



Decision Notice 143/2024

Prospectus for independence

Authority: Scottish Ministers

Case Ref: 202200247

Summary

The Applicant asked the Authority for information about work on a detailed prospectus for independence. The Authority stated that it did not hold some of the information requested, and withheld some other information on the basis that it related to the formulation of Scottish Administration policy.

During the investigation, the Authority changed its position. It identified further information, some of which it disclosed to the Applicant, and it withheld the remainder under various exemptions in FOISA.

Following an investigation, the Commissioner found that the Authority did not hold some of the information requested and that it had correctly withheld certain information. However, he also found that the Authority had failed to inform the Applicant that it did not hold some other information, that it had failed to identify all in-scope information until during the investigation, and that it had wrongly withheld some other information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (4) and (6) (General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions); 17(1) (Notice that information is not held); 29(1)(a) (Formulation of Scottish Administration policy etc.); 30(c) Prejudice to effective conduct of public affairs; 38(1)(b), (2A), (5) (definition of “the data protection principles”, “data subject”, “personal data” and “processing”, “the UK GDPR”) and (5A) (Personal information); 47(1) and (2) (Application for decision by Commissioner)

United Kingdom General Data Protection Regulation (the UK GDPR) articles 4(1) (definition of “personal data”) (Definitions); 5(1)(a) (Principles relating to the processing of personal data); 6(1)(f) (Lawfulness of processing)

Data Protection Act 2018 (the DPA 2018) sections 3(2), (3), (4)(d), (10) and (14)(a), (c) and (d) (Terms relating to the processing of personal data)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 4 November 2021 the Applicant made a request for information to the Authority about the commencement of work on a detailed prospectus for independence as reported in the media¹ (Request 1). He asked for the following information:
 - 1) Please could you let me know how many Scottish Government staff have been allocated to working on this prospectus, and the grades of each staff member? Please break this down by the number currently working on the project, and those allocated to work on it in the future.
 - 2) Please also provide me with the planned timescale for this work, and the budget allocated to it.
 - 3) Finally, please provide me with copies of any Scottish Government documents which set out the plan and budget for this prospectus, and the minutes of the relevant meetings which approved the plan and budget.
2. The Authority responded to Request 1 on 3 December 2021 and informed the Applicant, in terms of section 17(1) of FOISA, that it did not hold the information requested. It explained that, since the announcement in the [2021-22 Programme for Government](#)² (PfG), work on scoping what was required to take that commitment forward was in progress and final decisions on staffing, budget and timescale of work on the prospectus had not yet been taken.
3. On 14 December 2021 the Applicant made a subsequent request for information to the Authority (Request 2). As the Scottish Government 2022-23 budget had been announced since the Authority's response to Request 1, he presumed it had based the amount of funding required for each portfolio on the activities planned for 2022-23 which, he expected, included work on the detailed prospectus. He asked for the following information:
 - 1) Please could you let me know how much of the Scottish Government's 2022-23 budget has been allocated to the preparation of a detailed prospectus for independence?
 - 2) Please could you let me know the breakdown of this budget allocation, including staff and non-staff costs? Please could you provide details of each of these categories, including estimated numbers of staff and grades within staff costs, and the specific estimates used for non-staff costs?
 - 3) Please also provide me with the planned timescale for this work; if you are unable to provide planned dates, please provide me with the anticipated duration of the work.

¹ <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-58478187>

² <https://www.gov.scot/publications/fairer-greener-scotland-programme-government-2021-22/documents/>

- 4) Please could you also let me know how many Scottish Government staff are currently allocated to the scoping work for this prospectus (i.e. the ongoing work mentioned in the FOI response of 3 December [2021]), and the grades of each staff member?
- 5) Finally, please provide me with copies of any Scottish Government documents which set out the draft or approved plan and budget for the scoping exercise; the draft or approved plan and budget for the prospectus itself; and the minutes of the relevant meetings which approved the plans and budgets related to the prospectus.

4. The Authority responded to Request 2 on 17 January 2022.

- For parts 1, 2 and 4 of the request, the Authority stated it was unable to provide figures on the basis requested. It explained that the 2022-23 budget set out the amount of funding allocated to each portfolio, and the work to prepare the prospectus would be co-ordinated by a team in the Constitution and Cabinet Directorate, drawing on other officials across a range of portfolios who would contribute, to varying extents, as part of their wider responsibilities. The Authority provided the number of staff currently in the co-ordinating team and their grades, and informed the Applicant, in terms of section 17(1) of FOISA, that it did not hold some of the information requested.
- For part 3 of the request, the Authority stated that, as set out in the 2021-22 PfG, it would work to ensure that a referendum could be held within the current Parliament and, if the COVID-19 crisis was over, within its first half. It informed the Applicant that the prospectus would be published in advance of a referendum, in time to ensure that the people of Scotland had the information required to make an informed choice about their future.
- For part 5 of the request, the Authority refused to provide the information requested as it considered it to be exempt from disclosure under (i) section 29(1)(a) of FOISA, as the information related to the development of the policy on preparing an independence prospectus, and (ii) section 30(b)(i) of FOISA, as disclosure would substantially inhibit the provision of free and frank advice on preparation of the prospectus, particularly as those discussions (which related to the issue of Scotland's constitutional future) were ongoing and decisions had not been taken. The Authority recognised the public interest in disclosure as part of open, transparent and accountable government. It believed, however, that this was outweighed by the need for officials to be able to provide Ministers with free and frank advice, and for them to have a private space to freely consider and debate rigorously all options with candour, without fear of disclosure.

5. On 26 January 2022, the Applicant wrote to the Authority requesting a review of its decisions for both requests. The Applicant stated that he was dissatisfied with the decisions because:

- For Request 1, he found it hard to understand that the information requested did not exist in any form, particularly as the response to Request 2 withheld information. While he acknowledged the possibility that information may have been created between Requests 1 and 2, he asked the Authority to check whether any information was available on 3 December [2021].

