



Scottish Information
Commissioner
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Decision Notice 182/2025

First Minister's briefing papers

Authority: Scottish Ministers

Case Ref: 202401562

Summary

The Applicant asked the Authority for the First Minister's briefing papers for First Minister's Questions on a particular date. The Authority withheld the information requested under various exemptions in FOISA. The Commissioner investigated and found that the Authority had generally complied with FOISA, but he required it to disclose some information which it had wrongly withheld.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 28(1) (Relations within the United Kingdom); 30(b)(i) and (c) (Prejudice to effective conduct of public affairs); 38(1)(b), (2A), (5) (definitions of "the data protection principles, "data subject", "personal data" and "processing" and "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 5(1)(a) (Principles relating to processing of personal data); 6(1)(f) (Lawfulness of processing).

Data Protection Act 2018 (the DPA 2018) sections 3(2), (3), (4)(d), (5), (10) and (14)(a), (c) and (d) (Terms relating to the processing of personal data).

Background

1. On 10 October 2024, the Applicant made a request for information to the Authority. He asked for information related to the First Minister's (FM) briefing papers for First Minister's Questions (FMQs) on 10 October 2024. Specifically, he asked for:

- (i) Copies of any briefings/briefing packs/documentation provided to the First Minister from start of 9 October 2024 to midday 10 October 2024.
 - (ii) Copies of any briefings/briefing packs/documentation provided to the First Minister for the purposes of preparation for First Minister 's Questions on 10 October 2024.
 - (iii) In the First Minister 's Questions session in the Scottish Parliament on 10 October 2024, the First Minister claimed that 98% of people convicted of rape in Scotland received prison time. Regarding this:
 - (a) Please provide more details around this claim
 - (b) What is the source of this claim – how was it provided to the first minister, how was it compiled, and what public body compiled it
 - (c) What other information on conviction prison time rate (i.e. percentage of convicts, by offence type, who experience prison time for their offence) is kept by the Scottish Government or other public bodies?
 - (d) What other information on convict outcomes for rape convictions is available, for example regarding average time served in prison.
 - (e) Please provide an explanation and account for what happened to the other 2%.
2. The Authority responded on 30 October 2024. It explained that due to the wording of request (iii) it had responded to requests (i) and (ii) in the context of briefings, briefing packs, and documentation associated with the justice system in Scotland. In response to request (i) the Authority gave the Applicant notice that the FM was not provided with any briefings on justice issues; in response to request (ii) it withheld information under section 30(b)(i) and 30(c) of FOISA; and in response to request (iii) it referred the Applicant to published statistics and stated that as the information he wanted was already in the public domain, it was withholding it under section 25(1) of FOISA.
 3. On 31 October 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because the Authority had wrongly narrowed the scope of requests (i) and (ii) to justice issues, and he challenged its reliance on section 30(b)(i) and 30(c) of FOISA to withhold all of the information falling within the scope of request (ii).
 4. The Authority notified the Applicant of the outcome of its review on 28 November 2024 and acknowledged that it had wrongly limited the scope of requests (i) and (ii) to justice issues. The Authority broadened its interpretation of the requests and provided the Applicant with some documents falling within the scope of request (i) with information redacted under sections 28(1), 30(b)(i) and 38(1)(b) of FOISA. The Authority also advised the Applicant that some information falling within the scope of request (i) was already in the public domain, and it provided him with weblinks to this information and withheld it under section 25(1) of FOISA. In relation to request (ii), the Authority maintained its previous reliance on section 30(b)(i) and 30(c) of FOISA.
 5. On 28 November 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. He stated that he was dissatisfied with the outcome of the Authority's review because he considered that it had misapplied the exemptions and that the public interest favoured disclosure.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 4 December 2024, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments.
8. The Authority was also 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.
9. 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.

Commissioner's analysis and findings

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

Scope of the investigation

11. This decision will consider the Authority's response to requests (i) and (ii).
12. The Applicant did not challenge the Authority's reliance on section 25(1) of FOISA. As a result, the Commissioner will not consider this exemption in this decision.

Withheld information

13. The Authority is withholding 26 documents in their entirety, and it has redacted information from one document which it disclosed to the Applicant. A summary is provided below:

Sections 30(b)(i)

14. Documents 1-25 (wholly withheld – parts redacted under 30(b)(i))
15. Document 26 (released to the Applicant with some information redacted)

Section 30(c)

16. Documents 1 to 25 (wholly withheld – parts redacted under 30(c))

Section 28(1)

17. Document 26 (released to the Applicant with some information redacted)
18. Document 26(a) (wholly withheld)

Section 38(1)(b)

19. Documents 1 to 26 (applied to parts of each document)

Section 28(1) (Relations within the United Kingdom)

20. The Authority is withholding parts of document 26 and the entirety of document 26a under this exemption. These documents fall within the scope of request (i).

21. Section 28(1) of FOISA exempts information if its disclosure would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration. The Scottish Administration and the Government of the United Kingdom both fall within the definition of "administration in the United Kingdom" in section 28(2) of FOISA.
22. This is a broad exemption, and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to relations between administrations by disclosure of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
23. For section 28(1) to apply, the harm resulting from disclosure must be at the level of substantial prejudice. There is no definition of substantial prejudice in FOISA, but the Commissioner's view is that in order to claim this exemption an authority must be able to satisfy him that the damage caused, or likely to be caused, by disclosing the information would be both real and significant, as opposed to hypothetical or marginal. For the harm to be likely, there would require to be at least a significant probability of it occurring, in the near or foreseeable future and not at some distant time.

