

Decision Notice 120/2021

Coronavirus: Scottish ports, airports and border controls

Applicant: The Applicant

Public authority: Scottish Ministers

Case Ref: 202001106



Scottish Information
Commissioner

Summary

The Ministers were asked for information about Scottish airports, ports and border controls during the Covid-19 pandemic

The Ministers initially withheld all of the information on the basis that disclosure would substantial prejudice relations within the United Kingdom, but, during the Commissioner's investigation, they decided to only withhold some of the information under this exemption. Other information was disclosed to the Applicant, and some remained withheld under different exemptions/provisions.

The Commissioner investigated and found that the Ministers had partially breached FOISA in responding to the request. This was because they withheld information which they later disclosed.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) and (2)(e)(ii) (Effect of exemptions); 3(2)(a)(ii) (Scottish public authorities); 17(1) (Notice that information is not held); 28 (Relations within the United Kingdom); 30(b) (Prejudice to effective conduct of public affairs); 38(1)(b), (2A)(a), (5) (definitions of "the data protection principles", "data subject", "personal data", "processing" and "the UK GDPR") and (5A) (Personal information)

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

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

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

Background

1. On 19 April 2020, the Applicant made a request for information to the Scottish Ministers (the Ministers). He asked:
 - (i) Does the relevant Directorate of the Scottish Government have any information as to why were Scottish ports, airports and border controls not closed to non-UK residents immediately after the Coronavirus outbreak?
 - (ii) Does the relevant Directorate of the Scottish Government have any information as to why were Scottish ports, airports and border controls allowing flights and entries to continue from high risk countries affected by the Coronavirus such as China, Iran, Italy and Spain immediately after the Coronavirus outbreak?
 - (iii) Does the relevant Directorate of the Scottish Government have any information as to why were Scottish ports, airports and border controls not closed to non-UK residents later on after the Coronavirus outbreak?
 - (iv) Does the relevant Directorate of the Scottish Government have any information as to why were Scottish ports, airports and border controls allowing flights and entries to continue from high risk countries affected by the Coronavirus such as China, Iran, Italy and Spain later on after the Coronavirus outbreak?

- (v) Does the relevant Directorate of the Scottish Government have any information as to why are Scottish ports, airports and border controls not closed to non UK residents at the present time after the Coronavirus outbreak?
 - (vi) Does the relevant Directorate of the Scottish Government have any information as to why are Scottish ports, airports and border controls allowing flights and entries to continue from high risk countries affected by the Coronavirus such as China, Iran, Italy and Spain at the present time after the Coronavirus outbreak?
2. The Ministers responded on 3 June 2020 and withheld all of the information under section 28(1) of FOISA, on the grounds that disclosure would, or would be likely to, prejudice substantially relations between the Scottish Government and the UK Government.
 3. On 18 June 2020, the Applicant wrote to the Ministers requesting a review of their decision. He did not agree that the exemption applied, and even if it did apply, he argued that the public interest favoured disclosure.
 4. The Ministers notified the Applicant of the outcome of their review on 15 July 2020, upholding their original response.
 5. On 18 September 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Ministers' review because he did not agree that the exemption contained in section 28(1) of FOISA had been applied correctly, and he considered that the public interest favoured disclosure.

Investigation

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 29 September 2020, 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 related to their reasons for withholding the information under section 28(1) of FOISA.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner 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.

Withheld information

10. The Ministers initially withheld fourteen documents from the Applicant. During the investigation, the Ministers provided the Applicant with redacted versions of documents 1, 2, 2a, 4a and 5, and it withheld documents 1a, 3, 5a and 6 in their entirety. The Ministers also

identified three documents which they considered to be wholly outwith the scope of the request (documents 2b, 2c and 2e) and two documents which were duplicates of other information in the schedule (document 4 is a duplicate of document 5 and document 2d is a duplicate of page 1, document 2a). The Commissioner will not consider documents 4 and 2d any further in this decision as they are simply duplicates of other information that is being withheld and which will be considered later in this decision notice.

11. The Ministers withdrew their reliance on section 28(1) of FOISA to withhold all of the information, and instead they applied new exemptions and provisions to the information that was continuing to be withheld;
 - Section 3(2)(a)(ii) of FOISA – information withheld in documents 1, 1a, 5a and 6
 - Section 28(1) of FOISA – information withheld in documents 2a and 4a
 - Section 30(b)(i) of FOISA – information withheld in document 1
 - Section 30(b)(ii) of FOISA –document 3 (in its entirety)
 - Section 38(1)(b) of FOISA – information withheld in documents 1, 2, 4a and 5
12. In addition to the information withheld under an exemption, the Ministers also withheld some information on the grounds that it fell outwith the scope of the request, specifically information contained in documents 2, 2a, 4a, 5, 5a and 6, and the entirety of documents 2b, 2c and 2e.
13. The Commissioner has reviewed the wording of the request made by the Applicant along with the information that the Ministers have deemed to be out of scope of the request, and is satisfied that the out of scope information has been correctly identified. Given this, the Commissioner will not consider the out of scope information any further in this decision.
14. In relation to Annex A of document 1, the Ministers provided submissions explaining why they had disclosed this information to the Applicant during the investigation. The Ministers explained that the information contained in this document had been published online since the Applicant made his initial request, and so it no longer had the necessary quality of confidence. As this information had been publicly disclosed, the Ministers decided to provide the Applicant with a copy of this document. The Ministers maintained that Annex A of document 1 would have been captured by the provisions of section 3(2)(a)(ii) of FOISA, at the time of the request, and their arguments on this will be considered below.
15. The Ministers provided no submissions, explaining why the remainder of the information they disclosed during the investigation was correctly withheld at the time they dealt with the request or the requirement for review, so the Commissioner can only conclude that the Ministers were not entitled to withhold that information at that time, and they therefore breached section 1(1) of FOISA in doing so.
16. The Commissioner will now go on to consider whether information is held for the purposes of FOISA and each of the exemptions relied on by the Ministers and determine whether they apply to the withheld information.