- For parts 1 and 2 of Request 2, given that the Authority's response (i.e. that information was not available for these parts) was after the budget, he was surprised that the budget process did not appear to include any estimation of the plan and costs for a key part of the PfG. He asked the Authority to review what planning had been carried out and provide the information requested, if held.
 - For part 3 of Request 2, and the Authority's response regarding timing, he believed it should have been clear he was asking for something like a project plan or schedule of activity to show when work would start and the process of producing the prospectus. In his view, the generic response provided did not adequately address his request. He asked the Authority to provide the planning information, if held.
 - For part 5 of Request 2, he queried whether the public interest in allowing free and frank discussions really outweighed that in understanding the planning for a key part of the current Scottish Government's agenda.
6. The Authority notified the Applicant of the outcome of its review (for both requests) on 17 February 2022.
- For Request 1, the Authority fully upheld its original decision to rely on section 17(1) of FOISA as the information requested was not held. It reiterated its previous explanation that, at the time of the request, final decisions on the staffing, budget and timescale for work on the prospectus had not been taken.
 - For parts 1 and 2 of Request 2, the Authority fully upheld its original decision to rely on section 17(1) of FOISA. It stated that, having conducted further searches, it was satisfied that the information requested was not held at the time of the request, and it had adequately explained that no final decisions on the staffing, budget and timescale of work on the prospectus had been taken.
 - For part 3 of Request 2, the Authority apologised that its response did not fully interpret the specificity of that part of the Applicant's request. Using the clarification in the Applicant's request for review, the Authority concluded that the information requested in part 3 was covered by its response to part 5 (considered below).
 - For parts 3 and 5 of Request 2, the Authority upheld its original decision with modifications. It explained that, having reconsidered the exemptions, section 29(1)(a) still applied to the information requested, but it withdrew reliance on section 30(b)(i). The Authority stated that that it had revisited the public interest test and there had been no change in the circumstances which would have affected the outcome, since making its original decision.
7. On 24 February 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant believed that, rather than adhering to the spirit of FOI legislation and approaching his requests in the spirit of open government, the Authority had taken as narrow a reading as possible to divulge the minimum amount of information.
8. The Applicant stated that he was dissatisfied with the outcome of the Authority's review outcome for parts 1 and 2 of Request 2 because he found it incomprehensible that a budget could be set without considering the costs of producing a key part of the PfG. He expected that some information on estimated costs should be available.

9. The Applicant was further dissatisfied with the Authority's review outcome for parts 3 and 5 of Request 2 because:
 - he believed that the exemption in section 29(1)(a) of FOISA had been applied in a "blanket" fashion, and that it should be possible to provide key information in documents through selective and minimal redaction;
 - he believed the public interest in being able to view the decisions which led to the development of a plan for the production of the prospectus should outweigh the need to keep secret the formulation of policy, and
 - he did not believe that a plan for producing the prospectus (as clarified in his request for review), which was the outcome of the deliberations, should be covered by the exemption designed to cover policy formulation. In his view, by the time the plan was ready, the formulation was complete and the plan should be disclosed.
10. On 1 September 2023, the Applicant confirmed he was raising no dissatisfaction with the Authority's review outcome for Request 1 or for part 4 of Request 2. Accordingly, these parts of the Applicant's requests will not form part of the Commissioner's investigation in this case.

Investigation

11. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
12. On 24 March 2022, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was subsequently allocated to an investigating officer.
13. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These focussed on the searches carried out by the Authority to identify what information was held for parts 1, 2, 3 and 5 of Request 2, and on its justification for relying on section 29(1)(a) of FOISA for parts 3 and 5 of Request 2.
14. On 4 October 2023, the Authority informed the Commissioner that it now wished to change its position for the information originally withheld under section 29(1)(a) for parts 3 and 5 and, instead, wished to retrospectively rely on section 30(c) to withhold that information. It also explained that some information, previously considered to fall outwith the scope of the request, would fall within the scope of parts 3 and 5 of the request, and that it had now identified an additional nine documents (copies of which it provided to the Commissioner).
15. The Authority considered that some of the information in those nine documents was exempt from disclosure (variously) under the exemptions in section 29(1)(a), section 30(c) and section 38(1)(b) of FOISA, and that a small amount of information (in two of the documents) did not fall within the scope of the request. For the remainder, the Authority disclosed this information to the Applicant on 13 October 2023 and on 29 November 2023.

16. The Authority provided its submissions on the information being withheld under the exemptions in sections 29(1)(a), 30(c) and 38(1)(b) on 4 October 2024 and on 27 November 2024.
17. The Applicant was also invited to provide his comments on the public interest in disclosure of the information for parts 3 and 5 of Request 2.
18. On 2 and 6 September 2023, and subsequently on 18 October 2023 (following notification of the Authority's change of position), the Applicant provided his submissions to the Commissioner in relation to the exemptions now being relied on by the Authority.
19. As stated above, in providing the newly identified withheld information to the Commissioner, the Authority claimed that some of that information (contained in two documents), fell outwith the scope of the Applicant's request. During the investigation, having considered that particular information, the Commissioner took the view that it did, in fact, fall within the scope of the request.
20. The Authority was asked to reconsider its position in relation to that particular information. On 22 January 2024, the Authority informed the Commissioner that, having done so, it was satisfied that the information did, in fact, fall within scope, and disclosed it to the Applicant.

Commissioner's analysis and findings

21. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Whether the Authority held any relevant information - parts 1, 2 and 5 of Request 2

22. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the public authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.
23. The information to be given is that held by the Authority at the time the request is received, as defined by section 1(4). This is not necessarily to be equated with information that an applicant believes the public authority should hold. If no such information is held by the public authority, section 17(1) of FOISA requires the authority to give the applicant notice in writing to that effect.
24. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.
25. The Commissioner has taken account of the arguments in the Applicant's application, in which he provides reasons why he considers the Authority may hold the information requested. In summary, the Applicant believed it incomprehensible that a budget for the

Scottish Government could be set without consideration of the costs of the production of a key part of the PfG, and an area of significant focus for the Administration. He expected that some information on estimated costs should be available.

26. In its submissions to the Commissioner, the Authority confirmed that it wished to maintain reliance on section 17(1) of FOISA for parts 1 and 2 of Request 2 in relation to the “budget for the scoping exercise”, the “budget for the prospectus itself” and “the minutes of relevant meetings which approved the plans and budget related to the prospectus” (part 5).

Budget for the scoping exercise

27. The Authority submitted that the work was taken forward by civil servants as part of their normal duties supporting the Scottish Government. In line with usual practice, details of individual tasks carried out by civil servants, including the number of hours spent on them, were not routinely recorded or estimated as there was no business need to do so.

Budget for the prospectus itself, including breakdown of staff and non-staff costs

28. The Authority explained that, at the time of the Applicant’s request (December 2021), final decisions on the “Building a New Scotland” series regarding the number of papers and their content had not been taken, so it was not possible to calculate a meaningful budget given that it was not known, at that time, exactly what work was being taken forward.
29. The Authority also explained that the Scottish Government’s annually published budget sets out details of the money allocated to each Ministerial portfolio, and all costs for business areas under these portfolios, for taking their work forward, are met from these allocations.
30. While the “Building A New Scotland” series was being co-ordinated by the Constitutional Futures Division (CFD), the Authority explained, staff from Ministerial portfolios across the Scottish Government were contributing to it, with varying degrees of involvement. The Authority submitted that it was not possible to prepare an actual figure or accurate estimate for staff costs for this work, both in CFD and across the organisation. This was because, in line with usual practice, details of individual tasks carried out by civil servants, including the number of hours spent on them, were not routinely recorded or estimated as there was no business need to do so.
31. The Authority further explained that, even for those staff within CFD who were co-ordinating the prospectus, this work was not their only task, and the salaries of Scottish Government civil servants were determined by their grade and not by the individual tasks they carry out. For these reasons, the Authority submitted, it was not possible to provide actual or estimated figures for staff costs for work on the “Building a New Scotland series” either at the time of the request, or presently.
32. For associated non-staff costs, the Authority explained that these related to activity around the publication of the prospectus papers. It submitted that it was also not possible to provide details of a set or estimated budget for this at the time of the request because final decisions had not been taken on the content, size or exact number of papers to be published.
33. In addition, the Authority explained that there were a number of unknown variables in connection with publication costs such as translations, formatting and HTML online publication, and it was not possible to determine these until the work had actually been completed by the external company contracted to take this work forward. The Authority stated, however, that it had made a commitment to publishing the publication costs of each

paper once known, and that this had been done for all the papers published so far, outwith FOISA requirements.