The Authority's comments on section 28(1)

24. The Authority submitted that disclosure would substantially prejudice its ability to engage with the UK Government. It argued that it needed to maintain an open, trusting and collaborative relationship with the UK Government, who were responsible for producing, and sharing with the Scottish Government, the information withheld under section 28(1) in this case.
25. The Authority argued that it was vital that the lines of communication between the Scottish Government and the UK Cabinet Office remained clear and uninhibited and that they were able to share information packs with them to brief the FM ahead of meetings, to ensure he was fully informed. It noted that the information was shared with the Scottish Government in advance of the meeting and it was intended to be treated as confidential. The Authority submitted that disclosure of the information would substantially prejudice the likelihood that such collaboration could occur in future, and it would be unable to or would be substantially inhibited from participating in meetings with the UK Government going forwards.
26. It further submitted that it could only expect to receive advance notice of sensitive information if it treated the information with appropriate discretion. The Authority contended that it was necessary that this relationship remained open and that it had the ability to work together on issues of mutual concern and policy developments.
27. The Authority explained that it had sought comments from the UK Cabinet Office, and it provided the Commissioner with copies of those comments. It argued that these comments demonstrated that the UK government considered that release of the comments would be harmful. The Authority argued that if the information was disclosed, the UK Government would consider it to be a breach of trust and would be reluctant to work as closely with the Scottish Government on such matters in the future.

The Commissioner's view on section 28(1)

28. The Commissioner has considered the content of both documents, in conjunction with the arguments put forward by the Authority.

Document 26a

29. The Commissioner is satisfied that disclosure of this information in document 26a would not, or would not be likely to, prejudice substantially relations between the UK Government and the Scottish Government. He has considered the comments made by the UK Cabinet Office and he does not find them compelling. The UK Cabinet Office have suggested that document 26a contains analysis and if the information request had been made to it directly, it would likely withhold the information under an exemption. (The Commissioner notes however that “relationships” under the equivalent UK legislation need only be prejudiced, not prejudiced “substantially” as is the case under FOISA. The Scottish exemption therefore has a higher threshold). The UK Cabinet Office also acknowledges that document 26a is based on publicly available data.
30. The Commissioner has reviewed the content of document 26a and he cannot see how harm would result from its disclosure. He does not consider the information to be so sensitive that the Authority was required to treat it in confidence, and he cannot perceive why its disclosure would prevent the UK Government from working closely with the Scottish Government in the future.
31. In the circumstances, considering the publicly available content of most of the information contained in document 26a, and the limited amount of analysis and commentary, the Commissioner finds that the exemption contained in section 28(1) of FOISA has not been correctly applied to the information being withheld in documents 26a.
32. As the Commissioner has found that section 28(1) of FOISA does not apply to document 26a, he is not required to consider the public interest at this point. He requires the Authority to disclose this information to the Applicant.

Document 26

33. The Commissioner has considered the content of documents 26, in conjunction with the arguments put forward by the Authority.
34. The information withheld under section 28(1) is a reference, on page 31, which refers to and contains an embedded link to document 26a. As the Commissioner has already determined that document 26a is not exempt from disclosure under section 28(1), he must also conclude that the reference and link to document 26a in document 26, is also not exempt from disclosure under section 28(1) of FOISA.
35. As the Commissioner has found that section 28(1) of FOISA does not apply to this part of document 26, he is not required to consider the public interest. He requires the Authority to disclose this information to the Applicant.

Section 30(b)(i) – substantial inhibition to free and frank provision of advice.

36. The Authority is withholding information in documents 1 to 26 under section 30(b)(i) of FOISA. Documents 1 to 25 are within a “briefing pack” for the FM (for FMQs) and are being withheld in full (with information either withheld under 30(b)(i) or 30(c) of FOISA) and document 26 comprises documentation/briefings for the FM. Document 26 was disclosed to the Applicant with some information redacted under 30(b)(i).
37. Section 30(b)(i) of FOISA provides that the information is exempt if its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice. The exemption is subject to the public interest test in section 2(1)(b) of FOISA.

38. In applying this exemption, the chief consideration is not whether the information constitutes advice, but whether the disclosure of that information would, or would be likely to, inhibit substantially the provision of advice. The inhibition in question must be substantial and therefore of real and demonstrable significance.

The Authority's comments on section 30(b)(i)

39. The Authority explained that documents 1 to 25 set out candid advice to the FM in advance and in preparation for FMQs, and document 26 combines a number of submissions from policy areas to the FM, setting out advice on various topics.

