



Scottish Information  
Commissioner

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# Decision Notice 315/2025

## All evidence to James Hamilton's investigation into the First Minister under the Ministerial Code

Authority: Scottish Ministers

Case Ref: 202400274

### Summary

The Applicant asked the Authority for all evidence to James Hamilton's investigation into the First Minister under the Ministerial Code. The Authority considered that some information was otherwise accessible to the Applicant and withheld the remaining information under various exemptions in FOISA. The Commissioner investigated and found that the Authority had partially failed to comply with FOISA in responding to the Applicant's request. He required the Authority to disclose some information which it had wrongly withheld and to reconsider part of the Applicant's request in relation to a small amount of information and issue a new review outcome.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (4) and (6) (General entitlement); 2(1)(a) and (b), and (2)(b) and (e)(ii) (Effect of exemptions); 26(c) (Prohibitions on disclosure); 30(c) (Prejudice to effective conduct of public affairs); 36(1) (Confidentiality); 38(1)(b), (2A), (5) (definitions 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); 50(1)(a) (Information notices); 53(2)(b) (Failure to comply with notice).

United Kingdom General Data Protection Regulation (the UK GDPR) Articles 5(1)(a) (Principles relating to the processing of personal data) and 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 13 January 2019, the First Minister referred to the independent advisers on the [Scottish Ministerial Code](#)<sup>1</sup> (the Ministerial Code) the question of whether she had complied with the Ministerial Code, in connection with a number of meetings and discussions between her and the former First Minister, Alex Salmond. James Hamilton, one of the independent advisers, was appointed to carry out an investigation in order to answer that question.
2. On 22 March 2021, Mr Hamilton's [report](#)<sup>2</sup> was published in a redacted form. Mr Hamilton found no breach of the Ministerial Code by the First Minister.
3. On 6 December 2023, the Applicant made a request for information to the Authority. He asked for:

"… all evidence submitted to James Hamilton's investigation into Nicola Sturgeon's self-referral into allegations that she breached the Code."
4. The Commissioner considered a separate but similar request for information in [Decision 279/2025](#)<sup>3</sup>. Further background information relevant to the request in this case is available in Decision 279/2025 at paragraphs 3 to 7 of that decision.
5. The Authority responded on 23 January 2024. It supplied the Applicant with links to some information it considered already accessible (and therefore exempt in terms of section 25(1) of FOISA), and it withheld the remaining information under the exemptions in sections 26(c), 30(c) and 38(1)(b) of FOISA.
6. Later that same day, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision because, while he accepted that some information might reasonably be withheld in response to his request, he did not agree that all of the information he had requested would be exempt from disclosure.
7. The Authority notified the Applicant of the outcome of its review on 20 February 2024, which largely upheld its original position and otherwise:
  - made some minor modifications which are not relevant to this decision
  - applied the exemption in section 36(1) of FOISA to certain information.
8. Later that same day, 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 disagreed with the application of the exemptions in sections 26(c), 30(c), 36(1) and 38(1)(b) of FOISA.

## Investigation

9. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

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<sup>1</sup> <https://webarchive.nrscotland.gov.uk/20241027204754/https://www.gov.scot/publications/scottish-ministerial-code-2018-edition/>

<sup>2</sup> <https://www.gov.scot/publications/independent-report-by-james-hamilton-on-the-first-ministers-self-referral-under-the-scottish-ministerial-code/>

<sup>3</sup> <https://www.foi.scot/decision-2792025>

10. On 3 April 2024, the Authority was notified in writing that the Applicant had made a valid application. The case was subsequently allocated to an investigating officer.
11. On 10 April 2024, given the sensitivity of the withheld information and the Authority's concerns about voluntarily providing it in relation to the separate but similar application considered in Decision 279/2025, the Commissioner issued an information notice to the Authority, under section 50(1)(a) of FOISA, requiring it to provide him with the withheld information. The Authority provided 37 documents to the Commissioner in response to his information notice.
12. 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. Further submissions were also sought and obtained from the Applicant.
13. During the investigation, the Authority confirmed that it wished to rely on the exemptions in sections 26(c) and 36(1) of FOISA, additionally, in relation to some information it had originally withheld under other exemptions in FOISA.
14. Given the existence of various court orders (the details of which are set out later) and the sensitivity of the withheld information, the Commissioner asked the Authority to confirm its definitive position in relation to the exemption(s) in FOISA applicable to the information withheld in this case. The Authority did so on 10 March 2025.
15. During the investigation, the Commissioner identified that the Authority had not provided him with certain information in response to his information notice which, if held, appeared would fall within the scope of the Applicant's request. The Commissioner asked the Authority to respond to this point and to, if the information was held, apply and explain any applicable exemptions under FOISA.
16. The Authority confirmed that it held this information, that it fell within the scope of the Applicant's request and apologised that it had omitted to provide it earlier. The Authority provided this information to the Commissioner, hereinafter referred to as "document 38".
17. On 27 November 2025, the Commissioner issued Decision 279/2025 which, by virtue of the terms of the request in that case, considered in its entirety the same withheld information considered in this decision notice.
18. The Commissioner must stress that he has considered the withheld information in this case on its own merits and regarding the circumstances at the time the review outcome was issued in this case. However, where appropriate, the Commissioner will refer to Decision 279/2025 in what follows to explain his conclusions in this case.

## **Commissioner's analysis and findings**

19. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.
20. Given the various court orders in place, the Commissioner is acutely aware of the sensitivity of the subject matter of the request and, consequently, some of the withheld information. He would therefore underline the seriousness with which he has approached this case. This extended to providing the Authority with a further opportunity (beyond the statutory requirement in section 49(3)(a) of FOISA) to review the withheld information again and to

confirm its definitive position in respect of the exemption(s) in FOISA applicable to that information.

21. Having been provided with that latitude by the Commissioner, the Authority did so on 10 March 2025, after it had consulted the Crown Office and Procurator Fiscal Service – a step it said it considered essential to mitigate the risks of breaching the court orders designed to prevent jigsaw identification.
22. The Commissioner would stress that he must reach a conclusion in relation to the withheld information based on the exemptions in FOISA actually applied by the Authority and on the submissions provided in support of the application of these exemptions. It is not for the Commissioner to identify information as exempt that has not been marked as such by the Authority or to otherwise make the case on its behalf. Any failure to identify information as exempt under an applicable exemption in FOISA – including information that, if disclosed, would breach one or more of the court orders – is, therefore, the responsibility of the Authority.
23. In this case, the Commissioner has endeavoured to give as full account of his reasoning as he can, but, as recognised by Court of Session in Scottish Ministers v Scottish Information Commissioner [2006] CSIH 8<sup>4</sup>, at paragraph [18]:  
"in giving reasons for his decision, [the Commissioner] is necessarily restrained by the need to avoid, deliberately or accidentally, disclosing information which ought not to be disclosed."
24. In this case, the Commissioner is unable to set out the Authority's (or his own) reasoning in full as doing so could itself lead to the breach of one or more court orders.

