

**From:** [redacted – section 38(1)(b)]@gov.scot>

**Sent:** Wednesday, December 6, 2023 7:19 PM

**To:** Deputy First Minister and Cabinet Secretary for Finance <DFMCSF@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; Lord Advocate <LordAdvocate@gov.scot>; Solicitor General <SolicitorGeneral@gov.scot>

**Cc:** Minister for Parliamentary Business <MinisterforPB@gov.scot>; Permanent Secretary <PermanentSecretary@gov.scot>; zzzDG Strategy and External Affairs <zzzDGSEA@gov.scot>; DG Corporate <dgcorporate@gov.scot>; David Rogers <David.Rogers@gov.scot>; Solicitor to the Scottish Government <solicitor@gov.scot>; Andrew Bruce <Andrew.Bruce@gov.scot>; Ian Mitchell <Ian.Mitchell@gov.scot>; Helen Webster <Helen.Webster@gov.scot>; Ashleigh Gray <Ashleigh.Gray@gov.scot>; Graham Fisher <Graham.Fisher@gov.scot>; Kenneth Hannaway <Kenneth.Hannaway@gov.scot>; Shirley Ferguson <Shirley.Ferguson@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; Colin Troup <Colin.Troup@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; Colin McAllister <Colin.McAllister@gov.scot>; Penelope Curtis <Penelope.Curtis@gov.scot>; Lorna Gibbs <Lorna.Gibbs@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; Lesley Fraser <Lesley.Fraser@gov.scot>; Lorna Gibbs <Lorna.Gibbs@gov.scot>; Julie Grant <Julie.Grant@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>

**Subject:** RE: IMMEDIATE SUBMISSION - FOI Appeal - Scottish Ministers v Scottish Information Commissioner & Harrop - SGLD to DFM and Law Officers with decision of the court - appeal refused - court read out - 6 December 2023

Deputy First Minister, Lord Advocate, Solicitor General,

Following on from the brief update confirming the decision handed down this afternoon immediately after conclusion of submissions from parties, I now provide more detail on the discussions and comments from the bench which we anticipate will be reflected in the written reasons to follow in early course.

## Outcome

The appeal was refused. The Lord President stated that the Court is satisfied that the information involved was held by the Scottish Ministers in terms of the statute. Reasons for the decision will be given in writing in early course.

## Discussion

There were queries from the bench on the issue of Mr Hamilton's independence. Lord Boyd noted that the decision on whether a Minister has breached the Ministerial Code is for the First Minister who can accept or reject the advice from an independent advisor on referral. Senior Counsel for Ministers submitted with reference to Mr Hamilton's remit that Ministers only have a right to receive the report from the independent advisor and there is no entitlement to obtain the underlying evidentiary material. The Lord President found the "constant references to the advisor being independent rather interesting" and queried why it is "independent" rather than just advice as part of an internal governmental devised process. Senior Counsel for the Commissioner submitted that too much weight was being placed by

Ministers on notion of Mr Hamilton's independence and that independence cannot be taken to mean somehow that the information is not held by Ministers. The referral to Mr Hamilton instructs him to gather evidence, conduct interviews and determine if there is a breach of Code. He obtained information because he was instructed to do so by Ministers and the remit expressly covers gathering the information for Ministers which they say they do not hold. He noted that it is the Ministerial Code which provides the whole context for the investigation, making the point that the entire system aims to ensure Ministers comply with the Code, so that is indicative of an appropriate connection between Ministers and the information created and obtained in order to ascertain whether a Minister has complied with the Code.

Lord Boyd queried whether the question of remit was determinative and a distinction was made by Lord Pentland between public inquiries where conclusions are to be drawn and findings made and referrals like this where the advice is a step in the journey where the First Minister (or DFM in this case) is the ultimate decision maker.

It will be interesting to see how much weight is given to this issue in the written reasons – the bench were clearly sceptical of Ministers' position and of the view that there is not sufficient separation for the purposes of section 3(2) of the Freedom of Information (Scotland) Act 2002. SGLD Advisory and policy colleagues are giving consideration to the potential wider implications of this decision in terms of future referrals and more generally, and will be better placed to advise once sighted on the written reasons.

Much was made by Senior Counsel for the Commissioner of the fact that information was held in the SG document management system and that Ministers imposed access restrictions on the information on their own systems. The question posed, which was well received by the bench, was: how can Ministers impose any restrictions that bite if they do not hold the information? Making arrangements for control and access restrictions is indicative of Ministers holding the information. He highlighted that there is nothing in the restrictions under which Mr Hamilton worked which restricts Ministers themselves. They chose to impose and could lift restrictions. Lord Pentland then categorised this as a unilateral rather than bilateral arrangement. It is worth noting that Senior Counsel for the Commissioner made clear that there was no criticism of the seriousness with which Ministers undertook arrangements and that was not in question.

Ministers' approach was described by Senior Counsel for the Commissioner as resulting in erecting technical barriers to avoid disclosure of information to the public and section 3(2) has to be construed in a way to avoid that outcome. Accepting his submissions would not put the information at risk of inappropriate disclosure as other exemptions as applicable are available to Ministers. Applying "held" in a non technical way is not going to open up difficulties for public authorities as those difficulties are already covered by the exemptions available.

