

# Decision Notice 102/2020

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## Contact between Nicola Sturgeon and Alex Salmond in 2018

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**Applicant:**

**Public authority: Scottish Ministers**

**Case Ref: 201901071**



Scottish Information  
Commissioner

## Summary

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The Ministers were asked about contact between Nicola Sturgeon, First Minister and Alex Salmond, former First Minister, in 2018. The Ministers sent a link to information on the Scottish Parliament's website, withheld a small amount of information on the basis that disclosure would prejudice the administration of justice (section 35(1)(c)), and told the Applicant they held no other information.

The Commissioner found that the information withheld by the Ministers under section 35(1)(c) was not exempt from disclosure and ordered the Ministers to disclose it.

The Commissioner also considered that the Ministers had defined "held" too narrowly. He ordered the Ministers to carry out a new review.

## 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)(a) (Effect of exemptions); 3(1)(a)(i) and (2) (Scottish public authorities); 17(1) (Notice that information is not held); 21(4)(a) and (b) and (5) (Review by Scottish public authority); 25(1) (Information otherwise accessible); 35(1)(c) (Law enforcement) and 47(1) (Application for decision by Commissioner); 49(3) (Commissioner's decision); Schedule 1, paragraph 1 (Scottish Public Authorities) (Part 1 Ministers, the Parliament);

Scotland Act 1998 (the Scotland Act) sections 44(2) (The Scottish Executive); 52(3) and (4) (Exercise of functions)

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

## Background

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1. In 2018, Mr Alex Salmond, the former First Minister, commenced judicial review proceedings against the Scottish Government in relation to the manner in which complaints against him had been investigated. On 8 January 2019, the Scottish Ministers (the Ministers) settled that case. That afternoon, Ms Nicola Sturgeon, First Minister, made a statement to the Scottish Parliament.<sup>1</sup> During that statement, she said:

*In the past, questions have ... been raised about meetings that I had with Alex Salmond during the investigation, so I want to address that issue now. I met him on three occasions: on 2 April 2018 at my home in Glasgow; on 7 June 2018 in Aberdeen, ahead of the Scottish National Party conference; and on 14 July 2018, at my home. I also spoke to him on the telephone on 23 April and 18 July 2018. I have not spoken to Alex Salmond since 18 July. On 2 April, he informed me about the complaints against him which – of course – in line with the procedure [the procedure for handling complaints involving current or former ministers],*

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<sup>1</sup> <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11871>

*the permanent secretary had not done. He set out his various concerns about the process. In the other contacts, he reiterated his concerns about the process and told me about proposals that he was making to the Scottish Government for mediation and arbitration. However, I was always clear that I had no role in the process. I did not seek to intervene in it at any stage – nor, indeed, did I feel under any pressure to do so.*

2. Following the statement, Ms Rhoda Grant MSP commented that none of the First Minister's contacts with Mr Salmond, referred to in the First Minister's statement, had been referenced in the First Minister's diaries. Ms Grant asked the First Minister if she would make the content of the meetings public and, if not, why not.
3. In response, Ms Sturgeon stated that those contacts she had with Mr Salmond were not Government meetings.
4. The First Minister was further questioned on this point at First Minister's Questions on 10 January 2019.<sup>2</sup> Mr Jackson Carlaw MSP queried whether the contact had in fact involved Government business. He also asked whether the First Minister and Mr Salmond were the only two people at those meetings or whether other people were present.
5. The First Minister confirmed that her chief of staff was present at the first of those meetings and that, as a special adviser, her chief of staff was able to assist her in party matters. No one else was present at the other meetings. The First Minister went on to say that, the fact that she had no role in the Government process, is why it would not have been appropriate for the meetings to be Government meetings. She commented that she has responsibilities as party leader, as other leaders do.

## **The information request**

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6. On 17 January 2019, the Applicant made a request for information to the Ministers about contact between the First Minister, her Government and her staff and Mr Salmond and his representatives in 2018. He asked for:
  - the dates and times of contact, meetings and phone calls
  - details of who was present at meetings, who was involved in the phone calls and who else was present or listening in
  - details of notes and transcripts taken during these meetings and phone calls
  - reports made to officials after the meetings and phone calls had happened and details of these reports
7. The Ministers responded on 13 February 2019. They notified the Applicant that:
  - some information is available from the Scottish Parliament Official Report for 8 January 2019 and is therefore exempt from disclosure under section 25(1) of FOISA (Information otherwise accessible). The Ministers provided the Applicant with a link to the Official Report.