Information held by the Ministers

17. 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 certain qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it.

18. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.

Section 3(2)(a)(ii) (Information supplied by the UK Government)

19. In terms of section 3(2)(a)(ii) of FOISA, information which is held in confidence, having been supplied by a Minister of the Crown or by a department of the Government of the United Kingdom, is not considered to be held by a Scottish public authority for the purposes of FOISA.
20. The purpose of section 3(2)(a)(ii) is to allow UK Ministers and Government departments to provide confidential information to Scottish public authorities whilst ensuring that any decision to release the information remains with the relevant UK Ministers and Government departments, and subject to the (UK) Freedom of Information Act 2000 rather than FOISA. This purpose was noted in the Policy Memorandum which accompanied the Freedom of Information (Scotland) Bill and also in the Justice 1 Committee debates.
21. The Commissioner's briefing on the exemption in section 28 of FOISA¹ states that there are three points to consider when determining whether section 3(2)(a)(ii) of FOISA applies. These are:
 - (i) *was the information provided in circumstances giving rise to (or at least implying) a specific obligation to keep it confidential?* In most cases, there should be a clear indication that information was intended to be treated as confidential, for example with a protective marking (e.g. "restricted", "secret" or "top secret") or some other express statement.
 - (ii) *is the information still confidential at the time of the request?* This will depend on the nature of the information. In order to be confidential, it needs to have a necessary quality of confidence - the information must not be common knowledge or otherwise publicly available. For example, a document supplied to a public authority may subsequently have been published, in which case it is no longer confidential.
 - (iii) *would any damage result from the disclosure of the information?* In general, if no damage would follow from disclosure, there is no need to keep information confidential.
22. The Ministers submitted that documents 1a, 5a and 6 were supplied to the Scottish Government in confidence from the Cabinet Office, a department of the UK Government. The Ministers also argued that some of the information contained in document 1 (including Annex A) is captured by 3(2)(a)(ii) in so far as it disseminates the information provided in document 6.
23. The Ministers submitted that documents 1a and 5a are headed "*This document is the property of Her Britannic Majesty's Government*" and have an "*Official Sensitive*" marking. During the course of the investigation, the Ministers consulted with the UK Government in relation to these documents and the UK Government confirmed that it considers documents

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section28/Section28.aspx>

1a, 5a, and 6 (and accordingly the parts of document 1 that disseminate information contained in document 6) to have been shared with the Scottish Government in confidence, and requested that the material is not disclosed. The Ministers provided the Commissioner with a copy of the correspondence received from the UK Government, expressing this view.

24. The Ministers submitted that, due to the sensitive nature of the documents, and the nature of the GPSMIG (General Public Services Ministerial Information Group) meetings (which were established by and involving UK Government Ministers), confidentiality was implied and is expected by UK Government.
25. The Ministers argued that, as documents 1a, 5a, and 6 (and parts of document 1 that disseminates information contained in document 6) were provided by a department of the UK Government in confidence, they determined that, as set out in section 3(2)(a)(ii) of FOISA this information is not held by the Scottish Government for the purposes of FOISA.
26. The Ministers explained that, in their review response of 15 July 2020, as part of their duty to provide advice and assistance under section 15(1) of FOISA, they advised the Applicant that the Home Office was the lead body responsible for the UK's borders, and that he may wish to contact them directly for further information in relation to this matter. The Ministers submitted that they also provided a link to the relevant page of the Home Office's website containing details of how to make an FOI request. The Ministers noted that they reiterated this advice when applying section 3(2)(a)(ii) in their latest communication to the Applicant on 16 December 2020.
27. The Ministers acknowledged that information contained at Annex A of document 1a has been published online since they responded to the Applicant's initial request. The Ministers consider that section 3(2)(a)(ii) was relevant to this information at the time of dealing with his request. However, as it is now publicly available and no longer has the necessary quality of confidence, the Ministers noted that they have provided the Applicant with a copy of this information and, for awareness, a link to where the full minutes can be accessed. The Ministers provided the Commissioner with a copy of this correspondence with the Applicant.
28. The Ministers argued that release of the material could undermine the principle of collective agreement and the ability of Ministers to openly debate policy in a confidential manner before accepting collective responsibility for a decision made at Cabinet or its Committees. It is a long-standing convention that the frequency, agenda and attendees (beyond the "core" ministerial membership published on gov.uk) are not made public. The Ministers argued that, if they were to release this information, the public would be able to make assumptions about what had been discussed and what had not been discussed by Ministers in this forum. Disclosure of this information would weaken Ministers' ability to discuss controversial and sensitive topics free from premature public scrutiny.