#### ***The withheld information***

25. The withheld information provided to the Commissioner by the Authority in relation to this case comprises information within 38 documents (documents 1-38) that the Authority considered exempt from disclosure in terms of the exemptions in the following sections of FOISA (variously):
  - 25(1) (Information otherwise accessible)
  - 26(c) (Contempt of court)
  - 30(c) (Prejudice to the effective conduct of public affairs)
  - 36(1) (Legal advice)
  - 38(1)(b) (Personal information).
26. As the Applicant did not challenge the Authority's reliance on section 25(1) of FOISA, the Commissioner will not consider information subject to that exemption further in his decision.
27. The Commissioner must also comment that the Authority's handling of the request and its change of position, during his investigation, in relation to what exemptions apply to what information (and how these relate to the position set out by the Authority in its submissions) have added an additional layer of complexity to understanding the Authority's position in relation to what is already complex and sensitive information.

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<sup>4</sup> <https://webarchive.nrscotland.gov.uk/20240713015729/https://scotcourts.gov.uk/search-judgments/judgment?id=a94886a6-8980-69d2-b500-ff0000d74aa7>

#### *The Authority's compliance with the information notice*

28. As stated above, the Commissioner issued the Authority with an information notice requiring it to provide him with the information withheld in response to the Applicant's request. Despite this, the Authority subsequently confirmed – following a query from the Commissioner – that it had omitted to provide a document (document 38) in response to his information notice. The Authority explained that it did not know at what stage this omission had occurred, as different teams had been involved in the handling of the Applicant's request, but it apologised for the omission.
29. The Commissioner must therefore find that the Authority failed, in terms of section 53(2)(b) of FOISA, to comply with his information notice. This failure is a matter of significant concern. Compliance with an information notice issued under section 50(1)(a) of FOISA is a binding statutory requirement: the Commissioner has the right to certify to the Court of Session that an authority has failed to comply with an information notice. The Court of Session has the right to inquire into the matter and may deal with the authority concerned as if it had committed a contempt of court.
30. The Commissioner has considered the nature and content of the information that was omitted (document 38) and the explanation given by the Authority. Having done so, he accepts that the Authority's failure to provide the information in response to his information notice was a genuine (if inexcusable) oversight. In this case, the Commissioner has elected not to exercise his right to certify to the Court of Session that the Authority failed to comply with his information notice. However, where he considers the circumstances merit it, he will not hesitate to do so in future.

#### ***Section 1(1) – General entitlement***

31. 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 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.
32. The information to be given is that held by the authority at the time the request is received, as defined by section 1(4).

#### *Interpretation of request*

#### *The Authority's submissions*

33. The Authority submitted that a small amount of information within documents 6, 9, 13 and 38 fell outwith the scope of the Applicant's request.
34. The Authority explained that it had interpreted the Applicant's request to include both written and oral evidence subsequently submitted by transcript.
35. The Authority further submitted that the information identified within documents 6 and 9 fell outwith the scope of the Applicant's request on the basis that this information related to the "provision" of evidence and was not itself "evidence to" that investigation. (The Authority did not provide submissions on why it considered that some information in documents 13 and 38 fell outside the scope of the Applicant's request.)
36. The Authority considered that if this information in fact fell within scope of the Applicant's request, then the majority of that information would be exempt from disclosure.

### *The Commissioner's view*

37. The Commissioner has carefully considered the withheld information provided in relation to this application, as well as the terms of the Applicant's request in this case. Having done so, the Commissioner considers that the Authority's interpretation of the scope of the Applicant's request was, in relation to the out of scope information it identified in documents 6, 9, 13 and 38, too narrow (with two exceptions). He will explain why below.

#### *Documents 6, 9 and 13*

38. Regarding the above documents, the Commissioner notes that, in two instances, the information comprises direction contributing to the reading and understanding of evidence provided, or is otherwise information contained within a document comprising "evidence" without qualification. He can therefore see no reason why that specific information would not fall within the scope of the Applicant's request.
39. Regarding some information in document 6 that the Authority considered to be out of scope, the Commissioner recognises that this information is of a more administrative nature. However, he notes that there is no qualification within the Applicant's request requiring that information be restricted to the substance of evidence provided.
40. The Commissioner considers that "all evidence submitted to" should reasonably be read to include information submitted for the purpose of providing or conveying evidence to Mr Hamilton's investigation. (He also notes that, having considered the withheld information, the Authority elsewhere appears to have accepted that similar information – while exempt from disclosure – fell within the scope of the Applicant's request.)
41. Given the above, the Commissioner must find that the Authority failed to comply with section 1(1) of FOISA by failing to accurately interpret the scope of the Applicant's request in relation to certain specific information in documents 6, 9, and 13.
42. As the Authority submitted that the majority of that information would, if in scope, have otherwise been exempt from disclosure, the Commissioner will go on to consider that information later in his decision.
43. However, there is a small amount of "out of scope" information in document 6 (which the Commissioner is satisfied fell within the scope of the Applicant's request) that the Authority did not specify as being exempt from disclosure. The Commissioner requires the Authority to carry out a fresh review in respect of this information and issue a revised review outcome to the Applicant.
44. Elsewhere, the Commissioner accepts that a simple acknowledgement of an email in which evidence was provided could not on any reasonable reading be considered "evidence to" that investigation. He is therefore satisfied that the Authority was correct to consider that specific information (in document 6) out of scope.

#### *Document 38*

45. The Authority stated that document 38 comprised "written evidence" to Mr Hamilton's review, but it considered that some of the information therein fell outwith the scope of the Applicant's request. The Authority applied the exemptions in sections 26(c) and 38(1)(b) of FOISA to certain information and did not apply any exemptions to other information it did not specify as falling outwith the scope of the request.

46. Having carefully considered this document, the Commissioner is satisfied that an email contained within the document (sent outwardly by Mr Hamilton's secretariat on his behalf) could not on any reasonable reading be considered "evidence to" Mr Hamilton's investigation. He is therefore satisfied that the Authority was correct to consider that specific information (in document 38) out of scope.
47. The Commissioner is also satisfied that the remaining information in document 38 fell within the scope of the Applicant's request. To the extent that the Authority applied the exemptions in sections 26(c) and 38(1)(b) of FOISA, the Commissioner will consider this information later in his decision.
48. However, the Commissioner requires the Authority to disclose to the Applicant the information in document 38 to which it did not apply any exemptions or specify as falling outwith the scope of the request. By failing to disclose this information to the Applicant, the Commissioner must find that the Authority failed to comply with section 1(1) of FOISA. (The Commissioner would reiterate that it is not for him to identify information as exempt that has not been marked as such by the Authority or to otherwise make the case on its behalf.)

