

# Decision Notice 098/2020

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## Correspondence relating to FOI request

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**Applicant: The Applicant**

**Public authority: Scottish Ministers**

**Case Ref: 201902093**



Scottish Information  
Commissioner

## Summary

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The Ministers were asked for correspondence relating to an earlier FOI request made to them.

The Ministers disclosed some of the information, but withheld the remainder under various exemptions in FOISA.

The Commissioner investigated and found that the Ministers had wrongly withheld information on the basis that it was confidential or that disclosure prejudiced the effective conduct of public affairs. He required them to disclose the information to the Applicant.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1) and (2)(b) (Effect of exemptions); 30(b) and (c) (Prejudice to effective conduct of public affairs); 36(2) (Confidentiality)

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

## Background

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1. On 9 July 2019, the Applicant made a request for information to the Scottish Ministers (the Ministers). The information requested was all correspondence relating to FOI Request FOI/18/03666<sup>1</sup> and that applicant's subsequent request for review.
2. Having acknowledged receipt of the request on 11 July 2019, the Ministers wrote to the Applicant on 8 August 2019, stating it was taking longer than expected to deal with the request. The Applicant subsequently contacted the Ministers on a number of occasions requesting a response. Despite being told the response was forthcoming, the Ministers did not respond.
3. On 27 September 2019, the Applicant wrote to the Ministers requesting a review based on their failure to respond.
4. The Ministers notified the Applicant of the outcome of their review on 24 October 2019, apologising for their failure to respond within timescales and outlining remedial action taken in this regard. The Ministers withheld some information under section 25(1) (Information otherwise accessible) as it was publicly available on their website: a weblink was provided. They disclosed some information (partially redacted), withholding the remainder under the following exemptions, with explanation:
  - Section 36(2) (Confidentiality) – where the information was obtained from the Scottish Professional Football League (SPFL) in confidence and unauthorised disclosure would constitute an actionable breach of confidence.

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<sup>1</sup> <https://www.gov.scot/publications/foi-18-03666/>

- Section 30(b) (Prejudice to effective conduct of public affairs) – where disclosure of the free and frank advice provided and discussions held would inhibit the provision of future advice, particularly as discussions were ongoing and related to a sensitive issue. In their view, the public interest favoured non-disclosure.
  - Section 30(c) (Prejudice to effective conduct of public affairs) – where disclosure would undermine trust in the Scottish Government and inhibit future communications with stakeholders (and also the provision of future information, should the SPFL believe its views would be made public, particularly while discussions were still ongoing). This, the Ministers stated, would prejudice their ability to carry out aspects of work, and affect their ability to gather necessary evidence to make informed decisions, which was not in the public interest.
  - Section 38(1)(b) (Personal information) – where disclosure of personal data would breach the data protection principles in the General Data Protection Regulation / Data Protection Act 2018.
5. On 14 November 2019, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of the Ministers’ review because she disagreed with their decision to withhold information under the exemptions in section 30(b) and (c) and section 36(2). She expressed no dissatisfaction with any information otherwise available and withheld under the exemption in section 25(1), or with any personal data withheld under section 38(1)(b).

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 22 November 2019, the Ministers were notified in writing that the Applicant had made a valid application. The Ministers were asked to send the Commissioner the information withheld from the Applicant. The Ministers provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and to answer specific questions. These focused on the Ministers’ justification for withholding information under the exemptions in section 30(b) and (c) and section 36(2), including consideration of the public interest.
9. During the investigation, the Ministers changed their position in relation to their application of the exemptions in section 30. On 5 February 2020, they disclosed to the Applicant some further information, previously withheld (variously) under the exemptions in section 30(b) and (c), together with some newly-identified information (all with some personal data redacted). For the remaining withheld information, the Ministers considered this to be exempt (variously) under the exemptions in section 30(b) and (c) and section 36(2) of FOISA.
10. As the Ministers were withholding information under exemptions which are subject to the public interest test, the Applicant was also invited to provide submissions on the public interest in disclosure of the information.

11. Both parties provided submissions to the Commissioner.

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

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12. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Ministers. He is satisfied that no matter of relevance has been overlooked.

### **Information held**

13. In order to ascertain whether all relevant information had been identified, the Ministers were asked to explain the steps they took to establish what information they held and which fell within the terms of the Applicant's request.
14. The Ministers explained that the case handler, who dealt with the previous request to which this information related, had a good understanding of the information held, and established that all information was held within a specific casework folder for the previous request, stored on the Ministers' electronic record and document management system. The documents held in the folder were individually reviewed to identify the information falling within scope.
15. For the additional information identified during the investigation, the Ministers explained that this was originally considered to be a duplication of other information, but was later identified as additional information within the documents in question, not previously considered.
16. The Ministers were confident that all in-scope information had been identified and so did not consider it necessary to carry out any further searches.
17. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.
18. Having considered all the relevant submissions and the terms of the request, the Commissioner is satisfied that the information held by the Ministers, and falling within the scope of the Applicant's request, was capable of being identified by the searches carried out by the Ministers. Consequently, he is satisfied that, by the end of the investigation, the Ministers had taken adequate, proportionate steps to establish the extent of information held and relevant to the request.