Documents 1 to 25

40. The Authority argued that the information was exempt from disclosure as FMQ advice must be free and frank in order to allow the FM to give the best response possible to questions that are asked. It submitted that it was vital to the effective functioning of FMQs that the FM could be briefed appropriately, and disclosure of this advice would result in officials being less likely to give such candid advice in the future.
41. The Authority submitted that in comparison to Prime Ministers Questions at Westminster, FMQ debates tended to be more substantive and less political. It noted that the FM regularly referred to figures, statistics and used quotes from respected stakeholders to support their arguments. The Authority submitted that there was a significant risk that should this information be disclosed, future advice would become less detailed and rely much more on general information.
42. The Authority stated that in order to prepare the FM, it was necessary to provide a free and frank assessment of what the lines of attack from opposition leaders may be, and to outline these within advice to the FM. It argued that, given the challenging nature of the FMQ process, these lines were critical of the Government's position or actions, and were presented without context or assessment of their validity within these briefings.
43. The Authority submitted that, as part of this process, officials presented the Government's position in a negative light, often as a list of criticisms, as this was how it would be presented by the opposition. It argued that this was not a full, or often accurate, reflection of the position and it was not one that officials would present outwith the briefing process of FMQs. The Authority submitted that officials would be unwilling to present such critical arguments in this way if it was likely that they would be ultimately disclosed into the public domain, as doing so may be seen to give validity to these lines.
44. The Authority contended that the result of the substantial inhibition to officials' ability and willingness to provide such a frank assessment of likely points of attack as part of this written briefing would have a detrimental effect on the FM's ability to prepare for the questions that would be directed at them, and consequently the ability to robustly defend the Government's position would be compromised and the quality of this important public debate (and means of holding the government to account) would suffer.
45. The Authority explained that the officials' assessment was discussed with the FM who may specify a particular subject that they would like additional briefing on, based on a similar assessment. It argued that the very existence of a briefing (within the briefing pack) reflects the outcome of that free and frank advice. If the contents of the FMQ folder were made public then there was a significant risk that this would be framed as a Government "worry list", which would be a mischaracterisation of the position, even where individual material within the brief itself may

seem to be, on the face of it, uncontroversial. If this occurred, the Authority argued that it was likely to lead to officials being reluctant to identify issues, or provide as much detail, as a result of concern that their advice would be disclosed - thereby having the effect of inhibiting the provision of free and frank advice.

46. The Authority submitted that the background provided within the briefings presented a summary of the criticisms the FM may face in Parliament on a given subject so that they could be fully prepared in advance. It contended that this was not a balanced assessment of stakeholder or public opinion as it focused on the negative responses only and if it was released in that format, it would give a distorted view of the position. The Authority commented that if officials were concerned about the release of the content of briefings on sensitive matters, it was more likely that they would be reluctant to present criticisms so candidly in writing for fear of appearing to give them undue weight or credence. The Authority submitted that its previous experience of similar situations demonstrated that this resulted in a greater degree of oral briefing, and less detailed written briefings.
47. The Authority noted that there was a high level of political interest in the context of the FM briefings with opposition parties regularly submitting FOI requests for all or part of its contents. It submitted that should the contents be released, as a consequence of this appeal, then its expectation was that such requests would become routine, and it would need to adjust its processes to reflect an expectation that every briefing would end up in the public domain, resulting in less frank and candid advice being given. It argued that this would affect the way that FMQs were prepared and presented.
48. The Authority explained that if FMQ briefings were routinely requested and disclosed, the frank assessment of the likely lines of attack would be removed from the written briefing and would probably be replaced by a fuller briefing which covered the policy in a more balanced way. It noted that the points of attack would then be drawn out in discussion with the FM with the FMQ team and Special advisors.
49. The Authority submitted that as the briefings draw on a large number of policy areas it would not be practical, given the demands on the FM's time, for every policy official to be part of that discussion, meaning some of their detailed knowledge and understanding of the issues might be lost in that process. The Authority contended that it was likely that the quality of the briefing would suffer from such a change and that the FM's preparation would also suffer as it would rely on recall from that discussion rather than on a written briefing, used both as part of their preparations and as a reference document in the chamber.
50. The Authority submitted that the format of the advice on how the FM should respond to likely challenges would also change (as a result of disclosure) so that it was a briefing that covered the policy in fuller, more balanced terms, rather than focusing on the areas which have been subject to criticism. The Authority reiterated its view that officials would be substantially inhibited from providing such advice were it to be disclosed. It submitted that it would be for the First Minister to extract from this longer, more balanced briefing, the lines they might wish to use having reflected on the verbal briefing they had received.
51. The Authority noted that each fuller briefing would be significantly longer and this would place a much greater demand on the FM's capacity and have a significant impact on their ability to prepare for FMQs which may not be feasible given the already limited window that is available for preparation. The Authority argued that it may be necessary to narrow the

scope of the briefing provided to the FM, meaning that the risk of being asked a question in the chamber that the FM has not prepared for would increase.

52. The Authority submitted that the cumulative impact of these changes would be that the First Minister would have a less focused briefing that was no longer targeted to the adversarial nature of FMQs. It argued that it was foreseeable that the kind of evidence based detailed responses that have been given at FMQs in the past would be less likely and answers would become more high level and less substantive. Given the important role that FMQs play in holding Government to account, the Authority submitted that if this occurred it would be detrimental to the parliamentary process, and would not be in the public interest. The Authority submitted that as FMQs were widely reported on this would also impact on the public's understanding and perception of Government.