Minutes of relevant meetings which approved the plans and budgets related to the prospectus

34. The Authority submitted that, at the time of Request 2, final decisions on the publication timetable for the "Building a New Scotland" series had not been taken and, as explained above, there was no separate budget for this project. For this reason, no meetings had taken place where decisions on these matters had been taken and, consequently, no minutes existed.
35. The Authority acknowledged that it could have given a more comprehensive explanation to the Applicant as to why it could not provide the information requested on budgets for the prospectus and the scoping exercise, however the information requested neither existed at the time of the request nor at present day.

The Commissioner's views

36. Having considered all relevant submissions and the terms of parts 1, 2 and 5 (relating to minutes) of Request 2, the Commissioner is satisfied that, by the conclusion of his investigation, the Authority took adequate, proportionate steps in the circumstances to establish whether it held any information that fell within the scope of those parts of the request.
37. The Commissioner notes that the Applicant believes the Authority may have held the information requested in these parts. The Authority has explained why it does not hold that information.
38. Given the nature of the information requested, and the explanations provided by the Authority, the Commissioner is satisfied that the arguments provided by the Authority sufficiently explained why it did not, and would not have expected to, hold the information requested.
39. In the circumstances, the Commissioner is therefore satisfied, on the balance of probabilities, that the Authority does not (and did not, on receipt of the request) hold any information falling within the scope of these parts of the Applicant's request. For parts 1 and 2, he finds that the Authority was therefore correct to give notice, in terms of section 17(1) of FOISA, that it did not hold the information requested.
40. However, and as noted above, where an authority receives a request for information that it does not hold, it must give the applicant notice in writing to that effect. For part 5 of Request 2, the Commissioner notes that the Authority did not provide the Applicant with such a notice in respect of the minutes requested in this part.
41. Given that the Authority did not hold any minutes falling within the scope of part 5 of Request 2, it had a duty to issue a notice in writing to that effect, to comply with the terms of section 17(1) of FOISA.
42. By failing to inform the Applicant, at review stage, that it did not hold any minutes, as requested in part 5 of Request 2, the Commissioner must find that the Authority failed to comply with the requirements of section 17(1) of FOISA in that respect.
43. However, given that the Commissioner is satisfied that the Authority does not hold this information (as explained above), he does not require the Authority to take any further action in response to this failure.

Whether the Authority held any further information - parts 3 and 5 of Request 2

44. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received (subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it).
45. As explained above, during the investigation, the Authority informed the Commissioner that it now considered that some information, previously considered to fall outwith the scope of Request 2, would in fact fall within the scope of parts 3 and 5 of the request. In addition, it confirmed that it had also identified a further nine documents which fell within the scope of these parts of the request.
46. Later in the investigation, the Authority changed its position for some of the information in these newly-identified nine documents which it had initially deemed to fall outwith scope, and confirmed that this information did, in fact, fall within the scope of parts 3 and 5 of Request 2. The Authority disclosed this information to the Applicant on 22 January 2024.
47. In order to be certain that all in-scope information had been identified, the Authority was asked to explain the searches it had carried out to identify and locate all of the relevant information for these parts of the request.
48. In response, the Authority explained that, due to the time which had passed since the initial request and request for review, it had carried out revised searches. It submitted that searches for the information requested were conducted of its electronic filing system and corporate record (eRDM) for all folders belonging to the CFD, which was the team responsible for co-ordinating the publication of the "Building a New Scotland" series (or "the prospectus").
49. The Authority explained that CFD held a total of 19 folders, containing approximately 2,300 documents. The folders were filtered by date of creation and were checked from 1 May 2021 to one year after the date of the initial request, so as to include any information which may have existed at time of the request which had been saved to the system retrospectively. All documents falling within this timescale were examined by the naming conventions in their titles which gave details of the information stored in them and the associated date of the information. Although some of CFD's eRDM folders were created after the date of Request 2 (14 December 2021), these were still checked to ensure there was no relevant information held which had been saved to them retrospectively. These searches identified a total of 10 documents.
50. In addition, the Authority explained it had carried out a general search of eRDM (which would also capture any information held in CFD folders) covering the same time period as above, using the keywords "independence", "prospectus", "staff", "plan", "budget", "timescale", "meeting", "minutes", "scoping" and "scoping exercise". The Authority confirmed that these searches identified no further relevant information.
51. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information.

52. Having considered all the relevant submissions and the terms of parts 3 and 5 of Request 2, the Commissioner is satisfied that, by the end of the investigation, the Authority had taken adequate, proportionate steps to establish the extent of information held that was relevant to these parts of the request.
53. However, the Commissioner considers that the information referred to at paragraph 45 should clearly have been identified as falling within scope by the close of the Authority's review, at the latest. In failing to do this, the Authority failed to deal with the request fully in accordance with section 1(1) of FOISA. The Commissioner notes that not only was this a breach of FOISA, but it resulted in avoidable delay for the Applicant.

Section 29(1)(a) (Formulation of Scottish Administration policy etc.) - parts 3 and 5 of Request 2

54. Under section 29(1)(a) of FOISA, information held by the Scottish Administration is exempt information if it relates to the formulation or development of government policy. "Scottish Administration" is defined in section 126 of the Scotland Act 1998 as Members of the Scottish Executive and junior Scottish Ministers and their staff, and non-ministerial office holders of the Scottish Administration and their staff. In terms of section 29(4) of FOISA, and bearing in mind the timeframe of the request, "government policy" means the policy of the Scottish Administration.
55. For information to fall under this exemption, it need only "relate" to the formulation or development of government policy, i.e. to the consideration or development of options and priorities for Scottish Ministers, who will subsequently determine which of these should be translated into political action and/or legislation, and when.
56. "Formulation" of government policy suggests the early stages of the policy process, where options are identified and considered, risks are identified, consultation takes place and recommendations and submissions are presented to the Ministers. "Development" suggests the processes involved in reviewing, improving upon or amending existing policy: it can involve piloting, monitoring, analysing, reviewing or recording the effects of existing policy.
57. As noted above, the Authority withheld certain of the information requested in parts 3 and 5 of Request 2 under section 29(1)(a) of FOISA. This comprised parts of the additional information identified during the investigation.