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<sup>2</sup> <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11875>

- the reports made to officials (and details of these reports) were exempt from disclosure under section 35(1)(c) of FOISA (Law enforcement)
  - they did not hold the other information and section 17(1) of FOISA (Notice that information is not held) therefore applied.
8. On 28 February 2019, the Applicant wrote to the Ministers requesting a review of their decision. He expressed disappointment that so little information appeared to have been recorded. He considered the use of section 35(1)(c) to be unreasonable.
  9. The Ministers notified the Applicant of the outcome of their review on 27 March 2019. They confirmed their original decision, without modifications, in terms of section 21(4)(a) of FOISA. However, they clarified that, where they had advised the Applicant that they did not hold the information, this was because the meetings were not government meetings. The Ministers referred the Applicant to the First Minister's response to questions at First Minister's Questions on 10 January 2019.
  10. On 25 June 2019, the Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Ministers' review. He stated that it was in the public domain that a special adviser (or advisers) to the First Minister met representatives of Mr Salmond on several occasions in 2018 – the Applicant queried the designation of these meetings as “SNP party business”. He noted that the First Minister had told the Scottish Parliament that she told the Permanent Secretary “of all subsequent contact”. The Applicant believed this meant this was government business, and that records should have been kept.
  11. The Applicant also queried the way in which section 35(1)(c) had been applied.
  12. The Applicant did not raise any issues with the application of section 25(1) to the information available in the Official Report of 8 February 2019. Accordingly, this has not been considered by the Commissioner.

## Investigation

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13. 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.
14. On 21 August 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 under section 35(1)(c) of FOISA. The Ministers provided the information and the case was allocated to an investigating officer.
15. 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 focussed on the exemption in section 35(1)(c) of FOISA, on what searches had been conducted and on whether information was held by the Ministers for the purposes of FOISA.
16. Additional submissions were sought – and received – from the Ministers during the investigation. These are addressed below. The Applicant was also given the opportunity to provide further comments.

## Commissioner's analysis and findings

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17. 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.

### **Section 35(1)(c): Law enforcement**

18. In response to the Applicant's request for reports made to officials after the meetings and phone calls had happened, and for details of these reports, the Ministers withheld two documents under section 35(1)(c) of FOISA:

- a note from the First Minister to the Permanent Secretary dated 6 June 2018 (document 1) and
- a note from the Permanent Secretary to the First Minister dated 7 June 2018 (document 2)

19. Section 35(1)(c) exempts information if its disclosure would, or would be likely to, prejudice substantially the administration of justice.

#### *Was all of the information located?*

20. The Applicant expressed surprise at how little information the Ministers told him they held in relation to this part of his request. The Commissioner asked the Ministers to explain what searches had been carried out in relation to this information.
21. The Ministers advised the Commissioner that the Applicant's request was one of around 50 requests received on broadly similar topics concerning Mr Salmond in January 2019. The Ministers provided the Commissioner with evidence of the searches that had been carried out, not only for this request, but for other requests.
22. Information surrounding the legal proceedings and the underlying complaints was considered to be exceptionally sensitive, and only a limited number of officials were aware of it. Accordingly, when the requests were received, searches were carried out principally by staff in the First Minister's Private Office and in the Permanent Secretary's Office.
23. In this case, staff in the First Minister's Private Office searched the First Minister's email account and calendar and confirmed that no information was held. Staff in the Permanent Secretary's Office identified some material which it was thought might fall within scope, but was considered by the case handler not to do so. The Commissioner has reviewed this material and is satisfied that it does not fall within the scope of any part of the Applicant's request.
24. Staff in the Permanent Secretary's Office also identified that some information might be held in a specific restricted file in the Scottish Ministers' electronic records management system. (When a file is restricted, searches will not return information unless the searcher has the necessary permissions to access the file.) The case handler who responded to the Applicant's request was one of the limited number of officials with the necessary permission to access that file. It was as a result of this search that the case handler identified documents 1 and 2.