#### ***The Commissioner's approach to the withheld information***

49. The Authority considered the withheld information was (other than that otherwise accessible and that referred to at paragraphs 43 and 48) exempt from disclosure in its entirety under the exemption in section 30(c) of FOISA. However, it additionally applied the exemptions in sections 26(c), 36(1) and 38(1)(b) of FOISA to certain information.
50. The Commissioner will first consider whether the Authority was entitled to rely on the other exemptions in FOISA (i.e. other than section 30(c)) that it applied to certain information). To the extent that he finds that these exemptions do not apply to the withheld information, he will go on to consider whether the Authority was entitled to withhold that information under the exemption in section 30(c) of FOISA (as well as the information withheld under that exemption solely).

#### ***Section 26(c) – Prohibitions on disclosure***

51. Under section 26(c) of FOISA, information is exempt information if its disclosure by a Scottish public authority (otherwise than under FOISA) would constitute, or be punishable as, a contempt of court.
52. This exemption is not subject to the public interest test in section 2(1)(b) of FOISA (see section 2(2)(b)).
53. The Authority applied the exemption in section 26(c) of FOISA to information contained within the following documents: 1-3, 5, 7-10, 12-16, 24-27, 32-34 and 36-38.
54. A small amount of information in document 13 was not marked up by the Authority as being withheld under section 26(c) of FOISA in the withheld information provided by the Authority as part of its definitive position. However, the Authority's submissions were clear that this information was to be withheld under that exemption, and the Commissioner will consider this information on that basis.

#### ***The Civil order and the undertaking***

55. On 29 August 2018, Alex Salmond, former First Minister, commenced judicial review proceedings against the Authority, in which he challenged the handling of certain complaints that had been made against him.

56. On 8 October 2018, Lord Woolman made an order under section 11 of the Contempt of Court Act 1981 (the 1981 Act) ("the civil order") in relation to these proceedings. The order was in the following terms (emphasis added):

"The Lord Ordinary ... makes an order in terms of Chapter 102.3(5) of the Rules of Court **withholding** from the public in these proceedings **the names and the designations, past and present, of the complainers** referred to in the decision report which is the subject matter of this petition **and any other information concerning those complainers which would lead to their identification**; orders, in terms of section 11 of the Contempt of Court Act 1981, that no publication by any means, including on social media, of any of the aforementioned information relating to the complainers, be made ..."

57. The parties entered into a Joint Minute which brought the proceedings to a conclusion. As part of this, the Authority gave the following undertaking ("the undertaking"):

"Save insofar as necessary to comply with any lawful requirement, to co-operate with any criminal investigation, or as may otherwise be approved by the Court, the [Authority] will not cause or permit the publication or dissemination to any other person of the said Investigating Officer's report or any of the statements or other material taken or prepared by her in the course of preparing same."

58. On 8 January 2019, the judicial review proceedings were concluded. However, Lord Pentland emphasised that the section 11 order continued (and continues) to have effect.

#### *Criminal proceedings and the criminal order*

59. On 24 January 2019, Mr Salmond appeared in court charged with a number of offences. Around this time, both Police Scotland and the Crown Office and Procurator Fiscal Service issued reminders to the public that proceedings were therefore "live" for the purposes of the 1981 Act.

60. Mr Salmond went on trial at the High Court at Edinburgh on 9 March 2020.

61. On 10 March 2020, the Lord Justice Clerk (Lady Dorrian) made an order at common law and under section 11 of the 1981 Act preventing the publication of the names and identity and any information likely to disclose the identity of the complainers in that case ("the criminal order").

62. Mr Salmond was acquitted of the charges against him on 23 March 2020.

63. The order made on 10 March 2020 was varied by the Lord Justice Clerk on 11 February 2021 so that it prevented:

"the publication of the names and identity and any information likely to disclose the identity of the complainers ... as such complainers in those proceedings."

#### *Court of Session proceedings and the misfeasance case*

64. On 24 November 2023, Mr Salmond commenced legal proceedings against the Authority in which he alleged "misfeasance" in relation to the Authority's handling of the complaints referred to in the judicial review proceedings concluded on 8 January 2019.

65. On 29 November 2023, Lord Fairley made an order under section 11 of the 1981 Act in relation to these proceedings. The order was in the following terms (emphasis added):

The Lord Ordinary ... having considered the order made by Lady Dorrian on 10 March 2020, (as amended on 11 February 2021) in the criminal proceedings against the pursuer ... makes an order at common law and in terms of section 11 of the Contempt of Court Act 1981 **prohibiting the publication of the name, or any information which would otherwise disclose the identity, of the person named** in the fourth last sentence of article 29 of condescendence of the summons **as someone who gave evidence** in March 2020 **during the said criminal proceedings.**"

*The Applicant's submissions*

66. The Applicant disagreed with the Authority's application of the exemption on the basis that he considered that not all of the information falling within the scope of his request could plausibly be exempt from disclosure.

*The Authority's submissions*

67. The Authority referred to the court orders set out earlier. It submitted that disclosure of the withheld information would – were it combined with other information in the public domain (which it specified in one instance) – contribute to the jigsaw identification of two individuals. It offered no submissions in relation to the identifiability of a third complainant.
68. The Authority further submitted that the information withheld would also, in some instances, relate to the "substance" of allegations made against Mr Salmond and so breach its undertaking to him at the conclusion of judicial review proceedings.
69. On these grounds, the Authority argued that disclosure of some of the information withheld in this case would breach one or more of the court orders and that the exemption in section 26(c) of FOISA was, therefore, engaged.

*The Commissioner's view*

70. The Commissioner has carefully considered the submissions from both parties, together with the withheld information and the specific terms of the court orders (and the undertaking) set out above.
71. As a starting point, it is clear that the court orders set out above remain in place and were, subject to the variation to the criminal order in February 2021, in place at the time the Authority responded to the Applicant's requirement for review. It is also clear that, were the Authority to disclose any information contrary to the court orders, this would constitute, or be punishable as, a contempt of court and therefore any such information would be exempt from disclosure under section 26(c) of FOISA.
72. However, the question the Commissioner must consider is whether all of the information redacted by the Authority under section 26(c) of FOISA would identify the complainants or otherwise breach the undertaking.
73. The Commissioner is aware that he must consider all of the means reasonably likely to be used by third parties to identify the individuals in question. The amount of speculation as to the identities of the complainants, particularly given the high profile of Mr Salmond, means that any information disclosed is highly likely to be scrutinised, in conjunction with other information already in the public domain, in an attempt to identify the individuals.
74. As noted above, the Commissioner is unable to set out his reasoning in full because of the need, particularly in the light of the various orders, not to disclose in his decision, even accidentally, information which ought not to be disclosed.