### **The Ministers' change of position during the investigation**

19. As explained above, during the investigation, the Ministers provided submissions to the effect that some information, originally withheld, could now be disclosed. This information had been withheld at review stage under (variously) the exemptions in section 30(b) and (c) of FOISA. The Ministers disclosed this information to the Applicant on 5 February 2020, together with some newly-identified information (all with some personal data redacted).
20. The Ministers submitted that, in disclosing this further information, they wished to change their position for some of the remaining information. For certain information, they amended the exemption in section 30(b)(i) to that in section 30(b)(ii), while for other information they withdrew reliance on section 30(b)(ii), continuing to withhold this under section 30(b)(i). In conclusion, the Ministers confirmed they wished to continue to withhold the remainder of the information (variously) under the exemptions in section 30(b) and (c), and section 36(2), of FOISA.

21. The Ministers provided no submissions, however, explaining why the information, now disclosed, was correctly withheld at the time they dealt with the request or requirement for review. As such, the Commissioner can only conclude that the Ministers were not entitled to withhold that information under the corresponding exemptions applied at review stage, and therefore breached section 1(1) of FOISA in doing so.
22. The Ministers explained that one document, originally considered to be a duplication of other information already disclosed at review stage, contained additional information not previously considered. The Ministers also disclosed this additional information to the Applicant (with some personal data redacted) on 5 February 2020. In the circumstances, the Commissioner can only conclude that by not identifying this information until during his investigation, the Ministers failed to comply with section 1(1) of FOISA.
23. The Commissioner will now consider whether or not the Ministers were entitled to rely on any exemptions claimed to withhold the remaining withheld information. Given the Applicant raised no dissatisfaction with any information otherwise available and withheld under section 25(1), or any personal data withheld under section 38(1)(b), these matters have not been included in the Commissioner's investigation.

### **Section 30(b)(i) – Prejudice to effective conduct of public affairs – free and frank provision of advice**

24. Section 30(b)(i) of FOISA provides that information is exempt information if its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice. The inhibition must be substantial, in other words of real and demonstrable significance. It must also be at least likely, not simply a remote or hypothetical possibility. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.

#### *The Applicant's submissions*

25. In her application to the Commissioner, the Applicant commented that she did not believe the intention of the exemptions in section 30 was to obstruct accountable decision-making processes, arguing that the Ministers had not been open or transparent about their decision to withhold the information.

#### *The Ministers' submissions*

26. The Ministers explained that the information was an exchange between the case handler and the Scottish Government FOI Unit, seeking expert advice on the handling of the request. In their view, Ministers and officials required private space in which to seek free and frank advice from colleagues, including specialist advice from FOI experts, before finalising responses. The Ministers believed disclosure would substantially inhibit staff from seeking and/or providing candid advice in future similar cases.
27. The Ministers noted that the information in question was also related to a live investigation being conducted by the Commissioner. They submitted that disclosure, at that time, would substantially inhibit all involved from seeking and/or providing such candid views in future and compromise the Ministers' ability to robustly test positions prior to responding, thereby adversely impacting the quality of the final response. The Ministers argued that it was necessary to protect the private space in which advice was obtained and discussed, without fear of disclosure of that advice, in order to ensure the final response was of good quality and met legislative obligations.

28. The Ministers further submitted that, should the Commissioner determine that this withheld information did not fall to be exempt under section 30(b)(i), they would also wish to apply section 30(c) to this information.

*The Commissioner's views on section 30(b)(i)*

29. The Commissioner has taken account of all of the relevant submissions, together with the withheld information.
30. In assessing whether the exemption in section 30(b)(i) applies, the Commissioner has taken account of a number of factors, including the timing of the request. He must make his decision based on the Ministers' position at the time they issued their review outcome.
31. The Commissioner notes that the information concerns the seeking and provision of advice by the Scottish Government FOI Unit on the original request. He also notes that the advice given is quite generic, in that it gives options for considering exemptions that may be relevant, on the basis that they could be demonstrated to apply.
32. While the Commissioner accepts that officials must (in appropriate circumstances) have private space in which to obtain and consider internal advice, he is not persuaded that disclosure of this particular information would prevent this from continuing in future. Given the statutory obligation on Ministers to respond to information requests made under FOISA, and the public expectation that their responses are informed and accurate, in the Commissioner's view the information appears to show an objective approach being taken by the Scottish Government FOI Unit in this regard, which would be unlikely to be inhibited by disclosure.
33. The Commissioner has also considered the timing of the request. He notes that the request was made after the appeal (to which the information relates) had already been submitted to him. Further, the information under consideration here relates to the initial response (not the review response), the final version of which was already publicly available on the Scottish Government's website. Given these factors, the Commissioner does not consider timing to be a significant issue for this information.
34. The Commissioner is therefore not persuaded, from the submissions he has received and the content of the information itself, that disclosure of this information, withheld under section 30(b)(i), would result in the harm claimed by the Ministers.
35. In the absence of any submissions persuading him otherwise, the Commissioner does not accept that disclosure of this information would, or would be likely to, inhibit substantially the free and frank provision of advice. He does not believe such a conclusion can be reached on the basis of the arguments provided.
36. The Commissioner does not, therefore, accept that the exemption in section 30(b)(i) of FOISA should be upheld in respect of the information being withheld under this exemption.
37. Given that the Commissioner does not accept the application of the exemption for the information withheld under section 30(b)(i), he is not required to consider the public interest in section 2(1)(b) for that information.
38. As the Ministers have stated they also wish to rely on section 30(c) to withhold this information, the Commissioner will go on to consider the application of that exemption to this information later in this decision notice.