Document 26

53. The Authority acknowledged that document 26 did not contain FMQ briefings, but it noted that it did contain briefings to the FM, and it considered that many of the arguments that it outlined above in relation to FMQ briefings were also relevant to these non-FMQ briefings to the FM. It noted that an argument that underpinned each briefing was that it was essential for officials to be able to communicate freely with the FM, and set out clear advice and make recommendations. The Authority contended that officials would be reluctant to set out the potential options open and associated analysis of the potential consequences of actions taken as fully and in such candid terms if they thought that their free and frank handling advice would be disclosed into the public domain.
54. The Authority argued that the ability of the Scottish Government to test robustly proposed positions before using them publicly would be compromised substantially if every briefing had to be disclosed. It argued that officials would be far less likely to provide advice that fully tested all propositions if this advice was to be disclosed. The Authority submitted that disclosure was also likely to result in Ministerial briefings being less detailed, which would diminish the quality of the advice provided to Ministers. It stated that disclosure in this case, would result in Scottish Government officials being inhibited from providing advice of this nature in future.
55. The Authority provided the Commissioner with comments on some of the briefings included in document 6.
56. It noted that briefing 2 was prepared as a briefing to the FM for an inaugural meeting of the Council of the Nations and Regions that involved the Prime Minister and the heads of all the devolved governments meeting in person in Edinburgh along with the Mayor of London, Mayors of Combined Authorities and County Combined Authorities.
57. The Authority explained that this briefing pack included information and advice to the FM in preparation for his attendance at the CNR plenary as well as the separate meeting with the Prime Minister and other heads of devolved governments. In addition, it noted that the FM was briefed for his one-to-one bilateral with the Prime Minister. The Authority argued that the briefing in the pack covers a range of domestic and international issues including the UK Budget, Energy and the ongoing conflict in the Middle East including Lebanon and Gaza.

It submitted that, given the sensitivity of these topics, release of this kind of material prepared specifically for the FM would inhibit officials' ability to freely and frankly inform and advise the FM in this way in future. If this occurred, the Authority argued that it would essentially result in a "running commentary" of the FM's thinking on current and sensitive issues which would

cause unnecessary tensions between him and the Prime Minister and other leaders within the UK. It argued that the FM should have a private space to consider advice from officials on live and ongoing issues and if this were to be disclosed it would make the UK Government less likely to engage and fully brief the Scottish Government in the future.

58. The Authority explained that briefing pack 4 was prepared to inform the FM of a meeting with the Scottish Human Rights Commission (SHRC). It explained that the withheld information related to the relationship with the SHRC, which has been challenging, and the intention was to inform the FM that the meeting provided an opportunity to reset relations with the appointment of a new chair.
59. The Authority submitted that the briefing contained further information that represented advice following candid discussions between Authority officials and the SHRC. The Authority argued that if this advice was to be disclosed then officials would be less likely to provide advice that fully explained the planned direction of a meeting. It submitted that disclosure was also likely to result in Ministerial briefings being less detailed, which would diminish the quality of the advice provided to the FM. Furthermore, the Authority argued that disclosure could breach its trust with the stakeholder and potentially inhibit free and frank internal advice on the Authority's position with important stakeholders which would compromise the relationship with SHRC.
60. The Authority explained that briefing pack 6 was prepared to inform the FM of a meeting with the Scottish Catholic International Aid Fund (SCIAF) CEO Lorraine Currie in relation to receiving funding for projects from the International Development Fund, Humanitarian Emergency Fund and the Climate Justice Fund. It noted that the advice provided to the FM was in relation to live policy discussions and funding decisions where action was yet to be taken. The Authority argued that disclosure of this information would result in Ministerial briefings being less detailed, which would diminish the quality of the advice provided to the FM. It submitted that if this advice were to be disclosed then external stakeholders would know what the current discussions entailed and would risk a premature decision that would not be fully informed. It added that this would hinder the process in allocating public funds and prejudice further discussions with SCIAF.
61. The Authority explained that briefing pack 8 was prepared for the FM regarding a meeting with the Policy Chair of the City of London Resources Committee. It reiterated its previous view that disclosure of the information in this briefing would result in Ministerial briefings being less detailed, which would diminish the quality of the advice provided to the FM. It submitted that by providing this briefing to the FM, it allowed officials to provide advice on plan proposals and content for this visit and plans to refresh and update the partnership agreement with the City of London before coming to a final decision. The Authority argued that officials needed to have a space to present messaging around the investment summit freely and choose an appropriate forum to deliver this messaging. It commented that if it did not have this ability to present various options, the process for working with the city of London to agree objectives would be hindered.
62. In summing up its position, the Authority noted that under the terms of the Civil Service Code, civil servants were expected to carry out their duties with honesty (being truthful and open) and objectivity (basing advice on rigorous analysis of the evidence). It submitted that if officials failed to offer genuine assessment and instead, offered generalities because of the disclosure of FMQ briefings, this would put Scottish Government civil service officials at risk of falling short of the obligations and requirements placed on them under the Civil Service Code.

63. The Authority argued that in order to assist the FM with preparation for FMQs, officials have to provide candid advice on any subject that may come up, and this advice reflected an assessment of the level of controversy as well as the nature and extent of political and public attention that was being generated. The Authority submitted that if officials believed that the result of their assessment would be released, there was a substantial risk that they would avoid genuine assessment and instead offer generalities, thereby having the effect of inhibiting the provision of free and frank advice.
64. The Authority explained that the other briefings to the FM were prepared and presented by Scottish Government Officials where they provided candid advice on various policy topics and upcoming meetings. It argued that if officials were unable to provide candid advice not only would the quality of the advice be diminished as it would be less detailed, external stakeholders such as the UK Government, SCIAF and SHRC would not be able to share information to inform the Scottish Government on matters of mutual interest in as much detail. Furthermore, it argued that Scottish Government officials' relationship with these external stakeholders would be compromised if the advice was disclosed.
65. The Authority contended that disclosure of this information would substantially inhibit the ability of officials to give free and frank advice to the First Minister to allow him to answer questions and for the government to be held accountable by Parliament and to be briefed on policy matters and in advance of meetings.