75. The Commissioner has carefully considered the withheld information, alongside other information that the Authority argued would facilitate jigsaw identification of individuals. He has also carried out his own searches of information in the public domain.
76. Having done so, he is satisfied that some of the information withheld by the Authority under section 26(c) of FOISA would clearly breach one or more of the court orders in that that information would identify one or more living individuals as complainers, including by reference to their name(s) and/or by reference to specific events or matters.
77. The Commissioner is therefore satisfied that this information is exempt from disclosure in terms of section 26(c) of FOISA, on the basis that disclosure would breach one or more orders and could constitute a contempt of court. He therefore finds that the Authority complied with Part 1 of FOISA in withholding that information in response to the Applicant's request.
78. However, the Commissioner is not satisfied that the Authority has provided him with sufficiently compelling arguments to allow him to conclude that disclosure of the remaining information withheld under the exemption in section 26(c) of FOISA would lead to the identification of one or more complainers, or otherwise breach the undertaking given to Mr Salmond.
79. The Commissioner must reiterate that he must reach a conclusion in relation to the withheld information based on the exemptions in FOISA actually applied by the Authority and on the submissions it has provided in support of the application of these exemptions. It is not for the Commissioner to identify information as exempt that has not been marked as such by the Authority or to otherwise make the case on its behalf.
80. In view of the information already in the public domain, the Commissioner agrees that disclosure of this information (which he considers would not directly identify individuals) would permit assumptions to be made regarding the identity of one or more complainers. However, he is not satisfied that disclosure of this information, would – even when the above context (including what information is, or may be, known by others) is taken into account – allow for the confirmation or refutation of such assumptions (i.e. lead to their identification).
81. The Commissioner is similarly not persuaded that disclosure of this information would equate to:

“... the publication or dissemination ... of the said Investigating Officer’s report or any of the statements or other material taken or prepared by her in the course of preparing same” for the purposes of the undertaking.
82. The Commissioner has considered whether disclosure of the information to which he has found the exemption in section 26(c) of FOISA does not apply would (if he found that other exemptions also did not apply) result in that information being unintelligible or of no practical use to the Applicant. He notes the 2016 judgment of the First Tier Tribunal (Information Rights) in Paul Boam and the (UK) Information Commissioner and Ofsted<sup>5</sup>, where the Tribunal accepted that there are limits to reasonable redaction, e.g. where:

“the excisions required ... must be so drastic that what remains is incoherent or even meaningless ...”

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<sup>5</sup> [https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1916/Boam,Paul%20EA-2015-0294%20\(03-11-16\).pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1916/Boam,Paul%20EA-2015-0294%20(03-11-16).pdf)

83. Having considered the information withheld by the Authority under section 26(c) of FOISA that he is satisfied would not identify a complainer, the Commissioner does not consider that this information would be meaningless if disclosed – particularly amid other withheld (redacted) information and given that the Applicant has questioned the extent of the information withheld by the Authority in this case.
84. In all the circumstances, therefore, the Commissioner finds that the Authority was not entitled to withhold that information under the exemption in section 26(c) of FOISA. However, as the Authority also claimed that this information was also exempt from disclosure under other exemptions in FOISA (variously), the Commissioner will go on to consider this information below.

***Section 38(1)(b) – Personal information***

85. In this case, the Authority withheld information under section 38(1)(b) of FOISA in documents 2, 4, 6, 8, 10, 11-12, 14, 16-18, 21, 25-27 and 32-38.
86. 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.
87. 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 in section 2(1)(b).
88. To rely on this exemption, the Authority must show that the withheld 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 found in Article 5(1) of the UK GDPR.
89. The Commissioner must determine whether the Authority was correct to withhold some information covered by the Applicant’s request under section 38(1)(b) of FOISA.

*Is the withheld information personal data?*

90. The first question the Commissioner must address is whether the specific information withheld by the Authority, and identified as personal data, is personal data for the purposes of section 3(2) of the DPA 2018.
91. “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 by reference to –
  - (i) an identifier such as a name, an identification number, location data, or an online identifier, or
  - (ii) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
92. The two main elements of personal data are that the information must “relate” to a living person, and that person must be identified – or identifiable – from the data, or from the data and other accessible information.

93. 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. An individual is “identified” or “identifiable” if it is possible to distinguish them from other individuals.
94. The Commissioner is satisfied that most of the information being withheld under section 38(1)(b) of FOISA is personal data: the withheld data relate to individuals’ names and contact details or is otherwise information relating to the provision of evidence to the investigation by an individual. Living individuals are identifiable from this information and the information clearly relates to those individuals.
95. However, the Commissioner considers that a small amount of information apparently withheld in document 11 and 12 under section 38(1)(b) of FOISA is not personal data: the withheld data relate to terms that would not, if disclosed, identify a living individual.
96. The Commissioner must therefore find that the Authority was not entitled to withhold that information under section 38(1)(b) of FOISA. As the Authority also considers that information to be exempt under section 30(c) of FOISA, the Commissioner will go on to consider this later in his decision.
97. The Commissioner will consider the information that he is satisfied is personal data below.

*Would disclosure contravene one of the data protection principles?*

98. The Authority considered that disclosing the withheld personal data would breach the first data protection principle. The first data protection principle in Article 5(1)(a) of the UK GDPR requires personal data to be processed “lawfully, fairly and in a transparent manner in relation to the data subject.”
99. “Processing” of personal data is defined in section 3(4) of the DPA 2018. It includes (section 3(4)(d)) disclosure by transmission, dissemination or otherwise making available personal data. The definition therefore covers disclosing information into the public domain in response to a FOISA request.

*Article 6(1)(f) of the UK GDPR - legitimate interests*

100. In considering lawfulness, the Commissioner must consider whether any of the conditions in Article 6 of the UK GDPR would allow the data to be disclosed.
101. The Commissioner considers that condition (f) in Article 6(1) of the UK GDPR is the only condition which could potentially apply in the circumstances of this case. This states that processing shall be lawful if it “is necessary for the purposes of 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...”.
102. Although Article 6 of the UK GDPR states that this condition cannot apply to processing carried out by a public authority in the performance of their 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.
103. The three tests which must be fulfilled before Article 6(1)(f) of the UK GDPR can be relied on are as follows:
  - (i) does the Applicant have a legitimate interest in 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 the legitimate interest, would that be overridden by the interests or fundamental rights and freedoms of the data subjects which require protection of personal data?

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

104. The Applicant submitted that there was clearly some public interest in the disclosure of at least some of the information withheld, on the basis that the information:

- related to an inquiry by the independent advisor on the Ministerial Code, who himself had expressed frustration at the decision to “withhold information”
- would facilitate public understanding in how the Government, and Ministers, worked with Mr Hamilton.

105. The Authority submitted that the information being withheld under section 38(1)(b) of FOISA comprised the names and direct contact details of individuals and that it was not aware of any legitimate interest the Applicant held in that information.