## **Section 30(b)(ii) – Prejudice to effective conduct of public affairs – free and frank exchange of views for the purposes of deliberation**

39. Section 30(b)(ii) of FOISA provides that information is exempt information if its disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
40. In applying the exemption in section 30(b)(ii), the chief consideration is not whether the information constitutes opinion or views, but whether the disclosure of that information would, or would be likely to, inhibit substantially the free and frank exchange of views. The inhibition must be substantial and therefore of real and demonstrable significance.
41. Each request must be considered on a case-by-case basis, taking into account the effect (or likely effect) of disclosure of that particular information on the future exchange of views. The content of the withheld information will require to be considered, taking into account factors such as its nature, subject matter, manner of expression, and also whether the timing of disclosure would have any bearing.
42. As with other exemptions involving a similar test, the Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near future, not simply a remote or hypothetical possibility.

### *The Applicant's submissions*

43. As set out in paragraph 25 above, the Applicant believed that the intention of the section 30 exemptions was not to obstruct accountable decision-making processes, arguing that, in withholding the information, the Ministers had not been open or transparent about their decision to do so.

### *The Ministers' submissions*

44. The Ministers explained that the information in question set out discussions between Scottish Government officials, Special Advisers and the Ministers in relation to the handling of the earlier request (ref FOI/18/03666). In their view, Ministers and officials required private space in which to seek to develop, discuss, test and revise proposed responses to information requests, prior to reaching a final position which, by its nature, is designed for public view. They argued that, in contrast, the process for reaching this position was not.
45. The Ministers submitted that disclosure of the views exchanged would inhibit those involved from providing them as freely and frankly in future, thus compromising the Ministers' ability to robustly test proposals prior to responding. They argued that the private space required to do this, and obtain Ministerial approval of the final response (particularly in cases such as this where the subject matter was sensitive), was essential to ensure a good quality response, meeting legislative obligations.
46. In the Ministers' view, disclosure of internal considerations of the earlier information request (FOI/18/03666), particularly prior to the conclusion of the Commissioner's live investigation into that request, would inhibit officials from seeking and/or obtaining candid views, due to the fear that these would be made public.
47. The Ministers further submitted that should the Commissioner determine that this withheld information did not fall to be exempt under section 30(b)(ii), they would also wish to apply section 30(c) to this information.

*The Commissioner's views on section 30(b)(ii)*

48. The Commissioner has taken account of all of the relevant submissions, together with the withheld information.
49. In assessing whether the exemption in section 30(b)(ii) applies, the Commissioner has taken account of a number of factors, including the timing of the request. He must make his decision based on the Ministers' position at the time they issued their review outcome.
50. It is publicly known that certain information requests made to the Scottish Government are subject to Ministerial or Special Adviser clearance, and the Commissioner notes that this is what the information under consideration here relates to, where a Minister has given a view on the exemptions proposed.
51. While the Commissioner accepts that officials must have private space in which to obtain and consider internal advice, he is not persuaded that disclosure of this particular information would prevent this from continuing in future. Given the statutory obligation on Ministers to respond to information requests made under FOISA, and the public expectation that their responses are informed and accurate, in the Commissioner's view the information appears to show that the Ministers were not zealously seeking to rely on exemptions that might apply, but were giving appropriate consideration of their relevance to the information.
52. The Commissioner has also considered the timing of the request, which was made after the appeal (to which the information relates) had already been submitted to him. Again, the information under consideration here relates to the initial response (not the review response), which had already been published on the Scottish Government's website. Taking these factors into account, again the Commissioner does not believe timing to be an issue for this information.
53. The Commissioner is therefore not persuaded, from the submissions he has received or the content of the information itself, that disclosure of the information withheld under section 30(b)(ii) would result in the harm claimed by the Ministers.
54. In the absence of any submissions persuading him otherwise, the Commissioner does not accept that disclosure of this information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. He does not believe such a conclusion can be reached on the basis of the arguments provided.
55. The Commissioner does not, therefore, accept that the exemption in section 30(b)(ii) of FOISA should be upheld in respect of the information withheld under this exemption.
56. Given that the Commissioner does not accept the application of the exemption for the information withheld under section 30(b)(ii), he is not required to consider the public interest in section 2(1)(b) for that information.
57. As the Ministers have stated they also wish to rely on section 30(c) to withhold this information, the Commissioner will now go on to consider the application of that exemption to this information.