The Applicant's comments on section 3(2)(a)(ii)

29. The Applicant submitted that, although the Ministers had argued that the documents were held in confidence, he had not seen any evidence that the UK Government stipulated that the documents concerned were to be treated as confidential.
30. The Applicant argued that, for section 3(2)(a)(ii) to be engaged, he would expect there to be specific instructions from the UK Government stating that the information was supplied in confidence. The Applicant indicated that the decision on whether the documents were held in confidence or not, was one that lay with the Commissioner, as the Commissioner will have access to information (such as instructions from the UK Government) that he does not.

The Commissioner's comments on section 3(2)(a)(ii)

31. Taking account of the information provided to the Commissioner and the submissions made by the Ministers, the Commissioner is satisfied that the information within documents 1a, 5a and 6 (and document 1 (including Annex A), in so far as it disseminates information contained in document 6) were provided in confidence to the Ministers and was, when the Ministers carried out their review, held under circumstances bringing it within section 3(2)(a)(ii) of FOISA.
32. As such, the Commissioner has concluded that the information contained within those documents was (at the time of the review) not held by the Ministers for the purposes of FOISA and the Ministers were not obliged to provide them following a request under section 1(1).
33. The Commissioner finds that, in applying the section 28(1) exemption to information which, at the time of the request/review they did not hold, the Ministers failed to comply with section 17(1) of FOISA.

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

34. The Commissioner will now consider whether those parts of the information contained in documents 2a and 4a withheld by the Ministers under section 28(1) of FOISA can properly be withheld on that basis.
35. Section 28(1) of FOISA exempts information if its disclosure would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration. The Scottish Administration and the Government of the United Kingdom both fall within the definition of "administration in the United Kingdom" in section 28(2) of FOISA.
36. This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to relations between administrations by disclosure of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
37. For section 28(1) to apply, the harm resulting from disclosure must be at the level of substantial prejudice. There is no definition of substantial prejudice in FOISA, but the Commissioner's view is that in order to claim this exemption an authority must be able to satisfy him that the damage caused, or likely to be caused, by disclosing the information would be both real and significant, as opposed to hypothetical or marginal. For the harm to be likely, there would require to be at least a significant probability of it occurring, in the near or foreseeable future and not at some distant time.
38. The Ministers are withholding information contained in documents 2a and 4a under section 28(1) of FOISA.

The Applicant's submissions

39. The Applicant argued that his request related to measures put in place at border controls in Scotland relating to the Coronavirus outbreak. He argued that disclosure of the information he had requested would not be likely to "prejudice substantially relations between any administration in the United Kingdom" as claimed by the Ministers.

The Ministers' submissions

40. The Ministers submitted that the administrations whose relations would, or would be likely to, be substantially prejudiced by disclosure, were the Scottish Government and the UK Government, more specifically the Cabinet Office, Department for Transport, Department for Health and Social Care and the Home Office, including the relevant UK Government Ministers.
41. The Ministers noted that document 2a is a Scottish Government briefing prepared for the GPSMIG meeting held on 31 March 2020. As noted above, the Ministers explained that the GPSMIG meetings were established by, and involved, UK Ministers and that confidentiality was implied and is expected by the UK Government. The information being withheld under section 28(1) of FOISA sets out the Scottish Government's considerations of information provided by the UK Government in confidence.
42. The Ministers submitted that document 4a is readout of the GPSMIG meeting held on 30 March 2020 and it contains details of the discussions held at the meeting, disclosure of which would substantially prejudice the Scottish Government's relations with the UK Government.
43. The Ministers argued that effective communications between the various governments of the UK are essential for the effective administration of the UK as a whole. Throughout the coronavirus pandemic, decisions regarding measures taken at the borders have been made through consultation between the UK Government (the Home Office) and the devolved administrations, including the Scottish Government, with a view to taking a four nations approach as far as possible. Disclosure of any discussions that took place between the Scottish and UK Governments up until 19 April 2020 would, or would be likely to, prejudice substantially relations between the Scottish Government and the UK Government.
44. The Ministers further contended that it is essential for the effective administration of the UK as a whole that there should be regular, and often private, communications between the Scottish Government, the UK Government and the other devolved administrations.
45. The Ministers submitted that, if the UK Government documents or the information contained within them, and meeting read-outs, were released into the public domain, it would be likely to substantially harm UK Government engagement with the Scottish Government, which could lead to a reduced level of quality engagement on key issues, which could impact public safety and COVID-19 management.