## **Next steps**

Should we not be in receipt of the written reasons by the end of the week, we will seek an update from the clerks on when these can be expected. As noted, SGLD Advisory and policy colleagues are giving consideration to the potential wider

implications of the decision and the anticipated written reasons and further advice shall follow as soon as possible on handling and on the substance.

In terms of procedure, it is open to parties apply to the Inner House for permission to appeal to the Supreme Court within 28 days of today's date (by 3 January 2024). Further advice on this and on prospects shall follow once the written reasons are received.

Should the DFM or Law Officers wish to discuss matters further at this stage with SGLD, policy officials, or counsel, we are happy to make arrangements as suits.

Kind regards,

[redacted – section 38(1)(b)]

[redacted – section 38(1)(b)] | Solicitor | [redacted – section 38(1)(b)] | Scottish Government Legal Directorate

**Working pattern:** [redacted – section 38(1)(b)]

**From:** [redacted – section 38(1)(b)]

**Sent:** Wednesday, December 6, 2023 5:29 PM

**To:** Deputy First Minister and Cabinet Secretary for Finance <DFMCSF@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; Lord Advocate <LordAdvocate@gov.scot>; Solicitor General <SolicitorGeneral@gov.scot>

**Cc:** Minister for Parliamentary Business <MinisterforPB@gov.scot>; Permanent Secretary <PermanentSecretary@gov.scot>; zzzDG Strategy and External Affairs <zzzDGSEA@gov.scot>; DG Corporate <dgcorporate@gov.scot>; David Rogers <David.Rogers@gov.scot>; Solicitor to the Scottish Government <solicitor@gov.scot>; Andrew Bruce <Andrew.Bruce@gov.scot>; Ian Mitchell <Ian.Mitchell@gov.scot>; Helen Webster <Helen.Webster@gov.scot>; Ashleigh Gray <Ashleigh.Gray@gov.scot>; Graham Fisher <Graham.Fisher@gov.scot>; Kenneth Hannaway <Kenneth.Hannaway@gov.scot>; Shirley Ferguson <Shirley.Ferguson@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; Colin Troup <Colin.Troup@gov.scot>; [redacted – section 38(1)(b)] @gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; Colin McAllister <Colin.McAllister@gov.scot>; Penelope Curtis <Penelope.Curtis@gov.scot>; Lorna Gibbs <Lorna.Gibbs@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; Lesley Fraser <Lesley.Fraser@gov.scot>; Lorna Gibbs <Lorna.Gibbs@gov.scot>; Julie Grant <Julie.Grant@gov.scot>; [redacted – section 38(1)(b)] @gov.scot>; [redacted – section 38(1)(b)]@gov.scot>

**Subject:** RE: IMMEDIATE SUBMISSION - FOI Appeal - Scottish Ministers v Scottish Information Commissioner & Harrop - SGLD to DFM and Law Officers with decision of the court - appeal refused - 6 December 2023

Dear [redacted – section 38(1)(b)],

Yes, that is correct.

The litigation may remain live as it is open to Ministers to apply to the Inner House for permission to appeal to the Supreme Court. That decision will be for Ministers and the Law Officers once the Court's written reasons have been received and considered and until that decision is taken, comment on the case should be limited.

I hope that assists for now. A more detailed read out of the hearing shall follow this evening.

Kind regards,

[redacted – section 38(1)(b)]

[redacted – section 38(1)(b)] Solicitor | [redacted – section 38(1)(b)] Scottish Government  
Legal Directorate

**Working pattern:** [redacted – section 38(1)(b)]

Email - Wednesday, December 6, 2023 5:12 PM – [redacted – out of scope]

Email - Wednesday, December 6, 2023 4:15 PM – [redacted – out of scope]

**From:** [redacted – section 38(1)(b)]@gov.scot>

**Sent:** Wednesday, December 6, 2023 3:49 PM

**To:** [redacted – section 38(1)(b)]@gov.scot>; Lord Advocate <LordAdvocate@gov.scot>;  
Solicitor General <SolicitorGeneral@gov.scot>

**Cc:** Minister for Parliamentary Business <MinisterforPB@gov.scot>; Permanent Secretary <PermanentSecretary@gov.scot>; zzzDG Strategy and External Affairs <zzzDGSEA@gov.scot>; DG Corporate <dgcorporate@gov.scot>; David Rogers <David.Rogers@gov.scot>; Solicitor to the Scottish Government <solicitor@gov.scot>; Andrew Bruce <Andrew.Bruce@gov.scot>; Ian Mitchell <Ian.Mitchell@gov.scot>; Helen Webster <Helen.Webster@gov.scot>; Ashleigh Gray <Ashleigh.Gray@gov.scot>; Graham Fisher <Graham.Fisher@gov.scot>; Kenneth Hannaway <Kenneth.Hannaway@gov.scot>; Shirley Ferguson <Shirley.Ferguson@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; Colin Troup <Colin.Troup@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; Colin McAllister <Colin.McAllister@gov.scot>; Penelope Curtis <Penelope.Curtis@gov.scot>; Lorna Gibbs <Lorna.Gibbs@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; Lesley Fraser <Lesley.Fraser@gov.scot>; Lorna Gibbs <Lorna.Gibbs@gov.scot>; Julie Grant <Julie.Grant@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>

**Subject:** IMMEDIATE SUBMISSION - FOI Appeal - Scottish Ministers v Scottish Information Commissioner & Harrop - SGLD to DFM and Law Officers with decision of the court - appeal refused - 6 December 2023

Deputy First Minister, Lord Advocate, Solicitor General,

The appeal hearing before the Lord President and Lords Pentland and Boyd concluded this afternoon and an oral decision was issued from the bench with written reasons to follow.