**Section 30(c) – Prejudice to effective conduct of public affairs – otherwise prejudice**

58. Section 30(c) of FOISA provides that information is exempt information if its disclosure would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.



59. The word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority applying it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure.
60. There is no definition of "substantial prejudice" in FOISA, but the Commissioner considers the harm in question would require to be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur: therefore, the authority needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.

#### *The Applicant's submissions*

61. As stated previously, the Applicant believed the Ministers had not been open or transparent about their decision to withhold the information, and that the intention of the exemptions in section 30 was not to obstruct accountable decision-making processes.

#### *The Ministers' submissions*

62. The Ministers explained that some information in certain documents comprised early drafts of the final response to FOI/18/03666, and the exemption was being applied to information therein that differed from the publicly-available final response. Some other information being withheld under section 30(c) recorded the case handler's views at review stage, including comments on exemptions. The Ministers were also withholding the covering letter to the SPFL report under this exemption.
63. As set out above, the Ministers also wished to rely on section 30(c) to withhold the information found (by the Commissioner) to have been wrongly withheld under section 30(b). The Ministers provided no further submissions, to those already considered above under section 30(b) (and so not replicated here), to withhold this information.
64. For the majority of this information (i.e. with the exception of the covering letter to the SPFL report), the Ministers argued that, during any live investigation by the Commissioner, they must be able to provide full and frank submissions to the Commissioner, detailing the reasons for their decision in response to an information request. In their view, disclosure of internal discussions, prior to completion of an appeal process, would substantially compromise their ability to do so in that, and future, appeals. The Ministers believed that officials would be less willing to record actions or share initial draft responses if they thought their contributions would be made publicly available, particularly during a live appeal.
65. The Ministers submitted that disclosing the content of draft responses and review records (detailing case handler's comments on the appropriateness of the exemptions applied) would prejudice their ability to robustly defend their position in a live investigation, by allowing their final position to be questioned during an ongoing appeal.
66. Further, the Ministers argued that disclosure of detailed exchanges setting out their considerations in responding to an information request would likely also prejudice the formal processes surrounding the consideration of applications under section 47(1) of FOISA, by prejudicing the Commissioner's ability to fully investigate and reach an informed decision on a live appeal (specifically that relating to FOI/18/03666).
67. For the covering letter to the SPFL report, the Ministers argued that, despite the passage of time, there had been no material change in circumstances permitting disclosure. They

explained that the SPFL had declined to share with the Scottish Government any subsequent information on unacceptable conduct, pending the outcome of the live appeal concerning FOI/18/03666. The Ministers argued that this further evidenced the prejudicial impact on the Ministers' ability to effectively assess the scale of the issue of unacceptable conduct, as the SPFL had shared no further material since the 2017/18 season. In the Ministers' view, the information was provided by the SPFL in the strictest confidence and, without its co-operation and engagement, this material would not otherwise be available to the Scottish Government.

68. The Ministers submitted that officials must be able to communicate, often in confidence, with external stakeholders on a range of issues, including those concerning unacceptable conduct and societal issues within Scottish football. Disclosure of information (setting out the basis on which the SPFL provided the Ministers with information, from its members, on sensitive and controversial issues), without the SPFL's consent, would, in the Ministers' view, likely undermine its trust in the Scottish Government and inhibit future communications on such issues, leading to a reluctance by the SPFL to share detailed (or indeed any) information in future.
69. The Ministers argued that they must be able to candidly discuss future development of matters relating to unacceptable conduct and societal issues with the SPFL, Police Scotland and other stakeholders, to ensure issues are supported as robustly as possible and sufficient research has taken place to identify options most likely to positively impact behavioural change. In their view, disclosure would make it very hard to engage stakeholders in any future collaboration on these (or similar) issues, should they believe their views (given in what was widely considered to be a confidential environment) would be subject to public scrutiny.

#### *The Commissioner's views on section 30(c)*

70. The Commissioner has taken account of all of the relevant submissions, together with the withheld information.
71. In assessing whether the exemption in section 30(c) applies, the Commissioner has taken account of a number of factors, including the timing of the request. He must make his decision based on the Ministers' position at the time they issued their review outcome.

#### Information comprising early drafts of the final response to FOI/18/03666

72. The Commissioner notes that this information, comprising early drafts of the final response to FOI/18/03666, does not appear to state anything of substance that did not appear in that final version, albeit some changes were made which appear to have resulted from Ministerial clearance.
73. While the Commissioner accepts that officials must be able to provide full and frank submissions to him during any appeal, he is not convinced that disclosure of this information (which again relates to the initial response) would adversely impact this requirement. He does not believe disclosure of this particular information would lead to less candid views being recorded in future, nor would it prejudice the Ministers' ability to defend their position during an appeal, given that the review outcome is ultimately an authority's final position at the point of an appeal by an applicant. As this particular information relates to the handling of the initial request, the Commissioner does not agree that its disclosure could prejudice the formal appeal process.