The Commissioner's view on section 28(1)

46. The Commissioner has considered the content of documents 2a and 4a, in conjunction with the arguments put forward by the Ministers and he is satisfied that disclosure of the information withheld under section 28(1) of FOISA would, or would be likely to, prejudice substantially relations between the UK Government and the Scottish Government.
47. Given the circumstances in which GPSMIG meetings took place, the Commissioner is satisfied that the UKG intended the meetings to be confidential and therefore any information prepared for those meetings or arising from discussions at those meetings would also be expected to remain confidential. The information contained in documents 2a and 4a clearly relates to the development or formulation of policy, in relation to the management of Covid-19. In this instance, the Commissioner is especially persuaded by the Ministers' arguments regarding the need to ensure that the administrations of the United Kingdom have an open

and collaborative working relationship in a key policy area which could impact on public health.

48. The Commissioner is satisfied that disclosure of this information would, or would be likely to, prejudice substantially relations between the UK Government and the Scottish Government. Given this, the Commissioner finds that the exemption contained in section 28(1) of FOISA has been correctly applied to the information being withheld in documents 2a and 4a.

Public interest test

49. As mentioned above, the exemption in section 28(1) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.

The Applicant's submissions

50. The Applicant argued that, due to the seriousness of the current pandemic, there should be complete transparency by governments in health issues, including border controls. He contended that the public interest weighs against non-disclosure, and that there cannot be any prejudice to relations to the UK government relating to border controls.

The Ministers' submissions

51. The Ministers recognised that there is public interest in the measures put in place at Scotland's borders during the Covid-19 pandemic, and that there is a public interest in disclosing this information as part of an open, transparent and accountable government, and to inform public debate.
52. However, the Ministers argued that this is outweighed by the strong public interest in the Scottish Government being able to maintain quality and trusted relations with the UK Government and individual departments of the UK Government, as well as other devolved administrations, and for them to be able to exchange information with them on a confidential basis, knowing that it will not be disclosed.
53. The Ministers submitted that it was essential for them to protect the free exchange of information between the administrations to ensure that they are able to keep each other fully and regularly informed about matters of mutual interest. They argued that this was essential for them to maintain the ability to advise Scottish Government Ministers confidentially on matters which continue to be highly sensitive, particularly during the Covid-19 pandemic, and covering reserved policy areas such as borders. The Ministers contended that there was no public interest in disclosing information when that will damage relationships and disrupt future communications.

Commissioner's view on the public interest

54. The Commissioner has considered all of the submissions and accepts that, where the subject of the information is a matter which invokes public discussion and debate, there is a public interest in ensuring that such matters are open to scrutiny. He also acknowledges the general public interest in transparency and accountability, particularly where this might contribute to understanding how the Ministers interact with the UK Government as they develop policies to deal with the impact of the Covid-19 pandemic. He acknowledges that the withheld information might cast some light on these matters.
55. The Commissioner has also taken account of the submissions made by the Ministers on the public interest in maintaining the exemption. He has already acknowledged the risk of

substantial prejudice to the relationship between the Ministers and the UK Government in this case, with particular reference to the need to ensure that the administrations of the United Kingdom have an open and collaborative working relationship. He accepts that such harm would not be in the public interest.

56. The Commissioner accepts that it is important for the Ministers maintain a good relationship with the UK Government and other administrations to facilitate the effective consideration and development of policy in this area. It is important that devolved administrations can communicate freely with the UK Government and, equally, that the UK Government is not inhibited in sharing its views and policy preferences. The Commissioner appreciates that this will, from time to time, involve the exchange of information and views of a confidential and sensitive nature.
57. Taking all of the circumstances into consideration, the Commissioner accepts on balance that greater weight should be attached to the arguments which would favour withholding this particular information and maintaining the exemption. The public interest in disclosure might be greater in other cases, but the Commissioner must consider the information and the circumstances in each individual case. Having reached this conclusion, the Commissioner finds that the public interest in disclosing the information is outweighed by that in maintaining the exemption in section 28(1) of FOISA. Therefore, the Ministers were entitled to withhold the information held under that exemption.

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

58. The Ministers are withholding some of the information in document 1 under section 30(b)(i) of FOISA. Section 30(b)(i) provides that that information is exempt if its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
59. In applying the exemption in section 30(b)(i), the chief consideration is not whether the information constitutes advice, but whether the disclosure of that information would, or would be likely to, inhibit substantially the provision of advice. The inhibition in question must be substantial and therefore of real and demonstrable significance.

The Ministers' submissions

60. The Ministers submitted that the information being withheld under section 30(b)(i) consists of a Scottish Government official's free and frank advice to the Cabinet Secretary for Finance and the Minister for Public Finance and Migration, on the options and risks for the imposition of additional restrictions on entry to the UK as a response to COVID-19. They explained that the advice paraphrases and comments on document 1a, which was written by the UK Government Department for Transport, Department for Health and Social Care, and the Home Office, and was shared in confidence with the Scottish Government.
61. The Ministers submitted that this exemption recognises the need for officials to have a private space within which to provide free and frank advice to Ministers before the Scottish Government reaches a settled public view. They argued that disclosing the content of free and frank advice which considers the imposition of additional restrictions and decisions regarding UK borders as a response to COVID-19 will substantially inhibit the provision of such advice and the candidness of such discussions in the future. The Ministers contended that officials will be reluctant to provide their advice fully and frankly in future, particularly because these discussions are still ongoing and relate to a sensitive issue such as border control during the pandemic.

