality of communications

An exemption under section 36(1) (confidentiality) of FOISA applies to some of the information that you have requested. This is because this information is subject to 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.

Section 38(1)(a)

An exemption under section 38(1)(a) of FOISA applies to a small amount of the information you requested. Section 38(1)(a) applies because it is your personal data as the requester. This exemption is applied in order to prepare the documents for possible publication on the Scottish Government website

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at a later date.

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)

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.

Yours sincerely

Ashleigh Gray

DPE : PROPRIETY AND ETHICS

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