74. The Commissioner has also considered the timing of the request, which was made after the appeal (to which the information relates) had already been submitted to him. Again, the information under consideration here relates to the initial response (not the review), which had already been published on the Scottish Government's website. In the circumstances, the Commissioner does not believe timing to be an issue for this information.

#### Information comprising case handler's views at review stage

75. The Commissioner notes that this information records the case handler's views at review stage, including comments on exemptions. Having examined the content of the withheld information, the Commissioner notes that all of this has either been expressed in the review outcome for FOI/18/03666, or was already public knowledge.
76. While the Commissioner accepts that officials must be able to provide full and frank submissions to him during any appeal, he is not convinced that disclosure of this information would adversely impact this requirement. He does not believe disclosure of this particular information would lead to less candid views being recorded in future, nor would it prejudice the Ministers' ability to defend their position during an appeal. The Commissioner recognises that the review outcome is generally an authority's final position at the point of an appeal by an applicant. However, given that this particular information has already been made public (either in the review outcome itself, or otherwise), the Commissioner does not agree that, in this particular case, its disclosure would prejudice the formal appeal process.
77. The Commissioner has also considered the timing of the request, which was made after the appeal (to which the information relates) had already been submitted to him. The information under consideration here relates to the review process, and by that time the review outcome (containing the majority of the information) had already been issued by the Ministers and was therefore already in the public domain, with the remainder already being public knowledge. As such, the Commissioner does not believe timing to be an issue for this information.
78. The Commissioner recognises that any request for information, even for information of the nature under consideration here, requires to be considered on a case-by-case basis, looking at the impact of disclosing that particular information and taking into account all other relevant circumstances, including timing. The Commissioner does not consider there is any basis for regarding information of this nature to be inherently exempt, without exception and for all time.

#### Internal exchanges (found to have been wrongly withheld under section 30(b))

79. The Commissioner notes that this information, found to have been wrongly withheld under section 30(b), comprises exchanges between the case handler and the Scottish Government FOI Unit, and between Scottish Government officials, Special Advisers and the Ministers in relation to the handling of the earlier request (ref FOI/18/03666).
80. The Commissioner is not persuaded that its disclosure would jeopardise the formal appeal process, or his ability to investigate and reach a decision, on the ongoing appeal to which this information relates, as claimed by the Ministers.
81. While the Commissioner accepts that officials must be able to provide full and frank submissions during an appeal process in support of decisions taken when responding to the information request, he is not satisfied that disclosure of this particular information would result in officials not recording or sharing their actions or views on initial drafts, or being unable to defend their position during an appeal.

82. The Commissioner has also considered the timing of the request, which was made after the appeal (to which the information relates) had already been submitted to him. Again, the information under consideration here relates to the initial response (not the review response), which had already been published on the Scottish Government's website. As such, the Commissioner does not believe timing to be an issue for this information.

#### Covering letter to SPFL report

83. Turning to the covering letter to the SPFL report, the Commissioner notes the Ministers' claim that disclosure of this information would lead (and for that matter had already led) to the reduction, or even stoppage, of the sharing of information (by the SPFL) on unacceptable conduct in Scottish football. In the Commissioner's view, if such actions are already being taken by the SPFL, then this cannot be as a direct result of disclosure of this particular information, given that such disclosure has not occurred.

84. The Commissioner accepts that officials must be able to communicate, in confidence, with external stakeholders on a range of issues, including sensitive issues such as unacceptable conduct at football events. He has also considered the actual content of this particular information, in which the SPFL sets out the basis on which the report was provided, an overview of the matches covered, who the report can be shared with (without obtaining SPFL consent), and requiring the Ministers to contact the SPFL should they receive a request for this information. Having done so, the Commissioner is of the view that the Ministers appear to have taken a "blanket" approach in withholding this information, the essence of which is largely publicly known already. He considers disclosure of its content would not come as a surprise to anyone following this issue.

85. The Commissioner notes the Ministers' claim that disclosure would impact on engaging stakeholders in any future collaboration on these issues, should they believe their views would be subject to public scrutiny. In his view, this argument seems somewhat over-stated, given the actual content of the information, and he is therefore not convinced that its disclosure would cause the substantial prejudice claimed by the Ministers.

86. The Commissioner has also taken into account the passage of time which, he considers, has had some impact on the circumstances permitting disclosure. In particular, the SPFL's views on disclosure are already publicly known, as set out, for example, in the Scottish Parliamentary Questions transcript of 18 June 2019<sup>2</sup>, where the Cabinet Secretary for Justice refers to the SPFL's objection to publishing the data.

#### *Commissioner's conclusions on section 30(c)*

87. The Commissioner is therefore not persuaded, from the submissions he has received, that disclosure of the information withheld under section 30(c) would result in the harm claimed by the Ministers.

88. In the absence of any submissions persuading him otherwise, the Commissioner does not accept that disclosure of this information would, or would be likely to, otherwise prejudice the effective conduct of public affairs. He does not believe such a conclusion can be reached on the basis of the arguments provided.