62. The Ministers argued that release of this information would significantly inhibit the ability of Ministers and officials to consider issues and develop thinking or future policy with regard to situations as they arise if they were unable to seek free and frank advice. They contended that the Scottish Government needs to be able to fully develop its thinking and understanding of situations in order to provide accurate and appropriate responses and in order to do so it is necessary for both officials to be able to provide, and for ministers to receive, free and frank advice.

The Commissioner's findings

63. The Commissioner has considered all the submissions made by the Ministers and the Applicant, along with the withheld information under consideration.
64. The Commissioner accepts that, in the circumstances of this case, officials required a private space to discuss matters freely and frankly. The Commissioner accepts that there was a need for Ministers and officials to have a private space to discuss the pros and cons of the options outlined in document 1a, before arriving at a final position. This process involved the free and frank provision of advice. Disclosure of this advice (at the time of the request or review) would, for the reasons given by the Ministers, substantially inhibit those involved from giving their advice freely. Furthermore, the Commissioner notes that, as he has already concluded that document 1a was provided to the Scottish Government by the UK government in confidence, any comments or advice offered in document 1, in relation to the information contained in document 1a, has particular sensitivity.
65. Given this, he is satisfied that all of the information under consideration here is exempt from disclosure in terms of the exemption contained in section 30(b)(i) of FOISA. He will now go on to consider the application of the public interest test in section 2(1)(b) of FOISA.

Public Interest

66. The "public interest" is not defined in FOISA, but has been described as "something which is of serious concern and benefit to the public", not merely something of individual interest. The public interest does not mean "of interest to the public" but "in the interest of the public", i.e. disclosure must serve the interests of the public.

The Applicant's submissions

67. The Applicant argued that, due to the seriousness of the current pandemic, there should be complete transparency by governments in health issues, including border controls and that the public interest favours disclosure of the withheld information.

The Ministers' submissions

68. The Ministers recognised that there is a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate, particularly in relation to a high profile matter like the imposition of border controls during the Covid-19 pandemic.
69. However, they argued that there is a greater public interest in allowing Ministers and officials a private space within which to deliberate, explore and refine the Scottish Government response to the UK Government's position in relation to the options for the imposition of additional restrictions at UK borders.
70. The Ministers contended that this private space is essential to enable all options to be properly considered, so that good decisions can be taken based on fully informed advice and evidence, such as that provided in confidence by the UK Government, SAGE and medical

and scientific advisers. Premature disclosure is likely to substantially affect the willingness of the UK Government to involve the Scottish Government in such sensitive discussions, which, in turn, would affect the provision of advice between Scottish Government officials and Ministers. This would undermine the Scottish Government's Ministers' and officials' ability to engage on key issues and ensure a quality decision making process, which would impact public safety and COVID-19 management, which would not be in the public interest.

71. The Ministers maintained that the public interest in withholding the information outweighs that in favour of disclosing it.

The Commissioner's conclusions on the public interest

72. The Commissioner has considered carefully all the public interest arguments he has received.
73. The Commissioner acknowledges that there is a public interest in transparency in relation to the actions and decision-making processes of the Scottish Government, and he accepts that disclosure of the free and frank advice contained in the withheld information would shed some light on these actions and processes.
74. However, the Commissioner also accepts that disclosure of this information would have an adverse impact on such frank and free advice being provided in future, particularly in light of the fact that the focus of much of the advice derives from a paper that was provided to the Scottish Government in confidence, by the UK Government. The Commissioner recognises that officials must be allowed to offer free and frank advice to Ministers on such confidential information, especially during a pandemic, and that deviation from this would or would be likely to lead to less frank advice being provided in future.
75. The Commissioner also accepts that Ministers and officials must have a private space in which to freely consider such free and frank advice, in order to reach an informed conclusion. He agrees that disclosure of the withheld information would, or would be likely, to inhibit officials from offering such free and frank advice on UK Government papers in the future, and that this would be to the detriment of the Scottish Government's ability to consider all available advice before executing policy decisions.
76. In all of the circumstances of the case, therefore, the Commissioner finds that the public interest in maintaining the exemption in the circumstances of this case outweighs that in making the information available. He therefore concludes that the Ministers were entitled to withhold the information under section 30(b)(i) of FOISA.

Section 30(b)(ii) – substantial inhibition to free and frank exchange of views

77. The Ministers are withholding document 3 in its entirety under section 30(b)(ii) of FOISA. Section 30(b)(ii) provides that that information is exempt 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.
78. As is the case with the exemption contained in section 30(b)(i), the chief consideration when applying the exemption in section 30(b)(ii), 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 exchange of views. The inhibition in question must be substantial and therefore of real and demonstrable significance.

