



# Decision Notice 135/2022

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## The James Hamilton report

**Authority: Scottish Ministers**

**Case Ref: 202100622**

### Summary

The Applicant asked the Authority for an unredacted copy of James Hamilton's report into whether the First Minister breached the Scottish Ministerial Code. The Authority withheld the redacted information on the grounds that it was exempt from disclosure under section 26(c) (contempt of court) of FOISA. The Commissioner investigated and agreed that the information was exempt from disclosure.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(2)(b) (Effect of exemptions); 26(c) (Prohibitions on disclosure); 47(1) and (2) (Application for decision by Commissioner); 50(1)(a) (Information notices)

Contempt of Court Act 1981 (the 1981 Act) section 11 (Publication of matters exempted from disclosure in court)

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. The Scottish Ministerial Code (the Code) provides a code of conduct and guidance on procedures for Scottish Ministers. The latest edition was published in February 2018.
2. The June 2008 edition of the Code introduced independent advisers on the application of the Code. Where the First Minister deems it appropriate, she may refer matters to the

independent advisers to provide advice on which to base her judgement about any action required in respect of ministerial conduct.

3. On 13 January 2019, the First Minister made a referral to the independent advisers in connection with a number of meetings and discussions between her and the former First Minister, Alex Salmond.
4. On 3 August 2020, the Deputy First Minister set out the remit for the referral in a [written response to a Parliamentary Question](#)<sup>1</sup>. It also confirmed that the referral would be led by James Hamilton.
5. On 23 March 2021, the Applicant made a request for information to the Authority. He asked for an unredacted copy of James Hamilton's report (the Hamilton report) into whether the First Minister breached the Code.
6. The Authority responded on 6 April 2021. It advised the Applicant that the information that was redacted from the report was being withheld under section 26(c) of FOISA, as its disclosure might identify complainers who are subject to an order under the Contempt of Court Act 1981 (the 1981 Act). The Authority also notified the Applicant that a redacted version of the Hamilton report was available online, and it provided him with a weblink to the document.
7. On 6 April 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he did not agree that publication of the non-redacted version of the report would identify complainers who were subject to a court order protecting their identity. He argued that the report should be published in full.
8. The Authority notified the Applicant of the outcome of its review on 13 May 2021, upholding its original decision to withhold the information under section 26(c) of FOISA.
9. On 17 May 2021, 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 Authority's review because he considered the public had a right to view an unredacted version of the report.

## Investigation

10. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
11. On 19 May 2021, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. (Given the sensitivity of the information and the Authority's concerns about disclosing the information voluntarily, the Commissioner subsequently issued an Information Notice to the Authority under section 50(1)(a) of FOISA. This Notice required the Authority to give the Commissioner access to the information which was the subject of the application. The Authority complied in full with the Information Notice.)

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<sup>1</sup> <https://www.parliament.scot/chamber-and-committees/debates-and-questions/questions/2020/08/03/s5w31054>

12. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions in relation to its reliance on section 26(c) of FOISA. The Authority provided submissions in response.

## Commissioner's analysis and findings

13. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.
14. He has endeavoured to give as full account of his reasoning as he can, but, as recognised by Court of Session in [Scottish Ministers v Scottish Information Commissioner](#) [2006] CSIH 8<sup>2</sup>, at paragraph [18]:

"in giving reasons for his decision, [the Commissioner] is necessarily restrained by the need to avoid, deliberately or accidentally, disclosing information which ought not to be disclosed."
15. In this case, the Commissioner is unable to set out the Authority's (or his own) reasoning in full as doing so could itself lead to the individual complainers being identified.

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

16. The Authority argued that the information redacted from the Hamilton report was exempt from disclosure in terms of section 26(c) of FOISA.
17. Under section 26(c) of FOISA, information is exempt information if its disclosure by a Scottish public authority (otherwise than under FOISA) would constitute, or be punishable as, a contempt of court.
18. This exemption is not subject to the public interest test in section 2(1)(b) of FOISA (see section 2(2)(b)).
19. In its submissions, the Authority referred to the order made by Lord Woolman under section 11 of the 1981 Act on 8 October 2018. The order was in the following terms: (emphasis added):

"The Lord Ordinary ... makes an order in terms of Chapter 102.3(5) of the Rules of Court **withholding** from the public in these proceedings **the names and the designations, past and present, of the complainers** referred to in the decision report which is the subject matter of this petition **and any other information concerning those complainers which would lead to their identification**; orders, in terms of section 11 of the Contempt of Court Act 1981, that no publication by any means, including on social media, of any of the aforementioned information relating to the complainers, be made ..."
20. The Authority referred to Lord Woolman's order as the "civil order".
21. The Ministers explained that, on 24 January 2019, Mr Salmond appeared in court charged with a number of offences. On or around this time, both Police Scotland and the Crown Office and Procurator Fiscal Service issued reminders to the public that proceedings were therefore "live" for the purposes of the 1981 Act.