106. In the circumstances and given the nature of the request, the Commissioner accepts, on balance, that the Applicant has a legitimate interest in obtaining the withheld personal data.

*Is disclosure necessary?*

107. Having satisfied himself that the Applicant has a legitimate interest, the Commissioner must consider whether disclosure of the withheld information, the personal data, is necessary to achieve the legitimate interest in the information.

108. “Necessary” means “reasonably” rather than “absolutely” or “strictly” necessary. When considering whether disclosure would be necessary, public authorities must consider whether the disclosure is proportionate as a means and fairly balanced as to the aims to be achieved, or whether the Applicant’s legitimate interest could reasonably be met by means which interfered less with the privacy of the data subjects.

109. The Applicant considered that it was in the interest of the public for the information to be made available for the reasons previously set out in paragraph 104.

110. The Authority argued that disclosure of the names and direct contact details withheld would not aid the Applicant’s understanding of the withheld information and, on that basis, disclosure of the withheld personal data was not necessary.

*The Commissioner’s view on whether disclosure is necessary*

111. The Commissioner has carefully considered the arguments in relation to legitimate interests and, in particular, the Applicant’s comments on why he believes the information should be disclosed.

112. While he acknowledges the Applicant’s legitimate interest in transparency regarding Mr Hamilton’s investigation under the Ministerial Code, the Commissioner is not persuaded that disclosure of some of the information withheld would serve the Applicant in his pursuit of that legitimate interest.

113. Specifically, the Commissioner cannot see that the disclosure of the following information is necessary to meet the legitimate interest that he has accepted the Applicant has:

- a personal email address
- the name, email address and work mobile number of a junior Authority official acting as secretariat to Mr Hamilton's investigation
- the work email addresses and telephone numbers of third parties
- the name of a solicitor at the (UK) ICO.

114. The Commissioner is satisfied that this information is incidental to the legitimate interest set out by the Applicant in this case. He is not satisfied that it is necessary for that information to be disclosed to fulfil the Applicant's legitimate interest. He therefore concludes that disclosure of that information would breach the first data protection principle, and so this information was properly withheld under the exception in section 38(1)(b) of FOISA.

115. However, the Commissioner notes that a small amount of further information withheld under section 38(1)(b) of FOISA comprises the personal data of an individual providing evidence to Mr Hamilton, or of individuals identified in, or by other evidence to, Mr Hamilton's investigation. In the circumstances, he considers that disclosure of that personal data (in documents 4, 8 and 32) is necessary to achieve the Applicant's legitimate interest.

*The data subjects' interests or fundamental rights and freedoms (and balancing exercise)*

116. The Commissioner has concluded, on balance, that the disclosure of some of the information requested would be necessary to achieve the Applicant's legitimate interest. However, this must be balanced against the fundamental rights and freedoms of the data subjects. Only if the legitimate interest of the Applicant outweighed those of the data subjects could personal data be disclosed without breaching the first data protection principle.

117. The Commissioner has considered the submissions from both parties carefully, in the light of the decision by the Supreme Court in South Lanarkshire Council v Scottish Information Commissioner [2013] UKSC 55<sup>6</sup>.

118. In carrying out the balancing exercise, much will depend on the reasonable expectations of the data subject. Factors which will be relevant in determining reasonable expectations include:

- (i) whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances)
- (ii) the potential harm or distress that may be caused by disclosure
- (iii) whether the individual objected to the disclosure.

119. The Applicant accepted that some information in this case might reasonably be exempt from disclosure. However, he did not accept that all information could rightly be withheld in response to his request.

120. The Authority explained that its general approach was to release details of individuals within senior civil service roles and officials with "relatively senior" roles that were public facing, but to withhold the equivalent details of junior staff. It explained that it adopted a similar approach to the personal data of individuals within third party organisations where their level

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<sup>6</sup> [https://supremecourt.uk/uploads/uksc\\_2012\\_0126\\_judgment\\_889774728f.pdf](https://supremecourt.uk/uploads/uksc_2012_0126_judgment_889774728f.pdf)

of seniority may not be known and based on whether that individual had a high public profile (or not).

121. The Authority submitted that disclosure of the information withheld in this case would be unfair because the individuals in question were either more junior members of staff who would not expect their personal data to be disclosed in response to the Applicant's request, or more senior staff who would not expect their private contact details to be disclosed in this way. To the limited extent that the Applicant did have a legitimate interest, it considered that these did not outweigh the individuals' interests in protecting their privacy.
122. In terms of the information in documents 4, 8 and 32 that he has accepted disclosure of which is necessary to meet the Applicant's legitimate interest, the Commissioner notes the following:
  - document 4 – the relevant withheld information comprises the name of a senior police officer in the context of their role in matters adjacent to those being investigated by Mr Hamilton. This individual's involvement in these matters was a matter of public record at the time of the Authority's review outcome
  - documents 8 and 32 – the relevant withheld information identifies and relates to individuals in their respective professional capacities, whose participation in (and provision of evidence to) Mr Hamilton's investigation is a matter of record.
123. The Commissioner is not persuaded that this information is particularly sensitive – particularly when it is not read in the context of other information that he is satisfied was correctly withheld by the Authority. This information either relates to the mechanics of the provision of evidence to Mr Hamilton's investigation or comprises the names of individuals whose name, and role in relevant matters, are a matter of record.
124. For these reasons and having carefully balanced the legitimate interest of the Applicant against the interests or fundamental rights or freedoms of the data subjects, the Commissioner finds that the legitimate interests served by disclosure of the personal data would not be outweighed by any unwarranted prejudice that would result to the rights and freedoms and legitimate interests of the data subjects. He does not accept that distress or harm would be caused by disclosure of the relevant withheld personal data in documents 4, 8 and 32 – and he has received no submission from the Authority that persuades him otherwise.
125. The Commissioner therefore cannot accept that the rights and freedoms of the specified individuals outweigh the legitimate interest of the Applicant. In the circumstances, the Commissioner finds that condition (f) in Article 6(1) of the UK GDPR can be met in relation to the relevant withheld personal data in documents 4, 8 and 32.

#### *Fairness*

126. The Commissioner must also consider whether disclosure would be fair. He finds, for the same reasons as he finds that condition (f) in Article 6(1) of the UK GDPR can be met, that disclosure of the relevant withheld personal data in documents 4, 8 and 32 would be fair.

#### *Conclusions on the data protection principles*

127. In the absence of any reason for finding disclosure to be unlawful other than a breach of Article 5(1)(a) of the UK GDPR and given that he is satisfied that condition (f) can be met, the Commissioner must find that disclosure of the relevant withheld personal data in documents 4, 8 and 32 would be lawful in this case.