The Ministers' submissions

79. The Ministers explained that document 3 is an email between Scottish Government officials that contains officials' free and frank views and opinions in the form of an informal readout of the discussions that took place at the GPSMIG meeting relating to borders. As noted previously, the GPSMIG meeting is conducted under the agreement that any information discussed, is done so in confidence.
80. The Ministers submitted that, the exemption in section 30(b)(ii) of FOISA recognises the need for officials to have a private space within which they are able to share and discuss views and opinions and to explore options to support effective policy deliberation and formulation before the Scottish Government reaches a settled public position. They argued that, disclosing the content of such free and frank exchanges of views would substantially inhibit the Scottish Government's capacity to consider the imposition of additional restrictions and decisions regarding UK borders as a response to COVID-19 and would also significantly inhibit such discussions in future.
81. The Ministers argued that release of the information would significantly inhibit the ability of Ministers and officials to consider issues and develop future policy with regard to situations as they arise, if they were unable to share and exchange views in a free and frank manner, particularly when exchanging views on information shared with the Scottish Government in confidence, for example the informal read-out of the GPSMIG meeting. The Ministers submitted that officials would be reluctant to provide their views fully and frankly in future, particularly because these discussions are still ongoing and relate to a sensitive issue such as border control during the pandemic.
82. The Ministers contended that the Scottish Government needs to be able to fully develop its thinking and understanding of situations in order to formulate an accurate and appropriate response for the people of Scotland; it is therefore necessary to be able to conduct free and frank, candid discussions and exchanges of views as part of this process.

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

83. The Commissioner has considered all of the submissions made by the Ministers and the Applicant, along with the withheld information under consideration. The Commissioner notes that document 3 provides an official's free and frank view (or readout) of a GPSMIG meeting. As noted previously, GPSMIG meetings were established by and involve UK Government Ministers and confidentiality was implied and is expected by the UK Government. (While this does not mean that the information should automatically be treated as exempt under section 30(b)(ii), it is a factor to consider.)
84. The Commissioner also accepts, in all the circumstances of this particular case, that officials reporting the discussion that took place at the GPSMIG meeting, require a private space to discuss matters freely and frankly.
85. The Commissioner considers that disclosure of document 3 would be likely to stifle the frankness and candour of comments on similarly sensitive issues in future and would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. The Commissioner is therefore satisfied that this information is exempt from disclosure under section 30(b)(ii) of FOISA. He will now go on to consider the application of the public interest test in section 2(1)(b) of FOISA.

Public interest test

86. The exemption in section 30(b)(ii) is subject to the public interest test required by section 2(1)(b) of FOISA. Where this exemption is correctly applied, the Commissioner must

consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

The Applicant's submissions

87. The Applicant argued that, due to the seriousness of the current pandemic, there should be complete transparency by governments in health issues, including border controls and that the public interest favours disclosure of the withheld information.

The Ministers' submissions

88. The Ministers recognised that there is a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate, particularly in relation to a high profile matter like the imposition of border controls during the Covid-19 pandemic.
89. However, they submitted that there is a greater public interest in allowing a private space between Ministers and officials within which to communicate free and frank exchanges of views as part of the process of understanding, exploring and refining the Scottish Government's response to the UK Government's position in relation to the options for the imposition of additional restrictions at UK borders.
90. The Ministers contended that this private space was essential to enable all options to be properly considered, so that good decisions can be taken based on fully informed advice and evidence. They argued that premature disclosure is likely to substantially affect the willingness of the UK Government to involve the Scottish Government in such sensitive discussions and UK Government meetings, such as the GPSMIG meeting. If this occurred, it would have a significant negative impact on the ability of officials to provide free and frank exchange of views between Scottish Government officials and Ministers in the future. This would undermine the Scottish Government Ministers' and officials' ability to engage on key issues and ensure a quality decision making process, which would impact public safety and COVID-19 management, which would not be in the public interest.
91. The Ministers maintained that the public interest in withholding the information outweighs that in favour of disclosing it.

The Commissioner's conclusions on the public interest test

92. The Commissioner has considered all of the arguments presented to him in relation to the public interest in withholding or disclosing the information in the email in question (document 3). He acknowledges the strong public interest in transparency in relation to the views exchanged by the Scottish Government in relation to border restrictions as a result of the Covid-19 pandemic, and he accepts that the Applicant feels that, due to the seriousness of the current pandemic, there should be complete transparency by governments in health issues.
93. The Commissioner acknowledges that there is a public interest in allowing individuals a private space for views to be exchanged and discussed. He is persuaded that, in the circumstances, disclosure in this case would limit frankness or willingness to comment in similar circumstances in the future, which would diminish the quality of the views provided for the purposes of deliberation. This would be contrary to the public interest.
94. On balance, the Commissioner has concluded that there is a significant, and greater, public interest in the Scottish Government being able to obtain such comments in future, and in preventing individuals from being inhibited from exchanging similar views.

95. Therefore, the Commissioner finds that the public interest in disclosing the withheld information is outweighed by that in maintaining the exemption in section 30(b)(ii) of FOISA. Consequently, he is satisfied that the Ministers have correctly withheld the email under that exemption.