The Court refused the appeal having been persuaded that the material involved was held by the Scottish Ministers for the purposes of the statute. A more detailed update shall follow – this is simply an immediate update on the decision handed down this afternoon.

No interlocutor has yet been received. Comms lines are being cleared and colleagues advised that the litigation remains live until the expiry of the 28 day period in which it is open to parties to apply to the Inner House for permission to appeal to the Supreme Court if so advised.

**The Deputy First Minister and the Law Officers are asked to note that:**

- **the appeal has been refused;**
- **the Court will issue written reasons; and**
- **that further briefing shall follow.**

Kind regards,

[redacted – section 38(1)(b)]

[redacted – section 38(1)(b)] | Solicitor | [redacted – section 38(1)(b)]  
| Scottish Government Legal Directorate

**Working pattern:** [redacted – section 38(1)(b)]

## OFFICIAL SENSITIVE

Deputy First Minister and Cabinet Secretary for Finance  
Minister for Parliamentary Business

### **SCOTTISH INFORMATION COMMISSIONER - DECISION 004/2023 - Mr Benjamin Harrop application – Appeal – Update**

#### **Purpose and Priority**

1. To provide an update on this appeal in the Court of Session, and to provide a further note from counsel.
2. Routine. For information, but officials are due to meet DFM on 31 May to discuss the background to this appeal and we will discuss this update then.

#### **Context and Issues**

3. Instructions were given to proceed with the appeal against the decision of the Scottish Information Commissioner (No 004/2023) dated 31 January 2023. This related to information held in relation to the former First Minister's self-referral to an independent adviser (in this case James Hamilton) as to whether there had been a breach of the Ministerial Code. Scottish Ministers' position was that information stored by and on behalf of Mr Hamilton and his secretariat on the Scottish Government IT system was held on behalf of Mr Hamilton acting in his capacity as an independent adviser and was not held by Scottish Ministers in terms of section 3(2) of FOISA.
4. The Commissioner decided that the referral to Mr Hamilton was instructed and carried out, evidence was obtained, and the report produced, all for the purpose of considering whether the former First Minister's conduct complied with the Code and advising on appropriate sanctions if it did. He took the view that information was obtained and created for that purpose and that this amounted to an appropriate connection with the Authority such that information was held by it for the purposes of section 3(2).
5. The appeal was lodged and served, and the Commissioner has lodged Answers to the Appeal. Notes of argument are due by 28 June, with a procedural hearing on 12 July. The hearing of the appeal itself is likely to be some time in the Autumn.
6. SGLD has carried out the precognition exercise to allow counsel to have a full picture of the factual background in relation to how information was stored and who had access to that information. The draft precognitions were given to counsel last month and they have responded with comments on individual precognitions, as well as providing a further note (attached separately). SGLD will follow up with the witnesses on the individual comments, which are largely matters of clarification, but the joint note is attached for information.
7. Counsel conclude this note by saying the following:

## OFFICIAL SENSITIVE

“the appeal can be argued principally on the simple propositions (i) that the written evidence to Mr Hamilton was only ever intended to be for him alone to consider; (ii) that by the nature of his office and the confidentiality of the evidence provided to him, Mr Hamilton was acting entirely independently in relation to the evidence; (iii) that the Secretariat therefore held that evidence solely on his behalf; and (iv) that the fact the evidence was held on Scottish Government systems is of little relevance, since it was held for the Commissioner’s purposes and not for those of the government. We do not consider that it would benefit Ministers, or assist the court, for the appeal to focus unduly upon the technical aspects of information storage. This approach has the advantage of keeping the focus upon the independent nature of the advisors to the Code.”

8. SGLD considers that this should remain the strategy for the appeal. However, the final paragraph of the joint note does sound a slightly more pessimistic note than we have seen before from counsel in this case:

“While the Commissioner’s reasoning is open to criticism for the reasons set out in senior counsel’s previous opinions, we consider that the court is likely to take a broad approach on appeal. If it does so, we consider that on balance the court is more likely than not to refuse the appeal and thus to leave the information request to be determined by reference to the various exemptions that may apply.”