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<sup>2</sup> <http://www.scotcourts.gov.uk/search-judgments/judgment?id=a94886a6-8980-69d2-b500-ff0000d74aa7>

22. Mr Salmond subsequently went on trial at the High Court at Edinburgh on 9 March 2020, and was acquitted of the various charges against him on 23 March 2020.
23. On 10 March 2020, the Lord Justice Clerk made an order at common law and under section 11 of the 1981 Act, preventing the publication of the names and identity and any information likely to disclose the identity of the complainers in that case. That order was varied by the [Lord Justice Clerk on 11 February 2021](#)<sup>3</sup> following an application by *The Spectator* magazine.
24. The Authority referred to the order varied by the Lord Justice Clerk as the “criminal order”.
25. The Authority submitted that, with the exception of paragraph 4.8 of the Hamilton report, all of the redacted information has been withheld on the basis that its disclosure would contravene the criminal order. The Authority noted that paragraph 4.8 of the report has been withheld as its disclosure would contravene the civil order.

*Would disclosure lead to the identification of the complainers?*

26. In his application to the Commissioner, the Applicant suggested that the redactions made by the Authority might have been too stringent, and that the application of the constraints of the court order might have been inappropriate.
27. The Commissioner notes that redactions were made to 14 pages (out of 61) of the Hamilton report.
28. It is clear, for the reasons set out above, that any information which would identify either of the complainants is exempt from disclosure under section 26(c) of FOISA.
29. However, the question the Commissioner must consider is whether all of the information redacted by the Authority would identify the complainants – in other words, is there information which could be disclosed which would not breach either the civil or criminal order?
30. The Authority submitted that, with one exception (paragraph 4.8), all of the withheld information was information which, when combined with other information in the public domain, would contribute to the jigsaw identification of a person who was a complainer in the criminal proceedings against Mr Salmond, and whose identity is protected by the criminal order.
31. The Authority noted that paragraph 4.8 contained details of an alleged incident involving Mr Salmond and one of the complainants. The Authority contended that disclosure of paragraph 4.8 would, when combined with other information in the public domain, contribute to the jigsaw identification of the complainant, whose identity was protected by the civil order.

*The Commissioner’s findings*

32. The Commissioner has considered carefully the information which has been withheld under section 26(c). He has been conscious of the fact that he must consider all of the means reasonably likely to be used by third parties to identify the complainers. As noted in Decision [125/2019](#)<sup>4</sup>, which involved a request for the contents of the complaints made against Mr Salmond, the amount of speculation as to the identities of the complainers, particularly given

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<sup>3</sup> <https://scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2021hcj001.pdf?sfvrsn=0>

<sup>4</sup> <https://www.itspublicknowledge.info/decision-1252019>

the high profile of Mr Salmond, means that any information disclosed in relation to the complaints is highly likely to be scrutinised, in conjunction with other information already in the public domain, in an attempt to identify the individuals.

33. Having carefully considered the information, the Commissioner is satisfied that disclosing the information would lead to the identification of the complainers, either directly or indirectly, contrary to the civil and criminal orders. Such information is exempt from disclosure under section 26(c) of FOISA.

## **Decision**

The Commissioner finds that the Authority complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

## **Appeal**

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

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

**30 November 2022**

## **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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

#### **2 Effect of exemptions**

- ...
- (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 -
  - ...
  - (b) section 26;
  - ...

#### **26 Prohibitions on disclosure**

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)-

- ...
- (c) would constitute, or be punishable as, a contempt of court.

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

- (1) A person who is dissatisfied with -
  - (a) a notice 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.
- (2) An application under subsection (1) must -

- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
- (b) state the name of the applicant and an address for correspondence; and
- (c) specify –
  - (i) the request for information to which the requirement for review relates;
  - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
  - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

...

## **50 Information notices**

- (1) Where the Commissioner -
  - (a) has received an application under section 47(1); or

...

that officer may give the authority notice in writing (referred to in this Act as “an information notice”) requiring it, within such time as it specified in the notice, to give the officer, in such form as may be so specified, such information relating to the application, to compliance with this Act or to conformity with the code of practice as is so specified.

## **Contempt of Court Act 1981**

### **11 Publication of matters exempted from disclosure in court**

In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purposes for which it was so withheld.