The Commissioner's view on section 30(b)(i)

66. The Commissioner has carefully considered all of the arguments he has received, together with the withheld information.
67. The Commissioner notes that in this case, the Applicant made his request for information at 13:01 on 10 October 2024, minutes after that day's edition of FMQ's had finished. He notes that the request was seeking the briefings that were given to the FM in advance of that edition of FMQs. He considers the timing of the request to be relevant here, given how soon it was made after discussion in the chamber had ended. While transcripts of FMQs are made available, and discussions in the chamber can be watched live, the briefings that inform the FM prior to FMQs are not routinely published.
68. The Commissioner has accepted, in previous decisions, that the Scottish Government and its officials require a private space to provide advice to Ministers, particularly in cases where that advice is free and frank. He accepts the Authority's arguments that the advice contained in the briefings was given by officials, freely and frankly and with little to no expectation that it would be disclosed. He also accepts that if officials expected their advice to be disclosed, it would likely take a different form, as outlined by the Authority, and disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice in the future.
69. He accepts that, in the circumstances of this case, officials required a private space to prepare and present advice to the FM, that prepared him for potentially hostile questioning in the chamber.
70. The Commissioner has also considered the briefings contained in document 26, which were not provided for FMQs, but were given to the FM to prepare him for various meetings and discussions. He also finds that disclosure of this information would, or would be likely to, inhibit substantially the free and frank provision of advice. He accepts that officials would be

less likely to be so candid in future, for fear that their advice would be disclosed, and relationships with stakeholders would be negatively impacted.

71. However, the Commissioner is not satisfied that the exemption has been applied correctly to all of the information withheld under section 30(b)(i) of FOISA. He considers that some of the information contained in the briefings is purely factual or statistical and contains no advice.
72. Specifically, the Commissioner considers that the entirety of documents 1, 17, and 22, and some sections of documents 4, 7, 10, and 12, have been wrongly withheld under section 30(b)(i) of FOISA.
73. As the Commissioner has found that section 30(b)(i) of FOISA does not apply to this information, he is not required to consider the public interest. He requires the Authority to disclose this information to the Applicant.
74. The Commissioner considers that disclosure of the remaining information would, or would be likely to, inhibit substantially the free and frank provision of advice for the purposes of deliberation in the future. The Commissioner is therefore satisfied that this information is exempt from disclosure under section 30(b)(i) of FOISA. He will now go on to consider the application of the public interest test in section 2(1)(b) of FOISA.

The public interest test

75. As noted above the exemption in section 30(b)(i) is subject to the public interest test required by section 2(1)(b) of FOISA.

The Authority's comments on the public interest

76. The Authority recognised that there was some public interest in the release of the information withheld in the interests of openness, transparency and government accountability. It also acknowledged the general public interest in what goes into the pack that the FM uses to answer questions at sessions of FMQ's. It argued that the public interest in some of this information that was statistical in nature was met because this information was published in various different places. It submitted that this public interest was also met in the answers that the FM gives and the subsequent publication of the session on the Scottish Parliament's website.
77. However, the Authority argued that the withheld information represented free and frank advice given to the FM to allow him to understand the background to the questions that he may be asked at FMQs. It submitted that this information summarised criticisms and did not represent a balanced consideration of the issues. In fact, it noted that it was often the case that the Government's view of the criticisms raised in the FMQ briefings would be that they were unfounded or misrepresented the Government's position.
78. The Authority stressed that the FMQ brief does not include considerations on the validity or otherwise of the comments, and it argued that publishing them in this format, without context, would give disproportionate weight to criticism and the potential for misinterpretation.
79. The Authority argued that it remained important that the FMQ team were able to share a free and frank summary of the criticisms so that the FM was fully prepared for the debate in Parliament. It stated that the FMQ process had an important role in providing parliamentary scrutiny of Government.

80. It noted that, during FMQs, every MSP had an opportunity to question the FM on issues that were important to their constituents. It argued that a comprehensive briefing was vital in order for the FM to provide detailed substantive answers to those enquiries. The Authority submitted that should the quality of the debate or the substantive nature of the responses at FMQs, be impacted by changes to the briefings provided to FM, then an important function of the Scottish Parliament would be negatively impacted, and the public accountability of Government reduced.
81. In relation to the briefings within document 26, the Authority argued that it was important to protect some private spaces, to allow all options to be fully and properly considered. It argued that this was to the overall benefit of good decision making, and to ensure that the process for briefing ministers was developed with the best advice in order that sound decisions were taken ahead of meetings. The Authority argued that it was not in the public interest to disclose advice ahead of important decision making or where disclosure would hinder further relations with the stakeholders discussed, which would impact the Government's ability to negotiate.
82. The Authority contended that the public interest lay in upholding the exemption and protecting a private space to allow officials to brief the FM to support the FMQ public function and to brief the FM on policy matters and ahead of important meetings with stakeholders

The Applicant's comments on the public interest

83. The Applicant rejected the arguments put forward by the Authority and argued that the public interest favoured disclosure.