### *The exemption*

25. As noted above, the Ministers withheld documents 1 and 2 on the basis that disclosure would, or would be likely to, prejudice substantially the administration of justice.
26. The Ministers commented that, at the time the request was received (17 January 2019), they were aware that there was an ongoing police investigation into allegations made against Mr Salmond. Indeed, the First Minister acknowledged the police investigation in her statement to Parliament of 8 January 2019 and indicated that this may limit what could be said. According to the Ministers, implicit in those acknowledgements was the fact that anything which prejudices an ongoing police investigation may in turn prejudice the ability of the procurator fiscal to bring criminal proceedings against the persons being investigated.
27. Mr Salmond appeared in court on 24 January 2019, charged with a number of offences. Around this time, both Police Scotland and the Crown Office and Procurator Fiscal Service issued reminders to the public that proceedings were live for the purpose of the Contempt of Court Act 1981. According to the Ministers, experience had shown that the release of any information connected to Mr Salmond, to the investigation or to the judicial review results in significant levels of heated discussion on social media. In the Ministers' view, increased speculation would, in turn, lead to increased pre-trial publicity which would have been likely to prejudice substantially the opportunity for a fair trial.
28. The Ministers provided the Commissioner with additional submissions which the Commissioner is unable to refer to or summarise in this decision without disclosing some of the content of document 1. The Commissioner has taken these additional submissions into account in coming to his decision.
29. As noted above, the Applicant considered that the Ministers had been unreasonable to apply the exemption in section 35(1)(c). He considered that the exemption had been applied in a blanket way to effectively avoid any information being disclosed. He was not satisfied that everything he asked for would be prejudicial in any subsequent court case.
30. The Applicant was given an opportunity to provide additional comments on section 35(1)(c), but did not do so.

### *Commissioner's view*

31. The exemption in section 35(1)(c) can be applied where disclosure would, or would be likely to, prejudice substantially the administration of justice. As the Commissioner's guidance<sup>3</sup> on section 35 recognises, "administration of justice" refers to matters related to the working of courts and tribunals. Examples might include the protection of basic principles such as the right to a fair trial and ensuring that individuals have access to justice.
32. The guidance also notes that the exemption can only be applied where disclosure would, or would be likely to, cause prejudice. There must be at least a significant probability that substantial prejudice would occur before the exemption can be applied. There must also be a genuine link between disclosure and the harm; it cannot simply be a remote or hypothetical possibility. Given that the prejudice must be substantial, the damage caused, or likely to be caused, by disclosing the information must be of real and demonstrable significance, rather than simply marginal.

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<sup>3</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.aspx>

33. The Applicant made his information request nine days after the judicial review proceedings were settled by the Ministers and, accordingly, nine days after the First Minister made the statement to the Scottish Parliament. One week after the Applicant made his information request, Mr Salmond appeared in court charged with 14 offences, including accounts of sexual assault and attempted rape, charges he was subsequently acquitted of.
34. The Commissioner has carefully compared the contents of Document 1 with what was said by the First Minister to the Scottish Parliament on 8 and 10 January 2019 (and which, having been recorded in the Official Report, was in the public domain at the time of the Applicant's request). Having done this, the Commissioner notes that there is very little in document 1 which was not said by the First Minister in public nine days before the Applicant made his request. It is true that, in some cases, different terminology may have been used, but the information shared is the same. This includes the information specifically highlighted in the Ministers' submissions referred to in paragraph 28.
35. The Commissioner cannot accept that disclosing information which was in the public domain when the Applicant made his request would, or would be likely to, cause the substantial prejudice required for the exemption in section 35(1)(c) to apply. While the Commissioner has taken account of the Ministers' concerns set out in paragraph 28, he does not accept that the information will have the effect or effects envisaged by the Ministers.
36. The Commissioner recognises that there is a small amount of information in document 1 which was not included in the First Minister's statement or in answers to questions in the Parliament on 8 and 10 January 2019, and which was not in the public domain at the time the Ministers carried out a review. However, this information is innocuous and the Commissioner cannot accept that disclosing this information when the Applicant made his request would, or would have been likely to, cause the substantial prejudice required for the exemption in section 35(1)(c) to apply.
37. Similarly, the information in document 2 is innocuous and, again, the Commissioner cannot accept that disclosing this information when the Applicant made his request would, or would have been likely to, cause the substantial prejudice required for the exemption in section 35(1)(c) to apply.