The Applicant's submissions on section 29(1)(a)

58. In his application to the Commissioner, the Applicant expressed concern about what he perceived as the Authority's over-use of this exemption which, he believed, had been used in a "blanket" format, and that key information could have been provided through the selective and minimal redaction of parts of documents. In his view, rather than adhering to the spirit of FOI and open government, the Authority had sought to divulge the minimum amount of information through as narrow a reading of his request as possible, and by the over-use of exemptions. Acknowledging that his request had been deemed "sensitive", he did not believe that this meant, in itself, that the minimum of information should be provided.
59. The Applicant further submitted that he did not believe that a plan, which was the outcome of deliberations, should be covered by the exemption designed to cover policy formulation. In his view, by the time the plan was ready, the formulation was complete, and the plan should be disclosed.

The Authority's submissions on section 29(1)(a)

60. The Authority stated that the information withheld under this exemption related to ongoing policy formulation of the development of a detailed prospectus for an independent Scotland. These papers, known as the "Building a New Scotland" series, and which covered a wide range of policy areas, had been in development since 2021, when the Scottish Government had made a commitment to working on a detailed prospectus for an independent Scotland in the PfG. Since then, the Authority explained, five papers in the series had been published, and more were in development and planned for publication. While it had publicly outlined the broad areas to be covered, the Authority submitted that the number, sequence, overall timeframe and scope of the papers in the series, as well as the individual policy propositions to be set out, continued to be subject to further development and final decisions.
61. The Authority explained that the information in question captured early stage, civil service thinking on the potential content and coverage of prospectus papers over a wide range of topics concerning the Scottish Government's policies for an independent Scotland, to support planning and inform Ministerial advice. With the exception of one scoping note, the remainder related to papers in the series which were still in development, including some that were not being taken forward in the form, or with the coverage, originally considered. These, the Authority submitted, were all subject to final consideration and decision making.
62. At the time of Request 2, the Authority stated, discussions around the formulation of policies for an independent Scotland were in their earliest stages and a range of possible options were under consideration, with no final settled position agreed. It argued that, at such early 'brain storming' stages of policy formulation, particularly on a matter that attracted a very high level of attention from the political, media and public sphere, Ministers and officials needed to have a private space to rigorously and candidly explore all options on a range of matters concerning this project before reaching a settled decision.

The Commissioner's view on section 29(1)(a)

63. The Commissioner has considered the submissions from both parties and the information being withheld under section 29(1)(a). He must consider the withheld information with regard to the circumstances at the time of the Authority's review outcome.
64. The Commissioner recognises that the papers ultimately to be produced are a "prospectus" giving the people of Scotland information to be able to make an informed choice about Scotland's future, in the event of an independence referendum.
65. The exemption in section 29(1)(a) only requires the information to "relate" to the formulation or development of government policy, for the information to fall within the scope of the exemption.
66. The Commissioner notes that the Scottish Government has stated that, as part of the PfG, it would produce a prospectus for independence. Given that all of the information being withheld under section 29(1)(a) relates to that, the Commissioner is satisfied that the exemption is engaged for that information.

The public interest test – section 29(1)(a)

67. Section 29(1)(a) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner is therefore required to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

The Applicant's submissions on the public interest – section 29(1)(a)

68. In his application to the Commissioner, the Applicant believed that the public interest in being able to view the decisions which had led to the development of a plan for the production of a prospectus for independence should outweigh the need to keep secret the formulation of policy.
69. With regards to the plan (requested in part 3 of Request 2), the Applicant stated he would not necessarily have expected the Authority to have shared a highly detailed plan and understood that lower level of plans (for example, of who was contributing to which chapters, or the exact order of sign-offs) would not be made public. He did believe, however, that it was in the public interest to understand what the high level plan was as he recalled that, at the time, the process was opaque, apart from a statement that work had commenced.
70. The Applicant also submitted that, at the time, the prospectus was being referred to in the singular, which implied there would be one publication, and thus its planning and publication would be a major undertaking and event. It was not public knowledge at that time that there was no single prospectus, but rather that there was going to be a series of papers produced one after the other. The Applicant imagined that what would have existed as a plan then, would have been a schedule for the production and release of these documents. He expected that, at the very least, the Authority ought to have communicated this to him in its response, i.e. by explaining there was to be a series of papers, which areas they would cover, and the approximate release schedule. In the Applicant's view, it was in the public interest to know, at least, that level of information.
71. The Applicant provided further comments on why he believed disclosure of the approach and the planned dates for the prospectus was in the public interest. He submitted that, at the time of his requests, the question of whether and when there might be another independence referendum was very much a live one, and the First Minister had made it clear that this would be pursued as a matter of priority and urgency. In the Applicant's view, the prospect of a campaign over whether Scotland might leave the United Kingdom would have been of concern to businesses trying to plan for the future, and for individuals making life decisions, such as house purchases.
72. At that time, the Applicant submitted, all the public had was a fairly vague statement about the prospectus. In his view, he believed it was in the public interest to understand the approach and timescales, to support planning decisions, and to enable proper preparation from the media and opposition parties. The Applicant argued that, by withholding the information, the Authority was able to use information asymmetry to its political advantage. He did not believe it was in the spirit of open government to withhold information about such a potentially momentous topic.

The Authority's submissions on the public interest – section 29(1)(a)

73. The Authority recognised the public interest in disclosure, as part of an open, transparent and accountable government and to inform public debate.
74. It believed, however, that there was a greater public interest in high quality policy and decision-making, and in the properly considered implementation and development of policies and decisions. The Authority submitted that Ministers and officials therefore needed to be able to consider all available options and debate those rigorously to fully understand their possible implications. In the Authority's view, premature disclosure would undermine internal debate on the key priorities of the "Building a New Scotland" project and the key policies of

giving the people of Scotland the information they needed to make an informed choice over their future. This, in turn, would undermine the quality of the policy making process.

75. The Authority believed disclosure would have a negative effect on its current and future ability to develop policies for an independent Scotland. As work in this area was routinely subjected to intense, real time scrutiny, the disclosure of information on policy development or planning activity, which had not reached a settled position, could potentially mislead or misinform. The Authority submitted that it required an environment in which to discuss and develop ideas and plans which were then ultimately for Ministers to opine on. In its view, disclosure could mislead public expectations and perceptions about the content of the prospectus and the Scottish Government's policy positions over a range of matters concerning an independent Scotland. The Authority argued that it was therefore essential that only the correct information, reflecting the final decisions taken, was made public, to ensure that, in the event of a future independence referendum, the people of Scotland made their decisions based on correct information.
76. The Authority submitted that, for a large project of such political interest and controversy, such as this one, which would cover all aspects of life in an independent Scotland, it was essential that high quality policy and decision-making could be progressed through the properly considered implementation and development of policies and decisions. In its view, this would not be possible if early policy development information was disclosed before a reasonable period of time had passed following publication of the entire "Building a New Scotland" series of papers. The Authority argued that Ministers and officials would be less likely to contribute to this work effectively and candidly if they believed that their discussions, on exploring policy options for an independent Scotland, which may not reflect final decisions taken, were disclosed prematurely.
77. The Authority further submitted that, if it subsequently concluded that unpublished parts of the prospectus could be improved through a change in policy, and if details of early stages of policy formulation of this work had been made public, Ministers and officials may be less keen to implement those changes, resulting in work of a lesser quality being produced.
78. In conclusion, for the reasons set out above, the Authority believed that the public interest lay in upholding the exemption.