The Commissioner's view on the public interest - section 30(b)(i)

84. The Commissioner has carefully considered all of the public interest arguments he has received.
85. The Commissioner acknowledges that there is a public interest in transparency in relation to the actions and decision-making processes of the Scottish Government, and he accepts that disclosure of the free and frank advice contained in the withheld information would shed some light on these actions and processes.
86. However, the Commissioner also accepts that disclosure of this information would have an adverse impact on such free and frank advice being provided in future. The Commissioner recognises that officials must be allowed to offer free and frank advice to the FM in preparation for FMQs and on other matters, such as policy development or preparation for meetings with stakeholders and other external parties. The Commissioner considers that it is in the public interest, that the FM is fully briefed in advance of meetings with stakeholders, in order to ensure that he can negotiate for the best outcome for the Scottish people.
87. While there is a public interest in transparency in how the FM is briefed in advance of FMQs, this must be balanced against the public interest in the Authority being able to provide the FM with advice in a private space in relation to how to respond to questions at FMQs. The Commissioner recognises that there is a substantial public interest in ensuring that officials can offer the FM free and frank advice in preparation for FMQs.
88. The Commissioner considers that if all such preparatory material required to be routinely disclosed this would substantially inhibit the production of the FMQs briefing, with the result that the FM would be less able to participate fully in FMQs. He accepts that the public interest does not lie in disclosing information that would limit such future provision of advice,

where to do so would substantially inhibit the quality of that advice or the ability of the FM to participate fully in FMQs.

89. He considers that disclosure of this advice, would or would be likely, to lead to less frank advice being provided in future, and if this occurred, it would impede the Authority's ability to fully prepare the FM for FMQ's and it would also negatively impact on the Authority's decision-making in relation to other policy matters, and in how it engaged with external parties on matters of joint interest.
90. Consequently, the Commissioner finds that the public interest in maintaining the exemption outweighs that in making the information available. He therefore accepts that the information was properly withheld under the exemption in section 30(b)(i) of FOISA.

Section 30(c) of FOISA Prejudice to effective conduct of public affairs

91. As noted above, the Authority is withholding information in documents 1 to 25 under section 30(c) of FOISA. Documents 1 to 25 are within a "briefing pack" for the FM (for FMQs) and are being withheld in full (with information either withheld under 30(b)(i) or 30(c) of FOISA) Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs."
92. The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b). This is a broad exemption, and the Commissioner expects any public authority citing 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. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
93. In order for the exemption in section 30(c) to be upheld, the prejudice caused by disclosure must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case-by-case basis, taking into consideration the content of the information and all other relevant circumstances.

The Authority's comments on section 30(c)

94. The Authority confirmed that it was withholding some of the information in documents 1 to 25 under section 30(c) of FOISA. It commented that FMQ's provided a critical role in providing public and Parliamentary scrutiny on the policies of Scottish Government.
95. The Authority explained that If opposition parties were aware in advance of how the FM will respond to their challenges, the FM's position in the debate would be undermined. It argued that this would have a detrimental impact on the FM's ability to robustly defend the position of Scottish Government. The Authority submitted that it was not possible for it to predict what lines would be used in the future as questions to the FM may be on any topic and were not known in advance, however, many of the briefings (in documents 1 to 25) would be reused as the subjects remained topical.
96. It argued that it would not want to be in a position where the opposition parties had access to these lines ahead of the debate as this would undermine the FM's position as the opposition leaders would have the advantage of knowing what the FM was likely to say but the FM would have no idea what the opposition parties were going to ask.

97. The Authority noted that there were also wider issues around disclosing the FM's tactical choices and preferences, which would result from disclosure of the full pack or folder. It argued that disclosure of the folder would provide an insight as to debate tactics and how the FM prepares and formulates responses, which would again give an advantage to the opposition parties which, again, would undermine the FM's position.
98. The Authority submitted that, given the already high levels of interest from political parties in the contents of the FMQ folder, should this material be released it would expect requests to become routine and it would revise the process and contents of briefing to reflect an assumption of publication. In that instance the Authority would not be able to tolerate a position where the lines used by the FM would be available to the opposition leader and would no longer be able to provide lines of this nature as part of the briefing. As a result, the briefings would instead cover the substance of the policy, making them longer and less focussed and requiring the FM to then construct their lines themselves.
99. It argued that, if this occurred, it would create a number of issues:
- It would make the briefing pack substantially longer which would be difficult for the FM to manage within the limited window for preparation.
 - As the FM would be drafting their own lines there would be no ability for the policy officials who hold the detailed knowledge and understanding to feed into this which could lead to inaccuracies. There would no longer be an easy reference document that could be used by the FM in the chamber. The net effect would be that the FM would be less well prepared for a substantive debate, and answers would likely to be less detailed to reduce any risk of inaccuracies. The Authority argued that it was also likely that the FM would be unable to fully read and digest a significantly longer briefing pack, increasing the likelihood that they may be asked about a topic they were not fully prepared for.
100. The Authority submitted that, given the public nature of the debate and the extent to which it is reported on, this would not only have political implications but would affect public perception. Allowing the FM's lines and tactics to be disclosed ahead of them being used would substantially prejudice the effective conduct of public affairs in its impact on how FMQs would function and its effectiveness at allowing scrutiny of the government

The Commissioner's views on section 30(c) FOISA.

101. The Commissioner has carefully considered all the arguments he has received, together with the withheld information.
102. The Commissioner considers the timing of the request to be relevant here, given how soon it was made after discussion in the chamber had ended.
While transcripts of FMQs are made available, and discussions in the chamber can be watched live, the briefings that inform the FM prior to FMQs are not routinely published.
103. The exemption in section 30(c) of FOISA can potentially apply to a wide range of situations. The Commissioner takes a case-by-case approach when reaching a decision on whether the exemption has been correctly applied.
104. The Commissioner accepts that, in the circumstances of this case, disclosure of the information would, or would be likely to, prejudice substantially the effective conduct of public affairs. He accepts that disclosure of some of the withheld information in documents 1 to 25, would disadvantage the FM as it would enable opposition parties to anticipate, with some accuracy, the responses the FM would provide at FMQ's. If this occurred, it would make

FMQ's a more one-sided affair, with the opposition able to ask key probing questions, while the FM would be underprepared.