### **Conclusion and Next Steps**

9. The rationale for appealing the Commissioner’s decision was: that the decision was unclear; had significant and unknown consequences for arrangements for independent advisers, groups etc that are used routinely by government; and without more clarity the decision would be very difficult to interpret in future. In taking the decision to appeal to the Court of Session, the former DFM noted the risks of the case, as set out in Counsel’s advice. He noted that it was necessary to balance the risk of letting the Commissioner’s Decision stand and the implications of that, a significant shift from how SG has interpreted FOISA and beyond what Parliament probably intended, versus the risk of appealing the Decision with the risk of appealing the Decision with the possibility of the court refusing the appeal and giving an adverse judgment.
10. Our view (policy and SGLD) is that, despite the slightly more pessimistic note from counsel, the rationale for appealing the decision is unchanged. There remain reasonable arguments to make in support of Ministers’ position (as set out in paragraph 7 above), and counsel do not suggest that the appeal should be dropped. If we lose the appeal at the Court of Session we will be required to undertake a review of the original FOI request. At that point we would consider the exemptions that may apply to the information in scope. We should also still benefit from achieving a clearer and more workable legal position.
11. Counsel has asked to consult once the precognitions are finalised and there is a draft note of argument for the Law Officers to consider, which will likely be in

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the week of 12 June. SGLD intends to interrogate counsel's views on prospects more at that point, once there is a draft of the note of argument for review. We will update Ministers at that point.

12. You are invited to: Note the updated position.

PENNY CURTIS

DD: Elections and FOI Division

30 May 2023

Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constit Interest	General Awareness
Lord Advocate Solicitor General Permanent Secretary DG Strategy and External Affairs DG Corporate David Rogers Ruairaidh Macniven Andy Bruce Ian Mitchell Helen Webster Ashleigh Gray Graham Fisher, SGLD Kenneth Hannaway, SGLD Shirley Ferguson, SGLD [redacted – section 38(1)(b)], SGLD [redacted – section 38(1)(b)], SGLD [redacted – section 38(1)(b)], SGLD [redacted – section 38(1)(b)] [redacted – section 38(1)(b)] [redacted – section 38(1)(b)] LSLA Colin McAllister, Special Adviser					



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JOINT NOTE BY SENIOR AND JUNIOR COUNSEL

FOR

THE SCOTTISH GOVERNMENT

in the matter of the Scottish Information  
Commissioner's Decision Notice 004/2023

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**Introduction**

1. We refer to this appeal in the Court of Session and to the previous advice provided by Senior Counsel in his Opinions dated 9 February and 2 March 2023. We have considered the draft precognitions provided by agents and in this Note we advise on the content of those precognitions and on their potential impact on the conduct of the appeal.

**The draft precognitions**

2. As explained in the Opinion of Senior Counsel dated 2 March 2023, the submissions made by Scottish Ministers to the Commissioner did not provide the full factual background about what information was held by whom, when, where and with what element of security. A principal purpose of obtaining detailed precognitions, as requested by the Lord Advocate, was to ensure that if the appeal is insisted upon, Ministers' submissions to the court are fully accurate on the facts. We doubt that the authors of the letters to the Commissioner dated 13 September 2021 and 22 June 2022 had full details about what was held where and on what terms. The key concern at this stage is therefore to ensure that

counsel acting on Ministers' behalf provide to the court information that is as clear and accurate as possible.

3. On the basis of the information available in mid-March and as confirmed by the relevant officials, the appeal states at paragraph 5:-

The evidence received by Mr Hamilton and the secretariat has been stored and processed within (i) restricted-access areas of the Scottish Government's document management systems, and (ii) the secure email account of the head of the secretariat used for communication with Mr Hamilton and to which nominated officials have had access permissions for use in an emergency. Evidence sent to Mr Hamilton and the secretariat from within the Scottish Government using Scottish Government information systems will also be accessible by the individuals who sent it, if they have retained an electronic copy.

The focus there is rightly on the evidence provided to Mr Hamilton, since the FOI request was in the following terms:-

All written evidence to James Hamilton QC's investigation into the First Minister under the Ministerial Code. This includes evidence from the FM, her chief of staff Liz Lloyd and any other individuals within the Scottish Government who have submitted evidence.

At page 6 of his report, Mr Hamilton lists the 11 individuals who provided written observations to him and (in certain cases) answered follow-up questions. Those observations, and any written answers to what we understand to have been written follow-up questions, would between them comprise the "written evidence" to Mr Hamilton.<sup>1</sup>

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<sup>1</sup> The report at page 6 also refers to "follow-up interviews" but oral interviews would not comprise written evidence to the investigation within the scope of the request.

4. We are providing with this Note our comments on the text of the individual draft precognitions. However, we emphasise the following points about the draft precognition of [redacted - section 38(1)(b)].

4.1 The draft deals with technical IT systems without an explanation of how they function, e.g. where information is stored, whether there are back up copies, or whether the same information might be retained in more than once place or on more than one system. A precognition from a suitably qualified Scottish Government IT specialist is probably required in order to provide us with the necessary understanding of the various systems used. For example, the appeal mentions “restricted-access areas of the Scottish Government’s document management systems” and we need to be clear where the H-drive, OneDrive and Outlook programs fit into those document management systems – particularly given the reference to “eRDM” in the draft precognition.

4.2 At §8, the draft states that material came from those individuals from whom Mr Hamilton sought statements; that this material was comprised in “very big files”; and that these were “moved to my H drive” – a drive that was “retired” in summer 2022 and replaced with OneDrive (see §7). The request for “all written evidence” would appear to cover this material, but the draft does not distinguish clearly between the handling of written evidence to the investigation, and other communications. Nor is it clear whether this material sent to Mr Hamilton was thereafter retained only on the H drive; or whether parts of that material were later sent out by email using [redacted - section 38(1)(b)] email system and, if so, whether such attachments would remain held within, or accessible through, that email system and not merely through the H drive.