The Commissioner's view on the public interest – section 29(1)(a)

79. The Commissioner has considered carefully the public interest submissions made by both the Applicant and the Authority, together with the withheld information in question. He is required to balance the public interest in disclosure of the information requested against the public interest in maintaining the exemption. In the context of FOISA, the public interest should be considered as "something which is of serious concern and benefit to the public".
80. In the Commissioner's view, any change to Scotland's constitutional future is a matter of considerable and significant public interest, given that this would affect everyone in Scotland. He does not consider it unreasonable to conclude that the public interest in disclosing information about work on a prospectus for independence (in the event of an independence referendum) would be substantial.
81. The Commissioner recognises the public interest in ensuring that all options are explored and deliberated by the Ministers, and that this may require some private space to be afforded where a range of views can be gathered and ideas considered. With an important issue such as planning Scotland's future, in the event of an independence referendum, the

Commissioner acknowledges that there is a strong public interest in allowing a degree of private space to enable options to be fully considered.

82. In contrast, the Commissioner recognises that there is a substantial public interest in the disclosure of information that would contribute to accountability and transparency, thereby allowing scrutiny of the matters being considered in the process of policy formulation and development. This, he notes, would assist the public in understanding those very important policy issues under consideration and the likely consequences of any decisions to be taken, which are matters of legitimate public debate.
83. The Commissioner must also take into account that the withheld information in this case relates to what was, at the material time, ongoing policy formulation and development, and was relevant in informing the Ministers' consideration and refinement of their policy position and the options available. As he has recognised above, there is a general public interest in allowing all options to be explored and debated by the Ministers in a private space.
84. The Commissioner has given due weight to the Applicant's arguments on the public interest alongside the withheld information itself. The Commissioner is limited to what he can say about the withheld information without disclosing its content, but he notes that the particular information being withheld under section 29(1)(a) sets out a higher level of detail on what the papers will cover, and their interdependencies with other topics in the independence prospectus/any key assumptions to be determined in order to progress the proposition. He also notes that this particular information does not capture any information about planned dates or the proposed timetable for publication.
85. Having done so, on balance, the Commissioner has concluded that there is a greater, and significant, public interest in the Authority being able to consider a range of options, some of which may be discarded or developed later in the stages of policy development. For this reason, he is not persuaded (in all the circumstances of this case) that there is an over-riding public interest that favours disclosure of the particular information being withheld under section 29(1)(a). In the Commissioner's view, it is in the public interest that the Authority is able to formulate its policy position fully, and consider all analysis and evidence, without being drawn into a public debate prematurely on matters which, at the material time, were still under consideration.
86. In all the circumstances, therefore, the Commissioner has concluded that the public interest in disclosure of the information withheld under section 29(1)(a) is outweighed by that in maintaining the exemption. He concludes that the Authority was therefore entitled to withhold the information under this exemption.

Section 30(c) – Prejudice to effective conduct of public affairs – “otherwise” prejudice – parts 3 and 5 of Request 2

87. Section 30(c) of FOISA provides that information is exempt information if its disclosure would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
88. The word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority applying it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure.

89. There is no definition of "substantial prejudice" in FOISA, but the Commissioner considers that the harm in question would require to be of real and demonstrable significance. An authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur: therefore, the authority needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.
90. As noted above, during the investigation, the Authority confirmed that it was now relying on this exemption to withhold some information for parts 3 and 5 of Request 2. This included the information withheld at review stage under the exemption in section 29(1)(a) of FOISA, and parts of the additional information identified during the investigation.

The Authority's submissions on section 30(c)

91. The Authority stated that the information withheld under this exemption related to the indicative timetable and titles of papers that were in draft form, and therefore did not reflect decisions taken on either titles of papers within the "Building a New Scotland" series or a final timetable for publication. The Authority believed that disclosing out of date draft timetables or titles for publications in the "Building a New Scotland" project would negatively impact its ability to effectively communicate with the public to take forward one of its key policies of giving the people of Scotland the information they would need to make an informed choice over their future.
92. The Authority submitted that the provisional timetable, advice to Ministers and draft scoping notes included tentative dates for publication. Were these to be released, this would provide an inaccurate representation of the final position regarding the number, timing and sequencing of papers in the series. It argued that by publishing indicative deadlines, titles and timings that may not be met for a variety of reasons, the public and external commentators could misinterpret the reasons behind potential changes, thereby impacting the overall interpretation and consumption of the content.
93. The Authority stated that while the papers themselves, once finalised, were intended for public consumption, an outline timetable for publication at the earliest stages of the project's development, which was subject to substantial change, was not. It argued that a project of this nature could only be executed successfully if Ministers and officials were able to work from draft timetables or titles, which they were free to make changes to as and when required in a private space, in the knowledge that their initial proposals would not be disclosed at any time in the near future. The Authority believed it was important for Ministers and officials to also have a private space to discuss provisional timings for publication and titles, knowing that these may change for a variety of reasons, without these provisional timings and titles being made public.
94. The Authority concluded that disclosure of the information would substantially prejudice the Scottish Government's ability to effectively plan and change those plans as circumstances required.

The Applicant's submissions on section 30(c)

95. In his submissions to the Commissioner, following the Authority's change of position and the partial disclosure of some of the newly-identified information, the Applicant expressed concern that the information now disclosed was heavily redacted: he was unconvinced that it needed to be. Referencing redactions which appeared, to him, to be the names of departments or titles of areas for consideration, he failed to see why this was necessary. He

also expressed dissatisfaction that the timeline had been redacted completely, which was one of the key points of his original request, and most of the scoping notes were so redacted as to be effectively useless as information. In his view, the extent of the redactions resulted in the net increase in information through the provision of these documents being minimal.

96. In his submissions to the Commissioner, the Applicant stated that he remained deeply unsatisfied that it had taken so long, and so much effort, to obtain even the level of redacted information now disclosed by the Authority during the investigation. He stated that this delay had, effectively, rendered much of the information of limited use, as events had moved on, whereas if it had been released in a timely manner without having to appeal to the Commissioner, it would have had greater public utility.