Section 38(1)(b) – Personal information

96. The Ministers are withholding some information contained in documents 1, 2, 4a and 5 under section 38(1)(b) of FOISA, on the grounds that it comprises third party personal data, and its disclosure would breach the provisions of the UK GDPR.

97. Section 38(1)(b) of FOISA, read in conjunction with section 38(2A), exempts information from disclosure if it is "personal data" (as defined in section 3(2) of the DPA 2018) and its disclosure would contravene one or more of the data protection principles set out in Article 5(1) of the UK GDPR or (where relevant) in the DPA 2018.

98. The exemption in section 38(1)(b) of FOISA, applied on the basis set out in the preceding paragraph, is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.

99. To rely on the exemption in section 38(1)(b) of FOISA, the Ministers must show that the information is personal data for the purposes of the DPA 2018 and that disclosure of the information into the public domain (which is the effect of disclosure under FOISA) would contravene one or more of the data protection principles in Article 5(1) of the UK GDP.

Is the withheld information personal data?

100. The first question the Commissioner must address is whether the information withheld is personal data for the purposes of section 3(2) of the DPA 2018 - see the definition in Appendix 1.

101. The Ministers have withheld the names and contact details of Scottish Government employees who sent or received emails or who attended particular meetings. Having considered the information withheld from the Applicant under section 38(1)(b), the Commissioner is satisfied that it is personal data: it relates to identified or identifiable individuals.

Would disclosure contravene one of the data protection principles?

102. The Ministers have argued that disclosure of this data would breach Article 5(1)(a) of the UK GDPR, which requires personal data to be processed "lawfully, fairly and in a transparent manner in relation to the data subject". The definition of "processing" is wide and includes "disclosure by transmission, dissemination or otherwise making available" (section 3(4)(d) of the DPA 2018). In the case of FOISA, personal data are processed when disclosed in response to a request. Personal data can only be disclosed if disclosure would be both lawful (i.e. if it would meet one or more of the conditions of lawful processing listed in Article 6(1) of the UK GDPR) and fair.

103. The Commissioner will first consider whether any of the conditions in Article 6(1) can be met. The Commissioner considers condition (f) in Article 6(1) to be the only one which could potentially apply in the circumstance of this case.

Condition (f): legitimate interests

104. Condition (f) states that processing will be lawful if it "...is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests

are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data ..."

105. Although Article 6 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 (see Appendix 1) makes it clear that public authorities can rely on Article 6(1)(f) when responding to requests under FOISA.
106. The tests which must be met before Article 6(1)(f) can be met are as follows:
- (i) Does the Applicant have a legitimate interest in obtaining the personal data?
 - (ii) If so, is the disclosure of the personal data necessary to achieve that legitimate interest?
 - (iii) Even if the processing is necessary to achieve the legitimate interest, would that be overridden by the interests or fundamental rights and freedoms of the data subjects?
107. There is no presumption in favour of the disclosure of personal data under the general obligation laid down by section 1(1) of FOISA. Accordingly, the legitimate interests of the Applicant must outweigh the rights and freedoms or legitimate interests of the data subjects before condition (f) will permit the data to be disclosed. If the two are evenly balanced, the Commissioner must find that the Ministers were correct to refuse to disclose the personal data to the Applicant.
108. The Ministers submitted that they were not aware of any legitimate reason which the Applicant would have in seeing the names or contact details of the Scottish Government employees. They could not see how identifying the individuals would aid the Applicant's understanding of the measures put in place at border controls in Scotland relating to the Coronavirus outbreak. The Ministers argued that, even if the Applicant did have a legitimate interest, they did not believe this would outweigh the individuals' interests in protecting their privacy.
109. The Applicant submitted that the UK Information Commissioner's Office (the ICO) states in its guidance, that the "personal data" of minor government and public officials may be redacted. The Applicant also referred to paragraphs 48 to 70 of the Commissioner's guidance on section 38(1)(b) of FOISA², commenting again that the issue of redaction depends on the employees' seniority in the "pecking order". The Applicant noted that it is accepted that minor and junior officials may be entitled to have their personal data redacted, but more senior staff may not.
110. The Applicant asked the Commissioner to investigate the redactions made under section 38(1)(b) in order to ensure that the officials' seniority was considered.
111. Having considered the nature of the request and the Applicant's concerns, the Commissioner accepts that the Applicant has a legitimate interest in the individuals who were involved in discussions regarding the safeguarding of borders during a pandemic, and he is entitled to know whether the redactions made by the Ministers under section 38(1)(b) of FOISA are proportionate, and apply only to junior members of staff.
112. Having accepted that the Applicant has a legitimate interest in the personal data, the Commissioner must consider whether disclosure of those personal data is necessary for the

² <https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>

Applicant's legitimate interests. In doing so, he must consider whether these interests might be reasonably be met by any alternative means.