128. The Commissioner therefore finds that disclosure of the relevant withheld personal data in documents 4, 8 and 32 would not breach the first data protection principle, and so the Authority was not entitled to withhold this information under the exemption in section 38(1)(b) of FOISA.
129. As the Authority also considered this information to be exempt under section 30(c) of FOISA, the Commissioner will go on to consider this information later in his decision.

### ***Section 36(1) – Confidentiality***

130. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings.
131. Legal advice privilege applies to communications in which legal advice is sought or provided. For legal advice privilege to apply, certain conditions must be fulfilled:
  - (i) The information must relate to communications with a professional legal adviser, such as a solicitor or advocate
  - (ii) The legal adviser must be acting in their professional capacity, and
  - (iii) The communications must occur in the context of the legal adviser's professional relationship with their client.
132. There is a further matter to be considered, however, before the Commissioner can determine whether, or the extent to which, the section 36(1) exemption in FOISA is applicable in the circumstances of this case.
133. The information cannot be privileged unless it is also confidential. For the section 36(1) exemption in FOISA to apply, the withheld information must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. In other words, the claim must have been capable of being sustained at the time the exemption is claimed.
134. A claim of confidentiality cannot be maintained where, prior to a public authority's consideration of an information request or conducting a review, information has been made public, either in full or in a summary sufficiently detailed to have the effect of disclosing the advice. Where the confidentiality has been lost in respect of part or all of the information under consideration, any privilege associated with that information is also effectively lost.
135. The Authority submitted that some information withheld in documents 1, 8, 9 and 20 was subject to legal advice privilege.
136. The Authority's definitive position in relation to the withheld information did not specify that it was applying section 36(1) to document 8. However, the Authority's submissions were clear that some information within document 8 was also to be withheld under section 36(1) of FOISA. As the Commissioner is satisfied that the information in document 8 withheld under section 36(1) was correctly withheld by the Authority under section 26(c) of FOISA, he will not consider that specific information further.

### ***Documents 1 and 20***

137. The Authority explained that the information withheld in documents 1 and 20 was provided to Mr Salmond, as the client, by his legal advisers acting in their professional capacity.

138. The Authority submitted that a claim to confidentiality in legal proceedings could be maintained because the withheld information was shared by Mr Salmond with Mr Hamilton's investigation for the particular, limited, purpose of providing evidence to inform his investigation (solely) and on condition that it remained confidential (in that regard, the Authority noted that Mr Salmond had also claimed legal privilege to this information in his submissions to the Scottish Parliament).
139. The Authority argued that both Mr Salmond and Mr Hamilton (and by extension the Authority) had a common interest in ensuring that Mr Hamilton was able to obtain all of the information he required to carry out his investigation in order to draw fully informed conclusions. It confirmed that the information remained confidential at the time it received the Applicant's request.
140. The Authority submitted that, at the time the privileged information was created, Mr Salmond and Mr Hamilton (and therefore the Authority) had an interest in the content of the advice provided and that this remained the case at the time of the Authority's submissions to the Commissioner.
141. The Authority stated that all of this information was either made, or effected for, the principal or dominant purpose of seeking or giving legal advice. It considered that disclosure of this information would breach legal professional privilege (which had not been waived) by divulging information about the points being considered by lawyers, the extent of their comments and the issues being flagged for further consideration. It confirmed that all of the necessary conditions for legal advice privilege to apply were satisfied.

*Document 9*

142. The Authority submitted that the information withheld in document 9 referred to the taking or receiving of legal advice by the Scottish Government, and the fact that an individual was involved in briefing the Scottish Government's Counsel in advance of the judicial review referred to at paragraph 55.
143. The Authority argued that legal advice privilege applied to the withheld information because it related to communications with, or references to communications with, in-house legal advisers acting in their professional capacity and the Authority as their client, in which it sought, and was provided with, legal advice, including material which evidenced the substance of those communications.
144. The Authority again submitted that all of this information was either made, or effected for, the principal or dominant purpose of seeking or giving legal advice or evidenced by those communications. It considered that disclosure of this information would breach legal professional privilege by divulging information about the points being considered by lawyers, the extent of their comments and the issues being flagged for further consideration. It confirmed that all of the necessary conditions for legal advice privilege to apply were satisfied.
145. The Authority submitted that a claim to confidentiality in legal proceedings could be maintained because the withheld information was only shared between the Authority and its legal advisers (and had not been shared outwith the Authority). The information remained confidential at the time the Authority responded to the Applicant's request and requirement for review (and it remained so at the time of the submissions). Accordingly, legal professional privilege had not been waived.

146. The Authority further argued that the communications were subject to the Law Officers' Convention referred to in the [Scottish Ministerial Code 2023](#)<sup>7</sup> which, it contended, prevents the Authority from revealing whether Law Officers either have, or have not, been asked to provide legal advice on any matter. It also referred to paragraph 2.38 of that Code, which it considered prevented it from divulging the source of the Authority's legal advice, whether from the Law Officers or others.

*The Commissioner's view*

147. Having considered the withheld information, the context in which it was created and the Authority's submissions, the Commissioner accepts that the withheld information in documents 1 and 20 meet the conditions for legal advice privilege to apply.

148. However, the Commissioner does not consider that the information withheld in document 9 engages the exemption in section 36(1) of FOISA. The information withheld describes the notification of a legal adviser in relation to specific matters, solely, and provides no evidence of the seeking of advice from, or provision of advice by, said legal adviser.

149. The Commissioner also cannot agree that, for the purposes of the Law Officers' Convention, the withheld information in document 9 reveals the definitive source of the Authority's legal advice in relation to the judicial review specified. While it indicates one source of legal support, it does not make clear whether other sources of legal advice had, or had not, been drawn upon previously (or would not be consulted in future).

150. The Commissioner therefore finds that the Authority was not entitled to withhold the information in document 9 under section 36(1) of FOISA. As the Authority held that information to be otherwise exempt in terms of 30(c) of FOISA, the Commissioner goes on to consider this information later in his decision.

151. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA.

152. Having accepted that the information within documents 1 and 20 withheld under section 36(1) of FOISA was properly exempted from disclosure, the Commissioner must go on to consider whether, in all the circumstances of the case, the public interest in disclosing that information is outweighed by the public interest in maintaining the exemption.

*The public interest test – section 36(1)*

*The Applicant's submissions on the public interest test*

153. The Applicant considered that disclosure of the information was in the public interest for the reasons rehearsed at paragraph 104.

*The Authority's submissions on the public interest*

154. The Authority recognised the public interest in transparency and in the question of whether Ministers had complied with the standards set out in the Ministerial Code.

155. However, the Authority considered there was a very strong interest in maintaining the exemption relating to legal professional privilege to ensure confidentiality of communications, between legal advisers and their clients or other legal advisers, including where this legal advice had been shared in confidence, for the following reasons:

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<sup>7</sup> <https://www.gov.scot/publications/scottish-ministerial-code-2023-edition/pages/3/>

- it remains important in all cases that lawyers can provide free and frank legal advice, which considers and discusses all issues and options, without fear that the advice may be disclosed and, as a result, potentially taken out of context
- in areas such as this, which are the subject of political debate, an expectation that legal advice could be released would inevitably lead to the legal advice being much more circumspect and therefore less effective (or in evidence being provided to the review being less candid).