The Commissioner's views on section 30(c)

97. The Commissioner has considered the submissions from both parties and the information being withheld under section 30(c). Again, he must consider the withheld information with regard to the circumstances at the time of the Authority's review outcome.
98. The Commissioner notes, from the Authority's submissions, that it considers disclosure of the information being withheld under section 30(c) (the provisional timetable, advice to Ministers, draft scoping notes and tentative dates for publication) would give an inaccurate picture of the final position on the number, timing and sequencing of papers in the series, and that any changes to that, going forward, could lead to misinterpretation. He has also considered the argument put forward by the Authority for Ministers to have a private space in which to discuss provisional timings and topics.
99. In the Commissioner's view, the majority of the information withheld under this exemption is information on topics which a reasonable person would expect to be included in the prospectus, and which would be considered by an open, transparent and accountable government in exploring options for Scotland's future in the event of an independence referendum. In the Commissioner's view, none of this information (relating to the topics to be considered) would come as a "surprise" to anyone as it relates to matters which the people of Scotland would naturally expect to be included.
100. In addition, and without disclosing the content of the information itself, the Commissioner notes that the majority of the information being withheld under section 30(c) does not include detailed descriptions or considerations (as appears to be claimed by the Authority) and is essentially "high level" information relating to issues that have continued to evolve since the date of the Applicant's request. The Commissioner is not persuaded, from the submissions he has received and consideration of the withheld information itself, that disclosure of the majority of the information withheld under section 30(c) would result in the harm claimed by the Authority.
101. In the absence of any submissions persuading him otherwise, the Commissioner does not accept that the disclosure of the majority of this information would otherwise, or would be likely to, prejudice substantially the effective conduct of public affairs. He does not believe that such a conclusion can be reached on the basis of the arguments provided, for the majority of this information.
102. The Commissioner does not, therefore, accept that the exemption in section 30(c) of FOISA should be upheld in respect of the majority of the information withheld under this exemption.

103. Given that the Commissioner does not accept the application of the exemption for the majority of the information withheld under section 30(c), he is not required to consider the public interest test in section 2(1)(b) of FOISA for that information. As no other exemption has been claimed to justify the withholding of that information, the Commissioner requires the Authority to disclose it to the Applicant. He will identify that information to the Authority along with this Decision Notice.
104. Turning to the remainder of the information being withheld under section 30(c) (which relates to the provisional timetable and dates for the prospectus), the Commissioner has considered the arguments from both parties in relation to this particular information.
105. For information relating to dates for progressing and publishing the prospectus, it is clear to the Commissioner (from the information which the Authority has already partially disclosed to the Applicant), that the timetable was provisional and subject to change as matters evolved. At the time of the Authority's review outcome, these dates were current (albeit provisional), and therefore disclosure of the information would have been likely to give an impression of when each element was likely to be completed. In that respect, the Commissioner appreciates the argument put forward by the Authority that disclosure would prejudice its ability to effectively communicate with the public on this, particularly where the dates had not been confirmed.
106. The Commissioner notes, from the Authority's submissions, that it considers disclosure of this information would lead to undue focus in the event that the dates in the provisional timetable were not met (for whatever reason), and would prejudice its ability to effectively communicate with the public in taking forward the key policy of providing the people of Scotland with information on their options in the event of an independence referendum.
107. While the Commissioner is of the view that disclosure of this remaining information would be unlikely to prejudice the Authority's ability to publish future papers in the series (as appears to have been claimed by the Authority), he does accept that it would be likely to cause undue speculation and detract the Authority from being able to make changes to the provisional dates, as and when appropriate.
108. As such, the Commissioner is satisfied that section 30(c) is engaged for the remaining withheld information, in that disclosure would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs, in the manner described by the Authority.
109. As the exemption in section 30(c) has been found to apply to the remaining withheld information, the Commissioner is now required (for this information) to go on to consider the public interest test in section 2(1)(b) of FOISA.

Public interest test - section 30(c)

110. Section 30(c) is subject to the public interest test required by section 2(1)(b) of FOISA. As the Commissioner has found that the exemption in section 30(c) was correctly applied to some of the withheld information, he is now required to consider whether, in all the circumstances of the case, the public interest in disclosing that remaining withheld information is outweighed by the public interest in maintaining the exemption.

The Authority's submissions on the public interest test – section 30(c)

111. The Authority recognised the public interest in disclosure, as part of an open, transparent and accountable government and to inform public debate, and also in the planning around the publication of the “Building a New Scotland” series of papers in particular, given this was a matter of significant political interest and controversy. It submitted that the public interest in this information would be met, at least in part, when final decisions had been taken and the papers in the series were published.
112. The Authority believed, however, that there was a greater public interest in allowing officials a private space within which to communicate with Ministers and other officials as part of the process of exploring and refining the timetable for publishing the papers within the series before reaching a settled view. It argued that this, in turn, would enable the Scottish Government to effectively and accurately engage and communicate with the public on its proposals for an independent Scotland, without the risk of these proposals being prejudiced by the disclosure of inaccurate information, taken from earlier draft material, which did not reflect the final position.
113. The Authority submitted that the “Building a New Scotland” project was still under development and would continue to generate a significant level of interest from the public as well as political parties, commentators and journalists. It believed it was important for Ministers and officials to have a private space to rigorously and candidly explore all options on a range of matters concerning this project before reaching a settled decision. In the Authority’s view, it was in the public interest to enable this work to be approached in this way as it supported a robust process of developing and refining final proposals.
114. In conclusion, the Authority believed that the public interest lay in upholding the exemption.

The Applicant's submissions on the public interest test – section 30(c)

115. In his submissions to the Commissioner, following the Authority’s change of position and the partial disclosure of some of the newly-identified information, the Applicant stated that, in his view, the public interest was still being applied with a bias towards non-disclosure, more in the interests of the Scottish Government and Ministers than in the interests of the public and other stakeholders.

The Commissioner's view on the public interest – section 30(c)

116. The Commissioner has considered carefully the public interest submissions made by both the Applicant and the Authority, together with the remaining withheld information in question. He is required to balance the public interest in disclosure of the information requested against the public interest in maintaining the exemption. In the context of FOISA, the public interest should be considered as “something which is of serious concern and benefit to the public”.
117. As rehearsed in his comments for section 29(1)(a) above, the Commissioner considers that any change to Scotland’s constitution is a matter of significant and considerable public interest to the people of Scotland. In his view, it is reasonable to conclude that the public interest in disclosing information about the planned timetable for the prospectus for independence would be substantial.

118. The Commissioner recognises that there is a significant public interest in transparency and accountability concerning matters related to Scotland's future in the event of a second independence referendum. He accepts that disclosure of this information would allow public scrutiny and assessment of the Authority's plans, particularly the timing, for consideration of the topics to be included in the prospectus and, once agreed, publication of that information. In the Commissioner's view, this would not only inform public debate, but would also satisfy the public interest in openness, transparency and accountability. To a large degree, however, the Commissioner considers this is met by the disclosure of some further information during the investigation, together with the disclosure of the information he has found not to be exempt (as set out above).
119. On the other hand, the Commissioner accepts that there is a significant public interest in the Authority ensuring it can explore these topics without prejudice, and without speculation from the wider public as to when decisions on these matters, for inclusion in the published prospectus, will be taken. In the Commissioner's view, this would only detract the Authority from effectively progressing its discussions and plans on these matters, the dates for which (as he has already noted) were provisional at the material time, and subject to change.
120. As set out above, the Commissioner has already accepted that disclosure of the remaining information being withheld under section 30(c) (i.e. relating to the timetable and provisional dates) would otherwise, or be likely to, substantially prejudice the effective conduct of public affairs. Having balanced the public interest arguments for and against disclosure, he is satisfied that, on balance, the public interest in maintaining the exemption in section 30(c) outweighs that in disclosure of the remaining withheld information.
121. The Commissioner therefore concludes that the Ministers were entitled to withhold the remaining information under the exemption in section 30(c) of FOISA.
122. The Commissioner would stress that his decision, in this case, has to be based on the circumstances at the time the Ministers considered the Applicant's request and requirement for review. He recognises that this may change over time.