113. The Commissioner has considered this carefully in light of the decision by the Supreme Court in *South Lanarkshire Council v Scottish Information Commissioner* [2013] UKSC 55³. In this case, the Supreme Court stated (at paragraph 27):

A measure which interferes with a right protected by Community law must be the least restrictive for the achievement of a legitimate aim. Indeed, in ordinary language we would understand that a measure would not be necessary if the legitimate aim could be achieved by something less.

114. "Necessary" means "reasonably" rather than "absolutely" or "strictly" necessary. When considering whether disclosure would be necessary, public authorities should consider whether the disclosure is proportionate as a means and fairly balanced as to the aims to be achieved, or whether the requester's legitimate interests can be met by means which interfere less with the privacy of the data subject.
115. The Commissioner notes that the Ministers provided the Applicant with the names and contact details of senior employees who were involved in the correspondence/discussions captured by his request. The Commissioner notes that the only personal data being withheld from the Applicant, is that relating to junior members of staff. Having reviewed the information disclosed to the Applicant in this case, the Commissioner is satisfied that the Applicant's legitimate interests have been satisfied by the provision of this information. Consequently, the Commissioner does not consider it necessary to disclose the personal data of junior employees to satisfy the legitimate interests identified.
116. In the circumstances of this case, as the Applicant's legitimate interest have been satisfied by the explanations provided, the Commissioner concludes that condition (f) in Article 6(1) of the UK GDPR cannot be met in relation to the withheld personal data. Disclosure would therefore be unlawful.

Fairness and transparency

117. Given the Commissioner's finding that processing would be unlawful, he is not required to go on to consider separately whether disclosure of the personal data would otherwise be fair or transparent in relation to the data subjects.
118. The Commissioner, therefore, finds no condition in Article 6(1) of the UK GDPR can be met and disclosure of the information requested would contravene Article 5(1)(a) of the UK GDPR. The information was therefore properly withheld under section 38(1)(b) of FOISA.

Decision

The Commissioner finds that the Scottish Ministers (the Ministers) 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 correctly withholding information under sections 28(1), 30(b)(i) and (ii), and 38(1)(b) of FOISA, the Ministers complied with Part 1. The Commissioner also found that

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

the Ministers were correct to claim that some of the information was not, at the time of the review, held for the purposes of FOISA in terms of section 3(2)(a)(ii).

However, the Ministers failed to comply with Part 1 of FOISA by initially:

- withholding information under section 28(1) of FOISA which they later disclosed during the investigation (contrary to section 1(1) of FOISA) and
- applying the exemption in section 28(1) of FOISA to information which they did not hold (contrary to section 17(1) of FOISA).

Given that the Ministers have now disclosed this information to the Applicant, the Commissioner does not require the Ministers to take any action in respect of this failure in response to the Applicant's application.

Appeal

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.

Daren Fitzhenry
Scottish Information Commissioner

10 August 2021

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (e) in subsection (1) of section 38 –

...

- (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied.

3 Scottish public authorities

...

- (2) For the purposes of this Act but subject to subsection (4), information is held by an authority if it is held-

- (a) by the authority otherwise than-

...

- (ii) in confidence, having been supplied by a Minister of the Crown or by a department of the Government of the United Kingdom; or

...

17 Notice that information is not held

- (1) Where-

- (a) a Scottish public authority receives a request which would require it either-

- (i) to comply with section 1(1); or

- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

(b) the authority does not hold that information,

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

...

28 Relations within the United Kingdom

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration.

(2) In subsection (1), "administration in the United Kingdom" means-

(a) the Government of the United Kingdom;

(b) the Scottish Administration;

(c) the Executive Committee of the Northern Ireland Assembly; or

(d) the National Assembly for Wales.

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

...

38 Personal information

(1) Information is exempt information if it constitutes-

...

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

...

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

(a) would contravene any of the data protection principles, or

...

(5) In this section-

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

(a) Article 5(1) of the UK GDPR, and

(b) section 34(1) of the Data Protection Act 2018;

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

...

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

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

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

UK General Data Protection Regulation

4 Definitions

For the purposes of this Regulation:

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

...

5 Principles relating to processing of personal data

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

...

6 Lawfulness of processing

- (1) Processing shall be lawful only if and to the extent that at least one of the following applies:

...

- (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data, in particular where the data subject is a child.

...

Data Protection Act 2018

3 Terms relating to the processing of personal data

...

- (2) “Personal data” means any information relating to an identified or identifiable living individual (subject to subsection (14)(c)).
- (3) “Identifiable living individual” means a living individual who can be identified, directly or indirectly, in particular by reference to –
 - (a) an identifier such as a name, an identification number, location data or an online identifier, or
 - (b) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
- (4) “Processing”, in relation to information, means an operation or set of operations which is performed on information, or on sets of information, such as –

...

- (d) disclosure by transmission, dissemination or otherwise making available,

...

- (5) “Data subject” means the identified or identifiable living individual to whom personal data relates.

...

- (10) “The UK GDPR” means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (United Kingdom General Data Protection Regulation), as it forms part of the law of England and Wales, Scotland and Northern Ireland by virtue of section 3 of the European Union (Withdrawal) Act 2018 (and see section 205(4)).

...

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