#### *Public interest test*

38. As the Commissioner has concluded that the exemption in section 35(1)(c) does not apply to the information in documents 1 or 2, he is not required to – and will not – go on to consider the public interest test in regulation 2(1)(b) of FOISA.

#### *Conclusion on section 35(1)(c)*

39. The Commissioner requires the Ministers to disclose the information in documents 1 and 2 to the Applicant.

### **Government and/or party business?**

40. In their letter to the Applicant dated 27 March 2019 (the review response), the Ministers told the Applicant that they had applied section 17 of FOISA to the remaining information because the Scottish Government does not have the information. They referred the Applicant to the statement made by the First Minister in response to questions at First Minister's Questions (10 January 2019) that the meetings she had referred to were not government meetings.

41. The Applicant was dissatisfied with this response and, in his application, asked the Commissioner to clarify whether the meetings the First Minister had referred to were in an official government capacity.

*Submissions from the Ministers*

42. During the investigation, the Ministers were asked how they had come to the conclusion that the information related to purely party matters (which, even if held, would not be subject to FOISA) and not to government matters (which, if held, would be subject to FOISA).

43. The Ministers commented that, in common with all Ministers, the First Minister has contact with many people as a Scottish Minister, in a party capacity, as an MSP and as a private individual. Paragraphs 4.22 and 4.23 the Scottish Ministerial Code: 2018 edition (the Ministerial Code) recognise the need to differentiate between government and non-government meetings.<sup>4</sup>

44. The Ministers again referred to the statements made by the First Minister on 8 and 10 January 2019, where the First Minister had judged her contacts with Mr Salmond not to be government meetings for the following reasons:

- she attended the meeting on 2 April 2018 in the expectation that this was to discuss non-government business. In line with paragraph 4.23 of the Ministerial Code, which recognises that meetings which are expected to be non-government may nevertheless touch upon government business, the First Minister had informed the Permanent Secretary of these contacts and, where there had been significant content in terms of paragraph 4.23, had informed the Permanent Secretary of that significant content.
- the Scottish Government procedure for handling harassment complaints involving current or former Ministers states (paragraph 12) that the First Minister will be informed of the outcome of such an investigation. According to the Ministers, the First Minister had been clear at all points that she would play no role in the Scottish Government investigation and had explicitly informed the Permanent Secretary that this would be her approach in any contact with Mr Salmond.

45. The Ministers advised the Commissioner that they did not hold any recorded information in relation to these contacts other than documents 1 and 2. They confirmed, for the avoidance of doubt, that their position is that there is no other such recorded information and that they do not seek, and have never sought, to argue that recorded information within the scope of the request is in the Ministers' possession, but is not held for the purposes of FOISA in terms of section 3(2)(a)(i) of FOISA, i.e. because it is held on behalf of another person.

46. The Commissioner noted that the Applicant had questioned whether the attendance of the First Minister's chief of staff (a special adviser) meant that government, and not party political, business was being discussed. He asked the Ministers to explain the role of special advisers in relation to both government and party business.

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<sup>4</sup> <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2018/02/scottish-ministerial-code-2018-edition/documents/00531094-pdf/00531094-pdf/govscot%3Adocument/00531094.pdf?forceDownload=true>