Section 38(1)(b) – Personal information – parts 3 and 5 of Request 2

123. Section 38(1)(b) of FOISA, read in conjunction with section 38(2A)(a) or (b), exempts information from disclosure if it is "personal data" (as defined in section 3(2) of the DPA 2018) and its disclosure would contravene one or more of the data protection principles set out in Article 5(1) of the UK GDPR or (where relevant) in the DPA 2018.
124. The exemption in section 38(1)(b) of FOISA, applied on the basis set out in the preceding paragraph, is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.
125. To rely on this exemption, the Authority must show that the information withheld is personal data for the purposes of the DPA 2018 and that disclosure of the information into the public domain (which is the effect of disclosure under FOISA) would contravene one or more of the data protection principles to be found in Article 5(1) of the UK GDPR.
126. The Commissioner must decide whether the Authority was correct to withhold some of the information requested under section 38(1)(b) of FOISA.

Is the withheld information personal data?

127. The first question that the Commissioner must address is whether the withheld information is personal data for the purposes of section 3(2) of the DPA 2018, i.e. any information relating to an identified or identifiable individual. "Identifiable living individual" is defined in section 3(3) of the DPA 2018 - see Appendix 1. (This definition reflects the definition of personal data in Article 4(1) of the UK GDPR, also set out in in Appendix 1.)
128. Information which could identify individuals will only be personal data if it relates to those individuals. Information will "relate to" a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
129. In its submissions to the Commissioner, the Authority explained that the information in question comprised the names of individuals who could be identified from that information. As such, the Authority considered the information to be personal data as defined by section 3(2) of the DPA 2018.
130. Having considered the withheld information, it is clear to the Commissioner that the information being withheld in this case "relates to" identifiable living individuals.
131. The Commissioner therefore concludes that this particular information is personal data for the purposes of section 3(2) of the DPA 2018.

Which of the data protection principles would be contravened by disclosure?

132. The Authority stated that disclosure of this personal data would contravene the first data protection principle (Article 5(1)(a) of the UK GDPR). Article 5(1)(a) states that personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.
133. In terms of section 3(4)(d) of the DPA 2018, disclosure is a form of processing. In the case of FOISA, personal data is processed when it is disclosed in response to a request.
134. The Commissioner must now consider if disclosure of the personal data would be lawful (Article 5(1)(a)). In considering lawfulness, he must consider whether any of the conditions in Article 6 of the UK GDPR would allow the data to be disclosed.
135. In its submissions, the Authority concluded that the only condition that would allow it to process the data, in order to answer the Applicant's request, was condition 6(1)(f) (set out in full in Appendix 1).
136. The Commissioner agrees that condition (f) in Article 6(1) is the only condition which could potentially apply in the circumstances of this case.

Condition (f): legitimate interests

137. Although Article 6 states that condition (f) cannot apply to processing carried out by a public authority in the performance of their tasks, section 38(5A) of FOISA (see Appendix 1) makes it clear that public authorities can rely on Article 6(1)(f) when responding to requests under FOISA.
138. The tests which must be fulfilled before Article 6(1)(f) can be met are as follows:
 - (i) Does the Applicant have a legitimate interest in obtaining the personal data?
 - (ii) If so, would the disclosure of the personal data be necessary to achieve that legitimate interest?

- (iii) Even if the processing would be necessary to achieve that legitimate interest, would that be overridden by the interests or fundamental rights and freedoms of the data subjects?

Does the Applicant have a legitimate interest in obtaining the personal data?

139. In his submissions to the Commissioner, the Applicant recognised that the exemption in section 38(1)(b) could be applied sensibly to protect the details of more junior civil servants. However, given the extent of the redactions applied to the information now partially disclosed, it was impossible for him to form a view as to what had been redacted under this exemption, as opposed to other reasons.
140. In its submissions to the Commissioner, the Authority stated that it was not aware of any legitimate interest the Applicant had in the names of officials. In addition, it did not believe that identifying the individuals would aid in the understanding of the withheld information.
141. Having considered the submissions from both parties, the Commissioner accepts that the Applicant has a personal legitimate interest in knowing the identities of the individuals named in the information, with a view to understanding their involvement in the work more completely.

Is disclosure of the personal data necessary?

142. Having accepted that the Applicant has a legitimate interest in the withheld personal data, the Commissioner must consider whether disclosure of those personal data is necessary for the Applicant's legitimate interests. In doing so, he must consider whether these interests might reasonably be met by any alternative means.
143. The Commissioner has considered this carefully in light of the decision by the Supreme Court in [South Lanarkshire Council v Scottish Information Commissioner \[2013\] UKSC 55](#)³.
144. "Necessary" means "reasonably" rather than "absolutely" or "strictly" necessary. When considering whether disclosure would be necessary, public authorities should consider whether the disclosure is proportionate as a means and fairly balanced as to the aims to be achieved, or whether the requester's legitimate interests can be met by means which interfere less with the privacy of the data subject.
145. In its submissions to the Commissioner, the Authority argued that disclosure would be unfair as the individuals in question, who were more junior members of staff, would not expect their personal data to be processed in this way. The Authority did not consider such processing was necessary to meet the terms of the request, and it had no lawful basis under which to process the personal data for this purpose.
146. Having considered the Applicant's legitimate interests, the Commissioner accepts that, to some extent, disclosure of the information is necessary in order to fulfil them: disclosure of the withheld personal data would provide the Applicant with information which would aid his understanding of the level of involvement by the individuals named in the information.

³ <https://www.supremecourt.uk/cases/docs/uksc-2012-0126-judgment.pdf>

147. The Commissioner can identify no viable means of fully meeting the Applicant's legitimate interests which would interfere less with the privacy of the data subjects than providing the withheld personal data in full. In all the circumstances, therefore, the Commissioner is satisfied that disclosure of the information is necessary for the purposes of the Applicant's legitimate interests.
148. The Commissioner will now consider whether the Applicant's legitimate interest in obtaining the withheld personal data outweighs the rights and freedoms of the data subjects.

The data subjects' interests or fundamental rights and freedoms

149. The Commissioner must balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary for him to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under FOISA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override any legitimate interests in disclosure. Only if the legitimate interests of the Applicant outweigh those of the data subjects can the information be disclosed without breaching the first data protection principle.
150. The [Commissioner's guidance on section 38 of FOISA](#)⁴ notes factors that should be taken into account in balancing the interests of parties. He notes that much will depend on the reasonable expectations of the data subjects. These are some of the factors public authorities should consider:
- Does the information relate to an individual's public life (their work as a public official or employee) or to their private life (their home, family, social life or finances)?
 - Would the disclosure cause harm or distress?
 - Whether the individual has objected to the disclosure.