156. In summary, and on balance, the Authority considered that, in this case, the public interest in maintaining the exemption in section 36(1) of FOISA outweighed that in disclosure, given the overriding public interest in maintaining the confidentiality of legal advice shared with the Authority (in confidence) in this case.

*The Commissioner's view on the public interest*

157. As the Commissioner has noted in several previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client, on administration of justice grounds.

158. In a freedom of information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien [2009] EWHC164 (QB)<sup>8</sup>. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.

159. The Commissioner recognises that there will be occasions where the significant public interest in favour of withholding legally privileged communications may be outweighed by a compelling public interest in disclosing the information. For example, disclosure may be appropriate where (the list is not exhaustive):

- the privileged material discloses wrongdoing by/within an authority
- the material discloses a misrepresentation to the public of advice received
- the material discloses an apparently irresponsible and wilful disregard of advice
- a large number of people are affected by the advice
- the passage of time is so great that disclosure cannot cause harm
- disclosure would contribute to a debate on a matter of public interest.

160. The Commissioner accepts that there is a considerable, in-built, public interest in maintaining the ability of individuals to receive confidential legal advice without fear of that advice being disclosed (including in circumstances where that information has been shared by them for the fulfilment a specified, limited, purpose only).

161. The Commissioner also accepts that there is considerable public interest in the Authority being able to obtain all of the information necessary to facilitate the proper function of investigations under the Ministerial Code. Without such comprehensive information being available to Mr Hamilton (and thereby the Authority) in this case, Mr Hamilton's ability to

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<sup>8</sup> [https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=\(title:\(+o%27brien+\)\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=(title:(+o%27brien+)))

come to fully informed decisions would be restricted, which would not be in the public interest.

162. However, in the Commissioner's view, the subject matter of the request – which is well known and has been the subject of sustained and extensive discussion in the legal, media and political landscape for several years – remains a matter in which there is a clear public interest given that, at the time of the Authority's review response, public discourse continued in relation to both the matters explored in Mr Hamilton's report and the evidence provided to Mr Hamilton and a Parliamentary Inquiry (which considered similar matters).
163. The Commissioner also considers it important to note that the exemption in section 36(1) of FOISA is a qualified exemption. While he accepts that the public interest in maintaining confidentiality of communications is strong, it must be fully considered in each case – a consideration always fully open to the possibility that there may be relevant, and sufficiently weighty, countervailing arguments. When determining where the public interest lies, the Commissioner must make his assessment in relation to the specific circumstances of the case on each occasion and, as recognised by the Court of Session in Scottish Ministers v Scottish Information Commissioner [2006] CSIH 8<sup>9</sup> (at paragraph [31]), at the time of the review (at the latest).
164. Having considered the substance of the withheld information and the circumstances at the date of the Authority's review outcome, the Commissioner is of the view that the withheld information in document 1 is information that is not in the public domain, in relation to which there is a clear public interest (given that information would specifically contribute to the public debate to which he has referred) and which can only be satisfied by disclosure of the withheld information.
165. While he recognises the limited purpose for which this legal advice was deployed by Mr Salmond, and that disclosure here in response to a FOISA request would exceed that purpose, the Commissioner considers that disclosure of the withheld information in this case would nevertheless cast important light on subject matter that remains the topic of clear and sustained public debate, for the reasons rehearsed at paragraph 162.
166. The Commissioner cannot therefore conclude, in all the circumstances of this particular case, that (with regard to document 1) the Authority has demonstrated that the public interest in maintaining the exemption in section 36(1) of FOISA outweighs that in disclosure of the withheld information.
167. For the reasons set out above, and having regard to the submissions of the parties in this case, the Commissioner has concluded, on balance in all the circumstances, that the public interest in disclosure of the information in document 1 should be considered of sufficient substance to outweigh the in-built public interest in maintaining the exemption in section 36(1) of FOISA.
168. As the Authority also considered this information to be exempt under section 30(c) of FOISA, the Commissioner will go on to consider this information later in his decision.
169. In relation to the information withheld in document 20 under section 36(1) of FOISA, the Commissioner is not persuaded that this would contribute to, nor advance in any meaningful way, the public debate regarding the matters he refers to above, given that information

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<sup>9</sup> <https://webarchive.nrscotland.gov.uk/20240713015729/https://scotcourts.gov.uk/search-judgments/judgment?id=a94886a6-8980-69d2-b500-ff0000d74aa7>

relates to the Authority and the strength of its position in respect of Mr Salmond's judicial review case – a position the Authority had long since conceded at the time of the Authority's review outcome; the matter having been conclusively settled in Mr Salmond's favour.

170. The Commissioner is therefore not satisfied that the public interest in disclosure of the withheld information in document 20 is significant enough to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client. Consequently, he is satisfied that the information within document 20 withheld by the Authority under section 36(1) of FOISA was properly withheld under that exemption.

#### ***Section 30(c) – Prejudice to the effective conduct of public affairs***

171. The Authority withheld some information in document 6 and all of the information in documents 1-5, 7-18, 20-27, and 32-37 (other than that subject to the exemption in section 25(1) of FOISA, which includes documents 19 and 28-31 in their entirety) under the exemption in section 30(c) of FOISA. This includes information it considered was otherwise exempt (variously) under sections 26(c), 36(1) and 38(1)(b) of FOISA. (The Commissioner will not further consider any information that he has already found that the Authority properly withheld under any of these other exemptions.)
172. 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". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b).
173. Section 30(c) of FOISA 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.
174. The standard to be met in applying the tests contained in section 30(c) is high: the prejudice in question 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 (which may include the timing of the request).

#### ***The Applicant's submissions***

175. The Applicant disagreed with the Authority's application of the exemption in section 30(c) of FOISA, in this case, on the basis that he considered that not all of the information falling within the scope of his request would be exempt from disclosure.

#### ***The Authority's submissions***

176. The Authority submitted that the Ministerial Code set binding guidelines for Ministers for "living up to" the Nolan Principles and provided a referral process designed to provide the First Minister with independent advice to permit the taking of decisions on Ministerial conduct.
177. The Authority considered that, on this basis, a referral under the Ministerial Code was an aspect of the conduct of public affairs. It argued that investigations under the Ministerial Code largely depended on voluntary cooperation, given independent advisers had no powers

to compel testimony. Disclosure of the withheld information here would, it argued, therefore diminish the effectiveness of referrals to independent advisers under the Code.