47. The Ministers referred the Commissioner to the Code of Conduct for Special Advisers working in the Scottish Government,<sup>5</sup> which sets out some of the differences between the roles of civil servants and special adviser. It also makes it clear that special advisers are, for example, expressly permitted to undertake party political activity, including attending party functions (paragraphs 16 to 18).
48. The Ministers therefore submitted that the presence of the First Minister's special adviser did not automatically mean that government business was being discussed. Given the role of special advisers, the Commissioner agrees that the attendance of a special adviser does not automatically mean that government business is being discussed.
49. The Commissioner considered the submissions summarised in paragraphs 43 to 48 in the light of the contents of document 1, including the fact that the First Minister had considered it necessary, in line with the Ministerial Code, to alert the Permanent Secretary. He noted that the content suggested that some of the contact between the First Minister and Mr Salmond related to government rather than party business.
50. The Commissioner gave the Ministers examples of text from document 1 which suggested this view and advised the Ministers that he needed to see any records held by the First Minister or by her chief of staff about the contact with Mr Salmond in order to determine whether the records involve government business (which would therefore be held for the purposes of FOISA) or party business (which would not be subject to FOISA) or a mixture of both.
51. Although the First Minister did not believe that such information constituted government business, meaning that it would not be held by the Ministers for the purposes of FOISA, she voluntarily agreed to these searches being carried out. The Commissioner was provided with a note of the additional searches carried out information and with a document (document 3) which had been located as a result of those searches. The Commissioner notes that document 3 has not been shared with any Scottish Government staff and that it is not held on any Scottish Government system. The Ministers confirmed their view that document 3 does not fall within the ambit of government business and that it is not held by them for the purposes of FOISA.

#### *Commissioner's conclusions*

52. Section 1 of FOISA states:

*A person who requests information from a Scottish public authority **which holds it** is entitled to be given it by the authority (the Commissioner's emphasis)*

53. "Hold" in FOISA, although an ordinary, non-technical word, is nevertheless not a purely factual or physical concept. In terms of section 3(2) of FOISA (see Appendix 1), information is held by an authority for the purposes of FOISA if it is held by the authority otherwise than on behalf of another person (section 3(2)(a)(i)) or is held by a person other than the authority on behalf of the authority.

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<sup>5</sup> <https://www.gov.scot/binaries/content/documents/govscot/publications/agreement/2017/04/special-advisers-code-of-conduct-and-model-contract/documents/code-conduct-special-advisers-pdf/code-conduct-special-advisers-pdf/govscot%3Adocument/Code%2Bof%2Bconduct%2Bfor%2Bspecial%2Badvisers.pdf>

54. As noted in the case of *Dr Ian Graham v Scottish Information Commissioner*<sup>6</sup>, it is possible for the same information to be held on behalf of more than one person. (Here, the Court of Session concluded that a local authority held information principally for the purposes of the returning officer, but also held it for its own purposes.) It is therefore possible to conceive of information which a councillor or minister may hold on behalf of a local authority or government, but may also hold in some other capacity, whether private or representative.
55. “Hold” need not connote any legal relationship between the authority and the information such as ownership of the information. Because “hold” is not a technical legal term, what it means has to be determined having regard to the purpose of the legislation. That purpose is reflected in the long title of FOISA:
- An Act ... to make provision for the disclosure of information held by Scottish public authorities or by persons providing services for them ...*
56. Case law has accepted that the whole purpose of FOISA is the release of information and that it ought therefore to be construed in as liberal a manner as possible (paragraph 4 of *Common Services Agency v Scottish Information Commissioner*<sup>7</sup>).
57. The information request made to the Ministers seeks four categories of information concerning contact between the First Minister, her government and her staff and Mr Salmond and his representatives in 2018.
58. The information request was directed to the Ministers. They are the relevant public authority in terms of FOISA (section 3(1)(a)(i) and Schedule 1, paragraph 1). The expression “Scottish Ministers” refers to members of the Scottish Government collectively (section 44(2) of the Scotland Act 1998 (the Scotland Act)). The statutory functions of the Ministers are exercisable by any member of the Scottish Government and the acts or omissions of, or in relation to, any member of the Scottish Government are treated as the acts or omissions of each of its members: sections 52(3) and (4) of the Scotland Act.
59. When the provisions of FOISA and the Scotland Act are read together, the matter the Commissioner must consider is not whether information is “held” by one rather than another member of the Scottish Government but whether, because the information is “held” by a member of the Scottish Government, it is “held” by the Scottish Ministers.
60. The Commissioner must therefore consider whether document 3 is or may be “held” on behalf of the Ministers, having regard to their statutory functions. As noted above (paragraph 54), information may be held in more than one capacity: for example, the fact that the First Minister may hold it to some extent for her own purposes is entirely consistent with its also being held by the Scottish Ministers through her.
61. The information relates to a Scottish Government disciplinary procedure. Having taken account of:
- the connection between the information and the Ministers
  - the substantive content of the information and