89. The Commissioner does not, therefore, accept that the exemption in section 30(c) of FOISA should be upheld in respect of the information withheld under this exemption.

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<sup>2</sup> <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12194&i=110128>

90. Given that the Commissioner does not accept the application of the exemption for the information withheld under section 30(c), he is not required to consider the public interest in section 2(1)(b) for that information.
91. As, with the exception of one document, the Ministers are not relying on any other exemption to withhold this information, he requires the Ministers to disclose it to the Applicant (see paragraph 133 below regarding the redaction of personal data).
92. As the Ministers are also relying on section 36(2) to withhold information in one remaining document, the Commissioner will now go on to consider the application of that exemption to this information.

### **Section 36(2) – Confidentiality**

93. Section 36(2) of FOISA provides that information is exempt if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure, by the authority so obtaining it, to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA. However, it is generally accepted in common law that an obligation of confidence will not be enforced to restrain the disclosure of information which is necessary in the public interest.

#### *Information obtained from another person*

94. Section 36(2) therefore contains a two-stage test, both parts of which must be fulfilled before the exemption can be relied upon. The first is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.
95. The Ministers submitted that the information (the covering letter to the SPFL report) was provided by the SPFL.
96. In the circumstances, the Commissioner is satisfied that information being withheld under this exemption was obtained by the Ministers from another person and that the first part of the section 36(2) test has been fulfilled.

#### *Actionable breach of confidence*

97. The second part of the test is that the disclosure of the information by the public authority must constitute a breach of confidence actionable either by the person who gave the information to the public authority or by any other person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled.
98. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
  - (i) the information must have the necessary quality of confidence;
  - (ii) the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
  - (iii) unauthorised disclosure must be to the detriment of the person who communicated the information.

99. In her application to the Commissioner, the Applicant commented that her request sought correspondence relating to a specific FOI request, and not the information that fell within the scope of that request. As such, she argued that her request should not be subject to any legal restrictions that might apply to that information.

#### Necessary quality of confidence

100. The Ministers submitted that the information itself specified its limited uses, and named individuals with whom the SPFL had agreed it could be shared.
101. For these reasons, the Ministers believed the information had the necessary quality of confidence at the time of the request (and continued to do so) as it was not common knowledge, not publicly available and had not been shared outwith the parties listed by the SPFL.
102. Having considered the information requested and the arguments put forward by the Ministers, the Commissioner is satisfied that it fulfils the criteria of having the necessary quality of confidence. The information is not common knowledge and could not readily be obtained by the Applicant by any other means.

#### Obligation to maintain confidentiality

103. The Ministers submitted that the information was provided by the SPFL in confidence, evidenced by the express statement contained therein: "*The information included in or attached to this communication is confidential and is not publicly available or accessible*". As such, the Ministers confirmed they were relying on an explicit obligation to maintain confidentiality.
104. Given the clear circumstances expressed by the SPFL in providing the information, the Ministers believed the SPFL had a strong legal claim to challenge any disclosure which would breach this explicit obligation.
105. Having considered the information and the circumstances in which it was provided, the Commissioner is satisfied that the information withheld from the Applicant was received in circumstances which imposed upon the Ministers an obligation to maintain confidentiality. The withheld information falls within the overall definition of "confidential information" as described in the letter itself. On the face of it, therefore, he is satisfied that there is an explicit obligation of confidence.
106. While he notes that the obligation to maintain confidentiality might not remain in place for all time, the Commissioner is satisfied that it did remain in place at the time the Ministers received the request and when they carried out their review.

#### Unauthorised disclosure which could cause detriment

107. The third requirement is that unauthorised disclosure of the information must be to the detriment of the person who communicated it. The damage need not be substantial and indeed could follow from the mere fact of unauthorised use or disclosure in breach of confidence. In that respect, the test of detriment is different from establishing whether, for example, disclosure would prejudice substantially the commercial interests of any person when considering the exemption in section 33(1)(b) of FOISA.
108. In the Ministers' view, the SPFL's intentions in providing the information in confidence were explicit, as set out above, and the information itself indicated that its disclosure would cause substantial harm to the SPFL's interests. The Ministers submitted that were they to disclose the information, the SPFL had confirmed it would claim a breach of confidentiality.

109. The Commissioner considers these submissions relevant to the withheld information. Having considered that information, alongside the Ministers' submissions, he is satisfied that its disclosure would not be authorised by the SPFL and would be sufficiently detrimental to meet the requirements for an actionable breach of confidence. The Commissioner is therefore satisfied that all the tests for an actionable breach of confidence are met in this case.
110. Having found that all the tests for the exemption in section 36(2) of FOISA have been met, and the exemption is properly engaged, the Commissioner must now go on to consider where the balance of public interest lies in relation to disclosure of the information.