- 4.3 It is not clear from the draft whether the information that was moved to the H drive was transferred over to and retained in the OneDrive system in 2022. Agents' instructions dated 28 February 2023 advised at §3.2: "We understand some information relevant to the FOI request continues to be held the One-Drive but the H-drive is now defunct."
- 4.4 The draft suggests at §10 that discussions with Mr Hamilton about records management and transfer to the National Records of Scotland came to an end without matters being finalised. This suggests that the penultimate paragraph on page 2 of the submission dated 22 June 2022 needs to be updated, since it suggests that such discussions are proceeding.
5. Other precognitions demonstrate that there was a somewhat lax approach to access permissions. However, the appeal has already noted that emergency access to emails was in place.

### **The relevance of the precognitions to the appeal**

6. The Commissioner concluded that the circumstances in which the written evidence was obtained and the purpose for which it was used demonstrated an "appropriate connection" with the Scottish Ministers and therefore that the information is held by them: see §26 of the Decision. In light of that conclusion, and the relevant case authorities discussed in earlier Opinions, the precise manner in which the information has been held will not by any means be determinative of this appeal. It is clearly important to Ministers to be able to repeat to the court, as far as they were accurate, the earlier submissions to the Commissioner concerning the restricted access conditions in which the

information was and remains held, correcting any errors that may have been made. However, that is only one of a number of factors relevant to the appeal.

7. This is evident from the factors founded upon in the Commissioner's answers to the appeal. In answer 12, the Commissioner notes that Mr Hamilton has completed his task and adds: "In these circumstances, the information in question is not held by Mr Hamilton." The Commissioner then cites four reasons why Ministers have an interest in the information, on the basis of which there is said to be an "appropriate connection".

- (i) The investigation was instructed by the First Minister. In accordance with § 1.7 of the Code its purpose was to advise her in order to form a judgment as to 'any action required in respect of ministerial conduct'.

- (ii) The investigation was subject to ministerial oversight, albeit secretariat staff were not to disclose information outside the secretariat itself.

- (iii) The information in question is held in Scottish Government document management systems, and the report was published on the Scottish Government website.

- (iv) Compliance with the Code is a matter in which the Scottish Ministers collectively have an interest. The Code itself emphasizes the duties incumbent on ministers and their collective responsibility.

8. None of these arguments depends for its success or failure upon the precise manner in which information has been held by Ministers. The present appeal is an appeal on a point of law: see *Beggs v Scottish Information Commissioner* 2016 SC 615 at §13. Ministers cannot, and do not, appeal on the basis that the Commissioner has made a finding of fact for which he had no evidence or which was contradictory of the evidence that he had. His conclusion at §26 might be categorised as a finding in fact and law, depending in part on the purpose of the Act and concept of "appropriate connection" as discussed in case law. So far as

the contents of the draft precognitions are concerned, they make little difference to the overall prospects of the appeal. Once they have been finalised, they will serve to ensure that counsel corrects any errors that may have crept into the correspondence with the Commissioner in 2021 and 2022, and that any relevant omissions are explained. That process makes the appeal somewhat harder than it otherwise would be, but is obviously necessary nonetheless.

9. However, the appeal can be argued principally on the simple propositions (i) that the written evidence to Mr Hamilton was only ever intended to be for him alone to consider; (ii) that by the nature of his office and the confidentiality of the evidence provided to him, Mr Hamilton was acting entirely independently in relation to the evidence; (iii) that the Secretariat therefore held that evidence solely on his behalf; and (iv) that the fact the evidence was held on Scottish Government systems is of little relevance, since it was held for the Commissioner's purposes and not for those of the government. We do not consider that it would benefit Ministers, or assist the court, for the appeal to focus unduly upon the technical aspects of information storage. This approach has the advantage of keeping the focus upon the independent nature of the advisors to the Code.
10. While the Commissioner's reasoning is open to criticism for the reasons set out in senior counsel's previous opinions, we consider that the court is likely to take a broad approach on appeal. If it does so, we consider that on balance the court is more likely than not to refuse the appeal and thus to leave the information request to be determined by reference to the various exemptions that may apply.

James Mure KC

Paul Reid, Advocate

22 May 2023

**Note of meeting to discuss the appeal the Scottish Information**

**Commissioner's Decision 004/2023**

**Wednesday 31 May 2023**

**Present:**

Deputy First Minister, Penny Curtis, [redacted – section 38(1)(b)], [redacted – section 38(1)(b)], [redacted – section 38(1)(b)], Callum McCaig, [redacted – section 38(1)(b)]

1. DFM had requested a briefing covering the background to the decision to appeal the Scottish Information Commissioner's Decision 004/2003 that was taken by the former DFM, Mr Swinney, in March 2023. Officials summarised the arguments for the Scottish Ministers' position that they did not hold the information submitted to Mr Hamilton as part of his Ministerial Code investigation; the Commissioner's Decision, the implications of the Decision and the difficulty in interpreting the Decision; and the basis on which Mr Swinney decided to appeal the Decision to the Court of Session.
2. SGLD summarised the precognition exercise they had undertaken in order to have a full understanding of the role of the secretariat to Mr Hamilton and the arrangements for access to mailboxes. SGLD also summarised the latest opinion from counsel (provided in Penny Curtis' submission of 30 May).
3. Officials noted that, despite the more pessimistic view from counsel, the rationale for appealing the decision is unchanged. There remain reasonable arguments to make in support of Ministers' position, and counsel do not suggest that the appeal should be dropped.
4. There was discussion about the action that would be needed if we lose the appeal at the Court of Session: we would be required to undertake a review of the original FOI request. At that point we would consider the exemptions that may apply to the information in scope. We should also still benefit from achieving a clearer and more workable legal position