105. The Commissioner also accepts that if the Authority expected the briefings it provided to the FM to be published, the content of those briefings would be likely to change. He considers that future briefings would be significantly more bland, and arguably less useful to the FM, and if this occurred it would lessen the quality of debate in the chamber, and it would also lead to a decline in the quality of the answers provided by the FM, which would have a detrimental impact on public debate.
106. The Commissioner acknowledges that the topics covered in the briefings are not specific to FMQ's and the information and "lines" or advice within, may well be reused in other arenas.
107. However, the Commissioner is not satisfied that the exemption has been applied correctly to all of the information withheld under section 30(c) of FOISA. He considers that some of the information contained in the briefings is purely factual or statistical and contains no advice from officials.
108. Specifically, the Commissioner considers that the entirety of documents 1, 17, and 22, and some sections of documents 4, 7, 10, and 12, have been wrongly withheld under section 30(c) of FOISA.
109. As the Commissioner has found that section 30(c) of FOISA does not apply to this information, he is not required to consider the public interest. He requires the Authority to disclose this information to the Applicant.
110. The Commissioner considers that disclosure of the remaining information would, or would be likely to, inhibit substantially the free and frank provision of advice for the purposes of deliberation in the future. The Commissioner is therefore satisfied that this information is exempt from disclosure under section 30(c) of FOISA. He will now go on to consider the application of the public interest test in section 2(1)(b) of FOISA.

Public interest test - section 30(c)

111. As noted above the exemption in section 30(c) is subject to the public interest test required by section 2(1)(b) of FOISA.
112. The "public interest" is not defined in FOISA but has been described as "something which is of serious concern and benefit to the public", not merely something of individual interest. The public interest does not mean "of interest to the public" but "in the interest of the public", i.e. disclosure must serve the interests of the public.

The Authority's comments on the public interest – 30(c)

113. The Authority recognised that there was a public interest in disclosure for reasons of openness, transparency and government accountability. It also recognised the public interest in the material provided for the FM in order that they can answer questions at FMQ's.
114. However, The Authority argued that these briefings (documents 1 to 25) did not represent a balanced consideration of the issues, or form part of the decision making and governance of Government; it argued that their focus was on defensive lines which could be used in a political debate. It maintained that this differed substantially from other advice and briefings received by Ministers which provide detailed consideration of the issue and/or invite Ministers to make a decision.

115. The Authority explained that the information in the briefing pack for FMQs contributed substantially to the nature and quality of the debate at FMQs and, should the content of the briefing pack be known to the Opposition, the nature of the debate would be likely to change as a result, making it less substantive. The Authority argued that it was important to give the FM a private space to prepare for FMQs and for the FM to determine the answers they choose to give in their role as FM.
116. The Authority commented that although it acknowledged the public interest in the release of this information, for the reasons outlined above, it considered that the public interest in allowing the FM space to be briefed appropriately outweighs the public interest in disclosure.

Applicant's submissions on the public interest

117. The Applicant rejected the arguments put forward by the Authority and contended that the public interest favoured disclosure.

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

118. The Commissioner has taken account of all of the relevant submissions, together with the withheld information.
119. As outlined above, the Commissioner has already accepted that disclosure of the content of the briefings would, or would be likely to, cause substantial prejudice to the effective conduct of public affairs.
120. The Commissioner acknowledges that there is a public interest in transparency in relation to the actions and decision-making processes of the Scottish Government, and he accepts that disclosure of the content of the briefings in the withheld information would shed some light on these actions and processes.
121. However, the Commissioner also accepts that disclosure of this information would have an adverse impact on the effective conduct of public affairs. He recognises that content of the briefings contributes substantially to the nature and quality of the debate at FMQs. The Commissioner also considers that the content of the briefings is sensitive information, disclosure of this information would prejudice the effective conduct of the FM and would limit the windows of preparation of the briefing pack for FMQs.
122. The Commissioner considers that if all such preparatory material was required to be routinely disclosed under FOISA, it would negatively impact on the quality and content of briefings provided to the FM for FMQs, with the result that the FM would be less able to participate fully in FMQs. If this occurred, the Commissioner accepts that it would reduce the quality of information provided at FMQ's as well as the quality of the debate. The Commissioner considers that this would not be in the public interest. In the Commissioner's view, the public interest lies in permitting the FM to have a private space within which he can be given advice from officials to help him prepare and participate fully in FMQs.
123. Consequently, the Commissioner finds that the public interest in maintaining the exemption outweighs that in making the information available. He therefore accepts that the information was properly withheld under the exemption in section 30(c) of FOISA.

Section 38(1)(b) – Personal information

124. Section 38(1)(b), 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.

125. 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 also not subject to the public interest test contained in section 2(1)(b) of FOISA.
126. To rely on the exemption in section 38(1)(b), the Authority must show that the information 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 in Article 5(1) of the UK GDPR.

Is the withheld information personal data?