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<sup>6</sup> <https://scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2019csih57.pdf?sfvrsn=0>

<sup>7</sup> <https://publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>

- the circumstances in which the information was created,

the Commissioner is satisfied that the (limited) material in document 3 that falls within the scope of the request relates to government business and is held by the Ministers. It may, of course, also be held by the First Minister on her own behalf, but it is not held by the First Minister solely in a party political or private capacity and the fact that the First Minister may also hold the information on her own behalf does not affect the Commissioner's conclusion that it is held by the Scottish Ministers for the purposes of FOISA.

### *Commissioner's conclusions*

62. The Commissioner has concluded that the information in document 3, insofar as it falls within the scope of the Applicant's request, is held by the Ministers for the purposes of FOISA. The Ministers were therefore wrong to notify the Applicant that they did not hold this information for the purposes of FOISA.
63. The Commissioner sets out below the actions he requires the Ministers to take in relation to this breach.

## Decision

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The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with Part 1 (in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant by:

- withholding the information in documents 1 and 2 under section 35(1)(c) of FOISA and
- notifying the Applicant, in terms of section 17 of FOISA, that they do not hold further information falling within the scope of his request.

The Commissioner requires the Ministers, by **Monday 19 October 2020**, to:

- disclose documents 1 and 2 to the Applicant and
- carry out a new review of its handling of the Applicant's request and (in terms of section 21(4)(b) of FOISA) substitute its previous decision.

In carrying out a new review, the Ministers must provide the Applicant with a decision in relation to the information in document 3 which falls within the scope of the request, other than finding that the information is not held by the Ministers for the purposes of FOISA.

The Ministers must also, in light of the tests set out by the Commissioner in paragraphs 52 to 61 above, carry out further searches for information held at the date of receipt of the request. Again, the Ministers must provide the Applicant with a decision in relation to any such information located, other than finding that they do not hold the information for the purposes of FOISA.

## **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.

**Daren Fitzhenry**  
**Scottish Information Commissioner**

**2 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 –
  - (a) section 25;...

#### 3 Scottish public authorities

- (1) In this Act but, “Scottish public authority” means -
  - (a) any body which, any other person who, or the holder of an office which -
    - (i) is listed in Schedule 1; or...
- (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 –
    - (i) on behalf of another person; or
    - (ii) in confidence, having been supplied by a Minister of the Crown or by a department of the Government of the United Kingdom; or
  - (b) by a person other than the authority, on behalf of the authority....

## **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.

...

## **21 Review by Scottish public authority**

...

- (4) The authority may, as respects the request for information to which the requirement relates-
- (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
  - (b) substitute for any such decision a different conclusion; or
- ...
- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

...

## **25 Information otherwise accessible**

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...

## **35 Law enforcement**

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-

...

- (c) the administration of justice;

...

## **47 Application for decision by Commissioner**

- (1) A person who is dissatisfied with –
- (a) a notice given under section 21(5) or (9); or
  - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice,
- may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

...

## **49 Commissioner's decision**

...

- (3) In any other case, the Commissioner must -
- (a) give that authority notice in writing of the application and invite its comments; and

...

## **Schedule 1: Scottish Public Authorities**

### **Part 1: Ministers, the Parliament**

- (1) The Scottish Ministers.

## **Scotland Act 1998**

### **44 The Scottish Executive**

...

- (2) The members of the Scottish Government are referred to collectively as the Scottish Ministers.

...

### **52 Exercise of functions**

...

- (3) Statutory functions of the Scottish Ministers shall be exercisable by any member of the Scottish Government.
- (4) Any act or omission of, or in relation to, any member of the Scottish Government shall be treated as an act or omission of, or in relation to, each of them; and any property acquired, or liability incurred, by any member of the Scottish Government shall be treated accordingly.

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