- 5. DFM indicated that in all the circumstances, she considered it was necessary to continue with the appeal of the Commissioner's Decision to the Court of Session and asked to be updated as the case progressed.**

Elections and FOI Division

4 June 2023



**From:** [redacted - section 38(1)(b)]@gov.scot>

**Sent:** Friday, December 15, 2023 2:00 PM

**To:** Deputy First Minister and Cabinet Secretary for Finance <DFMCSF@gov.scot>; Lord Advocate <LordAdvocate@gov.scot>; Solicitor General <SolicitorGeneral@gov.scot>

**Cc:** Minister for Parliamentary Business <MinisterforPB@gov.scot>; Permanent Secretary <PermanentSecretary@gov.scot>; DG Corporate <dgcorporate@gov.scot>; David Rogers <David.Rogers@gov.scot>; Solicitor to the Scottish Government <solicitor@gov.scot>; Andrew Bruce <Andrew.Bruce@gov.scot>; Ian Mitchell <Ian.Mitchell@gov.scot>; Graham Fisher <Graham.Fisher@gov.scot>; Kenneth Hannaway <Kenneth.Hannaway@gov.scot>; Shirley Ferguson <Shirley.Ferguson@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; Colin Troup <Colin.Troup@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; J[redacted - section 38(1)(b)]@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; Colin McAllister <Colin.McAllister@gov.scot>; Penelope Curtis <Penelope.Curtis@gov.scot>; Lorna Gibbs <Lorna.Gibbs@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; Lesley Fraser <Lesley.Fraser@gov.scot>; Lorna Gibbs <Lorna.Gibbs@gov.scot>; Julie Grant <Julie.Grant@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>;

**Subject:** FOI Appeal - Scottish Ministers v Scottish Information Commissioner & Harrop - SGLD to DFM and Law Officers confirming court's written reasons available on Tuesday - 15 December 2023

Deputy First Minister, Lord Advocate, Solicitor General

Further to the briefing below on 6 December, we have now had notification from the court that its written reasons in this appeal will be published next Tuesday, 19 December (see attached). You will recall that unusually the court gave an *ex tempore* decision to refuse the appeal on 6 December, with written reasons to follow.

SGLD will receive the reasons between 9am and 9.30am on Tuesday and will consider these with a view to sharing them with this copy list at 10am or as close as we can thereafter, along with briefing. Separately we will be asking counsel to consider the court's reasoning on Tuesday morning and senior counsel has confirmed he is available and should be able to let us have advice that day on whether or not there are grounds to seek permission to appeal to the Supreme Court. The deadline for any application for permission to appeal to the Supreme Court remains 3 January 2024.

Kind regards,

[redacted - section 38(1)(b)]

[redacted - section 38(1)(b)] | Lawyer & [redacted - section 38(1)(b)] | Scottish Government Legal Directorate

[redacted - section 38(1)(b)]@gov.scot

CJSM address: [redacted - section 38(1)(b)]@gov.scot.cjasm.net

I am mainly working from home, so please contact me by email or MS Teams in the first instance. Working hours may vary.

**From:** [redacted - section 38(1)(b)]@gov.scot>

**Sent:** Wednesday, December 6, 2023 7:19 PM

**To:** Deputy First Minister and Cabinet Secretary for Finance <DFMCSF@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; Lord Advocate <LordAdvocate@gov.scot>; Solicitor General <SolicitorGeneral@gov.scot>

**Cc:** Minister for Parliamentary Business <MinisterforPB@gov.scot>; Permanent Secretary <PermanentSecretary@gov.scot>; DG Corporate <dgcorporate@gov.scot>; David Rogers <David.Rogers@gov.scot>; Solicitor to the Scottish Government <solicitor@gov.scot>; Andrew Bruce <Andrew.Bruce@gov.scot>; Ian Mitchell <Ian.Mitchell@gov.scot>; Graham Fisher <Graham.Fisher@gov.scot>; Kenneth Hannaway <Kenneth.Hannaway@gov.scot>; Shirley Ferguson <Shirley.Ferguson@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; Colin Troup <Colin.Troup@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; Colin McAllister <Colin.McAllister@gov.scot>; Penelope Curtis <Penelope.Curtis@gov.scot>; Lorna Gibbs <Lorna.Gibbs@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; Lesley Fraser <Lesley.Fraser@gov.scot>; Lorna Gibbs <Lorna.Gibbs@gov.scot>; Julie Grant <Julie.Grant@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>;

**Subject:** RE: IMMEDIATE SUBMISSION - FOI Appeal - Scottish Ministers v Scottish Information Commissioner & Harrop - SGLD to DFM and Law Officers with decision of the court - appeal refused - court read out - 6 December 2023

Deputy First Minister, Lord Advocate, Solicitor General,

Following on from the brief update confirming the decision handed down this afternoon immediately after conclusion of submissions from parties, I now provide more detail on the discussions and comments from the bench which we anticipate will be reflected in the written reasons to follow in early course.