*Public interest defence – section 36(2)*

111. As noted above, the exemption in section 36(2) of FOISA is an absolute exemption in terms of section 2(2) of FOISA and not subject to the public interest test in section 2(1)(b). However, the law of confidence recognises that, in certain circumstances, the strong public interest in maintaining confidences may be outweighed by the public interest in disclosure of the information. In deciding whether to enforce an obligation of confidentiality, the courts are required to balance these competing interests, but there is no presumption in favour of disclosure. This is generally known as the public interest defence.
112. The courts have identified a relevant public interest defence in cases where withholding information would cover up serious wrongdoing, and where it would lead to the public being misled on, or would unjustifiably inhibit public scrutiny of, a matter of genuine public concern.

The Applicant's submissions

113. In her submissions to the Commissioner, the Applicant stated her information request had been made on the basis of evidence which implied deliberate and sustained obfuscation of facts relating to a public recommendation made as part of a report commissioned by the Scottish Government. In her view, the Ministers were withholding the information as disclosure would show this to be true.
114. For context, the Applicant submitted that, in 2017, the Scottish Government published a second independent report<sup>3</sup> by Dr Duncan Morrow on tackling sectarianism (this being a review of how the Scottish Government had implemented an earlier review by The Advisory Group on Tackling Sectarianism in Scotland, published in 2015<sup>4</sup>). This second report recommended (on page 32) that a baseline study to enable a monitoring framework should be established and the outcomes published annually, to allow for genuine debate on sectarian behaviour in football, its impact on culture and the effectiveness of measures to reduce it, and to help further reviews.
115. The Applicant further submitted that, following Scottish Police Authority reports that sectarian incidents were increasing (but "hard to quantify") and comments made by DCC Will Kerr concerning the level of disorder, Liam McArthur MSP had an exchange during Topical Questions<sup>5</sup> in the Scottish Parliament (on 5 March 2019) about the issue of sectarian conduct at football matches. Following this, a number of Parliamentary Questions were submitted to the Scottish Government about what monitoring was being done, examples of which the Applicant described as:

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<sup>3</sup> <https://www.gov.scot/publications/review-implementation-recommendations-advisory-group-tackling-sectarianism-scotland-report-dr/>

<sup>4</sup> <https://www2.gov.scot/Publications/2015/05/4296>

<sup>5</sup> <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11976&mode=pdf>

- Question S5W-21949<sup>6</sup> (lodged 6 March 2019) asked about what monitoring was being done. The response was that while the football authorities collect relevant data, the Scottish Government does not directly monitor unacceptable conduct in football (Humza Yousaf 14 March 2019).
- Question S5W-22716<sup>7</sup> (lodged 18 April 2019) asked if the monitoring recommended by Dr Morrow was being done – namely whether the baseline study, the monitoring framework and the annual outcome would be placed in the Scottish Parliament Information Centre (SPICe). The Scottish Government admitted the data existed, but was held in confidence, at the request of the football authorities (Humza Yousaf 16 May 2019).
- Question S5W-24249<sup>8</sup> (lodged 5 July 2019) asked whether there was a contract relating to the agreement referred to in the previous response, who approved it and whether it was to be placed in SPICe. The response was that there was no contract (Humza Yousaf 2 August 2019).

116. In the Applicant's view, these showed that the Scottish Government continued to be evasive about the nature of these restrictions. As the requests for information made through Parliament were being frustrated from the outset, she believed the request for information (FOI/18/03666) to which her request related was being frustrated in the same way, and the public interest lay in establishing if this was the case.

117. The Applicant argued that Dr Morrow's recommendation was to inspire public debate, aimed at reducing sectarian behaviour associated with football. The level of interrogation to establish the most basic facts about the Scottish Government's response to the report showed that the response, so far, had had exactly the opposite impact, and that this was not in the public interest. In her view, sectarian conduct had not diminished, and the Scottish Government's approach had shown a will to deliberately circumvent scrutiny. She believed that this determined, needless secrecy was enabling the Ministers to avoid responsibility for their actions.

118. The Applicant also referred to separate whistleblowing reports by SPFL match delegates who were concerned that their reports of sectarianism were not being addressed. In her view, disclosure of the information was in the public interest, as this would hold the Scottish Government to account on the issue.

#### The Ministers' submissions

119. The Ministers recognised there was a general public interest in open, transparent and accountable government, and in helping inform public debate on unacceptable conduct in Scottish football.

120. The Ministers believed this was outweighed by the strong public interest in maintaining and respecting explicit confidences where information had been collated and shared on a confidential basis, as was the case here. They further believed that the public interest lay in maintaining trust between stakeholders, to allow the sharing of information on reviewing and reducing societal issues in Scottish football, and to improve public safety and enjoyment at these events. In the Ministers' view, there was no public interest in disclosure of information

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<sup>6</sup> <https://www.parliament.scot/S5ChamberOffice/WA20190314.pdf>

<sup>7</sup> <https://www.parliament.scot/S5ChamberOffice/WA20190516.pdf>

<sup>8</sup> <https://www.parliament.scot/S5ChamberOffice/WA20190802.pdf>



that would result in stakeholders being less likely to share information in future, thus undermining the quality of the decision-making process, as decisions would not be fully informed.

121. On balance, the Ministers concluded that the public interest lay in favour of upholding the exemption, believing there was no credible public interest defence to disclosure of the information.