127. Personal data” is defined in section 3(2) of the DPA 2018 as “any information relating to an identified or identifiable living individual”. Section 3(3) of the DPA 2018 defines “identifiable living individual” as “a living individual who can be identified, directly or indirectly, in particular with reference to –
 - an identifier such as a name, an identification number, location data or an online identifier, or
 - one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.”
128. The Authority submitted that the information being withheld under section 38(1)(b), in this case consists of names of individuals. As such those individuals can be identified from this information and therefore it is personal data as defined by section 3(2) of the DPA 2018.
129. The Authority submitted that none of the personal data being withheld falls into any of the special categories of personal data.
130. The Authority explained that the Scottish Government has a general approach of disclosing information about senior members of staff, releasing details of those within senior civil service roles and officials with relatively senior roles that are public facing, but withholding those details for more junior members of staff. It submitted that it took the same approach to individuals within third party organisations, where their level of seniority may not be known and based on whether they have a high public profile or not.
131. Having reviewed the withheld information, the Commissioner is satisfied that the information being withheld under section 38(1)(b) of FOISA is personal data. He notes that it comprises names and contact details of identifiable living individuals and the information therefore clearly relates to those individuals.

Would disclosure contravene one of the data protection principles?

132. The Authority argued that disclosing the personal data would breach the first data protection principle in 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”. The definition of “processing” is wide and includes (section 3(4)(d) of the DPA 2018), “disclosure by transmission, dissemination or otherwise making available”. In the case of FOISA, personal data are processed when disclosed in response to a request.

133. This means that, if it existed and were held, the personal data could only be disclosed if disclosure would be both lawful (i.e. if it would meet one of the conditions of lawful processing listed in Article 6(1) of the UK GDPR) and fair.
134. The Commissioner considers that condition (f) in Article 6(1) is the only one which could potentially apply in the circumstances of this case.

Lawful processing: Article 6(1)(f) of the UK GDPR

135. Condition (f) states that processing shall be lawful if it 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 protection of personal data.
136. Although Article 6(1) states that this condition cannot apply to processing carried out by a public authority in performance of its tasks, section 38(5A) of FOISA makes it clear that public authorities can rely on Article 6(1)(f) when responding to requests under FOISA.
137. The tests which must be met before Article 6(1)(f) can be met are as follows:
- (i) Would the Applicant have a legitimate interest in obtaining personal data, if held?
 - (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 subject?

Would the Applicant have a legitimate interest in obtaining the personal data, if held?

138. There is no definition within the DPA 2018 of what constitutes a “legitimate interest”, but the Commissioner takes the view that the term indicates that matters in which an individual properly has an interest should be distinguished from matters about which he or she is simply inquisitive.
139. The Commissioner’s published [guidance on section 38\(1\)\(b\) of FOISA](#)¹ states:
- “In some cases, the legitimate interest might be personal to the applicant, e.g. he or she might want the information in order to bring legal proceedings. With most requests, however, there are likely to be wider legitimate interests, such as the scrutiny of the actions of public bodies or public safety.”
140. None of the personal data being withheld falls into any of the special categories of personal data, or is data relating to criminal convictions, offences, or related security measures.
141. The Authority submitted it was not aware of any legitimate interests that the Applicant had in the names and direct contact details of officials, nor did it consider that identifying the individuals would aid in the understanding of the withheld information. The Authority argued that even if the requester did have a legitimate interest in the information, it did not believe these would outweigh the individuals’ interests in protecting their privacy

¹ [https://www.foi.scot/sites/default/files/2025-04/FOISA Exemption Guidance Section 38 Personal Information v04 CURRENT ISSUE Access Checked.pdf](https://www.foi.scot/sites/default/files/2025-04/FOISA%20Exemption%20Guidance%20Section%2038%20Personal%20Information%20v04%20CURRENT%20ISSUE%20Access%20Checked.pdf)

142. The Applicant commented that he wanted to challenge the Authority's application of section 38(1)(b) of FOISA, as he did not have access to the information himself and so he could not be sure that it had been correctly applied.
143. Having considered the withheld information, along with the comments from the Authority and the Applicant, the Commissioner is not satisfied that the Applicant has a legitimate interest in obtaining the personal data. He understands that the Applicant wants to be satisfied that the Authority has applied the exemption properly, but he does not accept that the Applicant has a legitimate interest in obtaining the personal data of junior members of staff.
144. As the Commissioner has concluded that the Applicant does not have a legitimate interest in receiving the personal data redacted in this case, he finds that condition (f) of Article 6(1) of the GDPR cannot be satisfied. Accordingly, he accepts that making the personal data available under FOISA would be unlawful.
145. Given that the Commissioner has found that the processing (i.e. making the information available, in response to the Applicant's request) would be unlawful, he is not required to go on to consider separately whether disclosure of the personal data would be necessary to fulfil any legitimate interest, or consider the data subject's interests or fundamental rights and freedoms, and balance them against any legitimate interest in disclosure.
146. In all the circumstances of the case, in the absence of a condition in Article 6(1) of the GDPR being met, the Commissioner must conclude that making the withheld personal data available would be unlawful and would breach the data protection principle in Article 5(1)(a) of the GDPR. Consequently, he is satisfied that disclosure of the personal data is not permitted by section 38(1)(b) of FOISA.

Information to be disclosed

147. The Commissioner will provide the Authority with a marked up copy of the withheld information, identifying the information that he requires to be disclosed, along with this decision notice.

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 relying on the exemptions in sections 30(b)(i), 30(c) and 38(1)(b) to withhold certain information, the Authority complied with Part 1 of FOISA.

However, the Commissioner finds that the Authority failed to comply with Part 1 of FOISA by wrongly withholding some information under the exemptions in sections 28(1), 30(b)(i) and 30(c) of FOISA.

The Commissioner therefore requires the Authority to disclose the wrongly withheld information (to be detailed in a marked-up copy provided by the Commissioner), by 29 August 2025.

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

16 July 2025