178. The Authority explained that individuals would expect to be able to give evidence candidly to such investigations and on the basis that their testimony would be used to create a final report summarising (without repeating in full) that evidence.
179. In support of this, the Authority noted that Public Inquiries might take evidence in private, which would not be published in full but summarised in a final report (a concept it argued was long established and accepted). It said that witnesses would expect a level of confidentiality in dealings with such investigations in order that they might fully explore the issues of concern, in the expectation that details which might identify them (for example, as complainants) would be withheld.
180. The Authority noted that draft letters from Mr Hamilton informed individuals that information provided might be referred to and/or disclosed in his report, and that individuals would be informed of any information to be published in advance.
181. The Authority considered it self-evident that material sent to Mr Hamilton was required to provide a full picture to enable him to carry out his brief and that this material was not redacted or withheld to take into account the court orders.
182. On that basis, the Authority considered that:
  - individuals relied on Mr Hamilton to construct his report without disclosing those elements in full
  - the final report was entirely a matter for Mr Hamilton, and it was for him to determine what (and to what extent) written evidence should be disclosed.
183. The Authority argued that disclosing the withheld information would lead to greater reticence among those providing evidence to future investigations and restrict such participants from providing evidence in a free and frank manner, were they to apprehend disclosure of their evidence (other than in a final report).
184. The Authority further submitted that Mr Hamilton had the benefit of seeing all written material before determining if and how it should be presented in his report. It submitted that if material Mr Hamilton had declined to include in his report were disclosed, it would undermine Mr Hamilton's decisions on this point and the credibility of the final report.
185. In summary, the Authority argued that for these reasons, the information requested fell to be withheld in its entirety under section 30(c) of FOISA.

#### *The Commissioner's view*

186. The Commissioner has carefully considered the Authority's submissions on the applicability of the exemption of section 30(c) of FOISA, together with the withheld information. He is considering both the information solely withheld under section 30(c) of FOISA and the information to which he has found the other exemptions claimed by the Authority did not apply.
187. Based on the arguments provided by the Authority in relation to the applicability of the exemption in section 30(c) of FOISA, he can see no basis for concluding that disclosure of the information withheld under that exemption (excluding that information he is satisfied was

properly withheld under other exemptions) would, or would be likely to, result in the effects claimed by the Authority.

188. Despite the disclosure of evidence<sup>10</sup> in relation to Sir David Bell's 2012 investigation under the Ministerial Code, eleven individuals participated voluntarily in this case and in the knowledge that any information they provided could be referred to in Mr Hamilton's final report (with the exception of information that would breach the court orders).
189. The Commissioner also recognises that the circumstances of this case are highly specific. As far as he is aware, it is the first (and, to date, only) time that a First Minister referred themselves to an independent adviser for the purposes of establishing whether they had committed a breach of the Ministerial Code. It is in this context that the Commissioner must consider the application of the exemption in section 30(c) of FOISA.
190. It is important to stress that a decision from the Commissioner requiring disclosure of information in one case should not be taken to imply that information of a particular type will be routinely required to be disclosed in future. The circumstances of each case, including the content of the specific information under consideration, must be taken into consideration and each case assessed on its own merits.
191. In the event that such a situation arose again, the Commissioner does not consider that any similar investigation would be prejudiced by the disclosure of information withheld in this case under section 30(c) of FOISA (excluding that information he is satisfied was properly withheld under other exemptions).
192. The Commissioner considers that the individuals providing evidence in this case are of sufficient seniority that comparable individuals in any similar future investigation would not be dissuaded by disclosure of the withheld information in this case from providing similar such evidence or otherwise co-operating with a future investigation of this kind. In fact, he considers it highly unlikely that any such inhibition (sufficient to engage the exemption in section 30(c) of FOISA) would arise in the context of a future investigation with a similar type of profile or seriousness.
193. The Commissioner acknowledges the Authority's concern that disclosure of material Mr Hamilton declined to include in his report would undermine his decisions on this point and the credibility of the final report. To the extent that the Authority has these concerns, it is open to it to choose to provide a commentary which places the information in context or explains its limitations.
194. The Commissioner also notes the Authority's argument that witnesses would expect a level of confidentiality in dealings with such investigations in order that they might fully explore the issues of concern, in the expectation that details which might identify them (for example, as complainants) would be withheld.
195. The Commissioner has already considered the information (i.e. that withheld under the exemption in section 26(c) of FOISA) that the Authority identified would, if disclosed, breach one or more of the court orders on the basis that it would identify one or more complainants. He is considering whether section 30(c) of FOISA applies to information to which he has found the other exemptions claimed by the Authority (including section 26(c)) do not apply, or where no exemption other than section 30(c) (including section 26(c)) was applied by the Authority.

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<sup>10</sup> <https://webarchive.nrscotland.gov.uk/20170712125104/http://www.gov.scot/About/People/14944/684/correspondence>

196. Having considered all the relevant submissions, therefore, the Commissioner does not accept (excluding that information he is satisfied was properly withheld under other exemptions) that the Authority was correct to withhold the remaining information under the exemption in section 30(c) of FOISA. As the Commissioner is satisfied that this information was not exempt from disclosure under section 30(c) of FOISA, he is not required to go on to consider the application of the public interest test in relation to that information.
197. The Commissioner therefore requires the Authority to disclose to the Applicant the information that was incorrectly withheld under the exemption in 30(c) of FOISA (other than that he has found the Authority correctly withheld under the exemptions in section 26(c), 36(1) and 38(1)(b) of FOISA (variously)).
198. In all, while the Commissioner recognises that he has reached the same conclusions in this case as those he reached in Decision 279/2025, he would again stress that he has considered this case on its own merits in reaching those same conclusions.

## 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 26(c), 36(1) and 38(1)(b) of FOISA 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 (and, in particular, section 1(1)) of FOISA by:

- failing to accurately interpret the scope of the Applicant's request in relation to certain documents
- failing to disclose some information which fell within the scope of the Applicant's request and which it did not specifically identify as being exempt from disclosure
- wrongly withholding some information under the exemptions in sections 26(c), 30(c), 36(1) and 38(1)(b) of FOISA (variously).

The Commissioner also notes that the Authority failed to comply with Part 4 of FOISA, by failing to comply with an information notice served under section 50(1)(a) of FOISA.

The Commissioner requires the Authority to:

- disclose to the Applicant the information it wrongly withheld
- consider afresh the information in document 6 that it wrongly considered to fall outside the scope of the Applicant's request and issue a revised review response for that information.

by **5 February 2026**. He requires the Authority to disclose to the Applicant the same information he required in Decision 279/2025 to be disclosed and to consider afresh the same information in document 6 that he required it consider afresh in Decision 279/2025.

The Commissioner's decision states a compliance date of **5 February 2026** in line with the timescales he is required to follow. This is the latest day on which the Authority must comply – the deadline does not prevent the Authority from doing so sooner.

## **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**

**22 December 2025**