## Outcome

The appeal was refused. The Lord President stated that the Court is satisfied that the information involved was held by the Scottish Ministers in terms of the statute. Reasons for the decision will be given in writing in early course.

## Discussion

There were queries from the bench on the issue of Mr Hamilton's independence. Lord Boyd noted that the decision on whether a Minister has breached the Ministerial Code is for the First Minister who can accept or reject the advice from an independent advisor on referral. Senior Counsel for Ministers submitted with reference to Mr Hamilton's remit that Ministers only have a right to receive the report from the independent advisor and there is no entitlement to obtain the underlying evidentiary material. The Lord President found the "constant references to the advisor being independent rather interesting" and queried why it is "independent" rather than just advice as part of an internal governmental devised process. Senior Counsel for the Commissioner submitted that too much weight was being placed by Ministers on notion of Mr Hamilton's independence and that independence cannot be taken to mean somehow that the information is not held by Ministers. The referral to

Mr Hamilton instructs him to gather evidence, conduct interviews and determine if there is a breach of Code. He obtained information because he was instructed to do so by Ministers and the remit expressly covers gathering the information for Ministers which they say they do not hold. He noted that it is the Ministerial Code which provides the whole context for the investigation, making the point that the entire system aims to ensure Ministers comply with the Code, so that is indicative of an appropriate connection between Ministers and the information created and obtained in order to ascertain whether a Minister has complied with the Code.

Lord Boyd queried whether the question of remit was determinative and a distinction was made by Lord Pentland between public inquiries where conclusions are to be drawn and findings made and referrals like this where the advice is a step in the journey where the First Minister (or DFM in this case) is the ultimate decision maker.

It will be interesting to see how much weight is given to this issue in the written reasons – the bench were clearly sceptical of Ministers' position and of the view that there is not sufficient separation for the purposes of section 3(2) of the Freedom of Information (Scotland) Act 2002. SGLD Advisory and policy colleagues are giving consideration to the potential wider implications of this decision in terms of future referrals and more generally, and will be better placed to advise once sighted on the written reasons.

Much was made by Senior Counsel for the Commissioner of the fact that information was held in the SG document management system and that Ministers imposed access restrictions on the information on their own systems. The question posed, which was well received by the bench, was: how can Ministers impose any restrictions that bite if they do not hold the information? Making arrangements for control and access restrictions is indicative of Ministers holding the information. He highlighted that there is nothing in the restrictions under which Mr Hamilton worked which restricts Ministers themselves. They chose to impose and could lift restrictions. Lord Pentland then categorised this as a unilateral rather than bilateral arrangement. It is worth noting that Senior Counsel for the Commissioner made clear that there was no criticism of the seriousness with which Ministers undertook arrangements and that was not in question.

Ministers' approach was described by Senior Counsel for the Commissioner as resulting in erecting technical barriers to avoid disclosure of information to the public and section 3(2) has to be construed in a way to avoid that outcome. Accepting his submissions would not put the information at risk of inappropriate disclosure as other exemptions as applicable are available to Ministers. Applying "held" in a non technical way is not going to open up difficulties for public authorities as those difficulties are already covered by the exemptions available.

### **Next steps**

Should we not be in receipt of the written reasons by the end of the week, we will seek an update from the clerks on when these can be expected. As noted, SGLD Advisory and policy colleagues are giving consideration to the potential wider implications of the decision and the anticipated written reasons and further advice shall follow as soon as possible on handling and on the substance.

In terms of procedure, it is open to parties apply to the Inner House for permission to appeal to the Supreme Court within 28 days of today's date (by 3 January 2024). Further advice on this and on prospects shall follow once the written reasons are received.

Should the DFM or Law Officers wish to discuss matters further at this stage with SGLD, policy officials, or counsel, we are happy to make arrangements as suits.

Kind regards,

[redacted - section 38(1)(b)]

**[redacted - section 38(1)(b)]** | Solicitor | [redacted - section 38(1)(b)] | Scottish Government  
Legal Directorate

**Working pattern:** [redacted - section 38(1)(b)]

**From:** [redacted - section 38(1)(b)] @gov.scot>

**Sent:** Monday, May 22, 2023 4:58 PM

**To:** Lord Advocate <LordAdvocate@gov.scot>

**Cc:** Solicitor General <SolicitorGeneral@gov.scot>; Solicitor to the Scottish Government <solicitor@gov.scot>; Legal Secretariat to the Lord Advocate <DLPCEALSLA@gov.scot>; David Rogers <David.Rogers@gov.scot>; Penelope Curtis <Penelope.Curtis@gov.scot>; Shirley Ferguson <Shirley.Ferguson@gov.scot>; [redacted - section 38(1)(b)] @gov.scot>; Graham Fisher <Graham.Fisher@gov.scot>; Kenneth Hannaway <Kenneth.Hannaway@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>

**Subject:** For information only - FOI Appeal - Scottish Ministers v Scottish Information Commissioner & Harrop - SGLD to Law Officers with further note from counsel - 22 May 2023