Does the information relate to public or private life?

151. In its submissions to the Commissioner, the Authority explained that its general approach to disclosing information about senior members of staff, was to release details of those within senior civil service roles and officials with relatively senior roles that were public facing, but to withhold those details for junior staff members.
152. The Commissioner acknowledges that the withheld information relates to the individuals' public lives, in that it identifies them as Authority staff or officials involved in the work to which the information relates. However, he also acknowledges that, by association, the information also relates to their private lives.
153. In the circumstances, the Commissioner concludes that the withheld information relates to both the private and public lives of the data subjects.

⁴ <https://www.itspublicknowledge.info/sites/default/files/2022-04/BriefingSection38PersonalInformationGDPR.pdf>

Would disclosure cause harm or distress to the data subjects and have the individuals objected to the disclosure?

154. In its submissions to the Commissioner, the Authority stated that, even if the Applicant did have legitimate interests in the information, it did not believe these would outweigh the interests in protecting the privacy of the individuals to whom the personal data related.
155. The Commissioner has considered the harm or distress that might be caused by disclosure. He notes that disclosure of any information under FOISA – although in response to a request made by a specific Applicant – effectively places that information into the public domain. As such, he must consider the effects of publicly disclosing any personal data under FOISA.
156. The Commissioner has considered the relevant submissions from both parties, together with the personal data withheld. He recognises that it records the involvement of those individuals in the information.
157. The Commissioner acknowledges that some of these individuals can be considered relatively senior and therefore subject to a higher level of scrutiny. It is still appropriate, however, to consider what reasonable expectations they would have in relation to disclosure of the information concerned. He also recognises that the roles of other individuals could be considered to be more junior. He accepts that these individuals would have no expectation that their personal details (names) would be disclosed into the public domain, in response to a request under FOISA.

Balance of legitimate interests

158. The Commissioner has carefully balanced the legitimate interests of the data subjects against those of the Applicant. He has concluded that the legitimate interest in the personal data is overridden by the interests or fundamental rights and freedoms of the data subjects and that the requirements of condition (f) cannot be met here. In the absence of a condition which would permit disclosure of the withheld personal data, the Commissioner must conclude that disclosure would be unlawful.
159. Given that the Commissioner has concluded that the processing of the personal data would be unlawful, he is not required to go on to consider whether disclosure of that personal data would otherwise be fair.

Conclusion on the data protection principles

160. The Commissioner finds that disclosure of the personal data under consideration here would breach the first data protection principle and that this information is therefore exempt from disclosure (and was properly withheld) under section 38(1)(b) of FOISA.

Decision

The Commissioner finds that the Authority partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that, by the conclusion of his investigation, the Authority complied with Part 1 in the following respects:

- The Authority was correct to give notice, in terms of section 17(1) of FOISA, that it did not hold any information falling within the scope of parts 1 and 2 of Request 2.
- By the end of the investigation, the Commissioner was satisfied that the Authority did not hold any minutes falling with the scope of part 5 of Request 2.
- By the end of the investigation, the Authority correctly withheld certain information (variously) under the exemptions in section 29(1), section 30(c) and section 38(1)(b) of FOISA.

However, the Commissioner finds that, by the conclusion of his investigation, the Authority failed to comply with Part 1 in the following respects:

- By failing to provide notice to the Applicant that it did not hold any minutes requested in part 5 of Request 2, the Authority failed to comply with the requirements of section 17(1) of FOISA.
- By failing to identify all of the information falling within the scope of parts 3 and 5 of Request 2 until during the investigation, the Authority failed to fully comply with section 1(1) of FOISA.
- By the end of the investigation, the Authority had wrongly withheld certain information under the exemption in section 30(c) of FOISA.

As the Authority has already disclosed some of this information to the Applicant during the investigation, the Commissioner does not require it to take any further action in respect of the information already disclosed. However, for the remaining information which the Commissioner has found to have been wrongly withheld under section 30(c) of FOISA, and which has not yet been disclosed, he requires the Authority to disclose this to the Applicant by **15 August 2024**.

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

David Hamilton
Scottish Information Commissioner

01 July 2024

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - ...
 - (e) in subsection (1) of section 38 –
 - ...
 - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied.

...

17 Notice that information is not held

- (1) Where-
 - (a) a Scottish public authority receives a request which would require it either-
 - (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),
- if it held the information to which the request relates; but

- (b) the authority does not hold that information,
it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

29 Formulation of Scottish Administration policy etc.

- (1) Information held by the Scottish Administration is exempt information if it relates to-
 - (a) the formulation or development of government policy;

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

...

38 Personal information

- (1) Information is exempt information if it constitutes-

...

- (b) personal data and the first, second or third condition is satisfied (see subsections (2A) to (3A);

...

- (2A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act -

- (a) would contravene any of the data protection principles, or
- (b) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.

...

- (5) In this section-

"the data protection principles" means the principles set out in –

- (a) Article 5(1) of the UK GDPR, and
- (b) section 34(1) of the Data Protection Act 2018;

"data subject" has the same meaning as in the Data Protection Act 2018 (see section 3 of that Act);

...

“personal data” and “processing” have the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(2), (4) and (14) of that Act);

“the UK GDPR” has the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(10) and (14) of that Act).

- (5A) In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted.

...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
- (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);
and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

UK General Data Protection Regulation

Article 4 Definitions

For the purpose of this Regulation:

- 1 ‘personal data’ means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person:

...

Article 5 Principles relating to processing of personal data

- 1 Personal data shall be:
 - a. processed lawfully, fairly and in a transparent manner in relation to the data subject (“lawfulness, fairness and transparency”)
 - ...

Article 6 Lawfulness of processing

- 1 Processing shall be lawful only if and to the extent that at least one of the following applies:
 - ...
 - f. processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data, in particular where the data subject is a child.
 - ...

Data Protection Act 2018

3 Terms relating to the processing of personal data

- ...
- (2) “Personal data” means any information relating to an identified or identifiable living individual (subject to subsection (14)(c)).
- (3) “Identifiable living individual” means a living individual who can be identified, directly or indirectly, in particular by reference to –
 - (a) an identifier such as a name, an identification number, location data or an online identifier, or
 - (b) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
- (4) “Processing”, in relation to information, means an operation or set of operations which is performed on information, or on sets of information, such as –
 - ...
 - (d) disclosure by transmission, dissemination or otherwise making available,
 - ...
- (10) “The UK GDPR” means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (United Kingdom General Data Protection Regulation), as it forms part of the law of England

and Wales, Scotland and Northern Ireland by virtue of section 3 of the European Union (Withdrawal) Act 2018 (and see section 205(4)).

...

(14) In Parts 5 to 7, except where otherwise provided –

(a) references to the UK GDPR are to the UK GDPR read with Part 2;

...

(c) references to personal data, and the processing of personal data, are to personal data and processing to which Part 2, Part 3 or Part 4 applies;

(d) references to a controller or processor are to a controller or processor in relation to the processing of personal data to which Part 2, Part 3 or Part 4 applies.

...