#### Third party views

122. The Ministers provided the Commissioner with correspondence from the SPFL, provided in the context of both FOI/18/03666 and the current application and objecting to disclosure.

#### The Commissioner's views on the public interest defence – section 36(2)

123. In coming to a decision on this matter, the Commissioner has taken account of the public interest defence submissions made by the Ministers (including the third party views referred to above), and the submissions made by the Applicant on the public interest in disclosure of the information. He has also taken account of the content of the withheld information itself.
124. The Commissioner must consider the actual circumstances of the case, and whether the Ministers were correct in their decision, at the time they responded to the request and subsequent requirement for review. That position may change in time, but the issue here is whether the Ministers responded to this particular request correctly at the relevant time.
125. The Commissioner recognises there is clearly a strong public interest defence in transparency to allow effective scrutiny of information relating to a matter of genuine public concern. In this case, he considers there is a particular public interest in informing debate on a sensitive matter of public importance, namely unacceptable conduct in football and, as argued by the Applicant, in the Ministers being held to account for their actions, or non-actions as the case may be.
126. On the other hand, he accepts there is also a strong public interest in the maintenance of confidences, where information has been shared in such circumstances.
127. The Commissioner has examined the content of this particular information, in which the SPFL sets out the basis on which the report was provided, an overview of the matches covered, who the report can be shared with (without obtaining the SPFL's consent) and requiring the Ministers to contact the SPFL should they receive a request for this information. He has also considered that the third party views expressed are those of the SPFL (which are largely already publicly known) and not those of wider stakeholders.
128. Having done so, the Commissioner does not accept that disclosure of this particular information would lead to the harm claimed by the Ministers. Given that the stated purpose of stakeholders sharing information is to review and reduce societal issues in Scottish football, and to improve public safety and enjoyment at these events, the Commissioner finds it unlikely that these same stakeholders would refrain from sharing information in future. In the circumstances, the Commissioner is not satisfied that much weight can be given to the public interest defence arguments put forward by the Ministers for non-disclosure.
129. The Commissioner considers it important to recognise the strong public desire for issues of this nature to be tackled, and finds it hard to accept how it would be in the interests of the SPFL or its member clubs to refrain from engaging with the Ministers and other stakeholders on such a high-profile issue, particularly given their professional status and reliance on public support, in financial terms.

130. Furthermore, the essence of the content of this information relates to matters which are already largely publicly known, for example, as recorded in the Scottish Parliamentary Questions transcript of 18 June 2019 (referred to in paragraph 86 above), where the Cabinet Secretary for Justice refers to the SPFL's objection to publishing the data. Indeed, the Ministers' withholding of this information appears, to some extent, to be in contradiction of the views of the Cabinet Secretary for Justice (regarding disclosure of the data in the report), and the recommendations (on football) in the report by Dr Duncan Morrow (page 32) referred to in paragraph 114 above.
131. On balance, having considered all relevant submissions and the withheld information itself, the Commissioner finds there is a strong public interest permitting disclosure of this information.
132. The Commissioner does not, therefore, accept that the exemption in section 36(2) of FOISA should be upheld in respect of the information withheld under this exemption. As the Ministers are not relying on any other exemption to withhold this information, he requires the Ministers to disclose it to the Applicant (see paragraph 133 below regarding the redaction of personal data).

## Personal data

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133. In disclosing the information, as required by this decision notice, the Commissioner notes that the information contains some personal data. The Ministers should give consideration to the redaction of personal data of junior staff, bearing in mind the expectations surrounding the disclosure of personal data of individuals in a senior position and/or with a public facing role.

## Decision

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The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply 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 the Ministers wrongly withheld some information, at review stage, under the exemptions in section 30(b) and (c) (Prejudice to effective conduct of public affairs).

He also finds that the Ministers wrongly withheld the remaining information under the exemptions in section 30(b) and (c) and section 36(2) (Confidentiality) of FOISA.

By failing to identify some information until during the investigation, the Commissioner further finds that the Ministers failed to comply with section 1(1) of FOISA.

For the information he has found to have been wrongly withheld, and not already released, the Commissioner requires the Ministers to disclose this information to the Applicant.

The Commissioner therefore requires the Ministers to disclose to the Applicant the information he has found to have been wrongly withheld (and not already disclosed) by **16 October 2020**.

## **Appeal**

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Should either the Applicant or the Ministers 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**

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

**Margaret Keyse**  
**Head of Enforcement**

**1 September 2020**

## Appendix 1: Relevant statutory provisions

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### Freedom of Information (Scotland) Act 2002

#### 1 General entitlement

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

#### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
- (a) the provision does not confer absolute exemption; and
  - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
- ...
- (c) section 36(2);
- ...

#### 30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-
  - (i) the free and frank provision of advice; or
  - (ii) the free and frank exchange of views for the purposes of deliberation; or
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

## 36 Confidentiality

...

- (2) Information is exempt information if-
  - (a) it was obtained by a Scottish public authority from another person (including another such authority); and
  - (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

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