Lord Advocate

### **For information only**

### **FOI Appeal - Scottish Ministers v Scottish Information Commissioner & Harrop Information relating to Hamilton Investigation**

#### **Purpose**

1. To update the Law Officers on this FOI appeal in the Court of Session; and provide a further note by counsel.

#### **Priority**

2. Routine

#### **Background**

3. The Lord Advocate will recall that instructions were given to proceed with the appeal against the decision of the Scottish Information Commissioner (No 004/2023) dated 31 January 2023. This related to information held in relation to the former First Minister's self-referral to an independent adviser (in this case James Hamilton) as to whether there had been a breach of the Ministerial Code. Scottish Ministers' position was that information stored by and on behalf of Mr Hamilton and his secretariat on the Scottish Government IT system was held on behalf of Mr Hamilton acting in his capacity as an independent adviser and was not held by Scottish Ministers in terms of section 3(2) of FOISA.
4. The Commissioner decided that the referral to Mr Hamilton was instructed and carried out, evidence was obtained, and the report produced, all for the purpose of considering whether the former First Minister's conduct complied with the Code and advising on appropriate sanctions if it did. He took the view that information was obtained and created for that purpose and that this amounted to an appropriate connection with the Authority such that information was held by it for the purposes of section 3(2).
5. The appeal was lodged and served, and the Commissioner has lodged Answers to the Appeal. Notes of argument are due by 28 June, with a procedural hearing on 12 July. The hearing of the appeal itself is likely to be some time in the Autumn.

## Update

6. SGLD has carried out the precognition exercise to allow counsel to have a full picture of the factual background in relation to how information was stored and who had access to that information. The draft precognitions were given to counsel last month and they have responded this afternoon with comments on individual precognitions, as well as providing a further note. SGLD will follow up with the witnesses on the individual comments, which are largely matters of clarification, but the joint note is attached for the Law Officers' information.

7. Counsel conclude this note by saying the following:

“the appeal can be argued principally on the simple propositions (i) that the written evidence to Mr Hamilton was only ever intended to be for him alone to consider; (ii) that by the nature of his office and the confidentiality of the evidence provided to him, Mr Hamilton was acting entirely independently in relation to the evidence; (iii) that the Secretariat therefore held that evidence solely on his behalf; and (iv) that the fact the evidence was held on Scottish Government systems is of little relevance, since it was held for the Commissioner's purposes and not for those of the government. We do not consider that it would benefit Ministers, or assist the court, for the appeal to focus unduly upon the technical aspects of information storage. This approach has the advantage of keeping the focus upon the independent nature of the advisors to the Code.”

8. SGLD considers that this should remain the strategy for the appeal. However, the final paragraph of the joint note does sound a slightly more pessimistic note than we have seen before from counsel in this case:

“While the Commissioner's reasoning is open to criticism for the reasons set out in senior counsel's previous opinions, we consider that the court is likely to take a broad approach on appeal. If it does so, we consider that on balance the court is more likely than not to refuse the appeal and thus to leave the information request to be determined by reference to the various exemptions that may apply.”

9. Counsel has asked to consult once the precognitions are finalised and there is a draft note of argument for the Law Officers to consider, which will likely be in the week of 12 June because senior counsel is away from tonight. We think that we can interrogate counsel's views on prospects more at that point, once there is a draft of the note of argument for review.

10. The one remaining point for this update is that the Deputy First Minister has asked policy colleagues and the FOI unit for in-person briefing in a Teams meeting at 13:15 on Wednesday 24 May and SGLD will also be in attendance at that meeting.

## Recommendation

11. The Lord Advocate is asked to note the terms of counsel's further joint note.

I would be happy to discuss any of the above with the Law Officers, but otherwise further briefing will be provided in due course.

Kind regards,

[redacted - section 38(1)(b)]

[redacted - section 38(1)(b)] | Lawyer & [redacted - section 38(1)(b)] | [redacted - section 38(1)(b)]  
| Scottish Government Legal Directorate

[redacted - section 38(1)(b)] **@gov.scot**

CJSM address: [redacted - section 38(1)(b)] **@gov.scot.cjsm.net**

I am mainly working from home, so please contact me by email or MS Teams in the first instance.  
Working hours may vary.

**From:** [redacted - section 38(1)(b)]@gov.scot>

**Sent:** Friday, December 15, 2023 10:45 AM

**To:** Lord Advocate <LordAdvocate@gov.scot>; Solicitor General <SolicitorGeneral@gov.scot>

**Cc:** Solicitor to the Scottish Government <solicitor@gov.scot>; LSLA : LEGAL SECRETARIAT TO THE

LORD ADVOCATE <DLODOBLSLALSLSLA@gov.scot>; Graham Fisher <Graham.Fisher@gov.scot>;

Kenneth Hannaway <Kenneth.Hannaway@gov.scot>; Shirley Ferguson

<Shirley.Ferguson@gov.scot>; [redacted - section 38(1)(b)] gov.scot>; [redacted - section 38(1)(b)]

@gov.scot>

**Subject:** FOI Appeal - Scottish Ministers v Scottish Information Commissioner & Harrop - SGLD to Law Officers confirming written decision available next Tuesday - 15 December 2023

Lord Advocate,  
Solicitor General.

We have now had notification from the court that its written reasons in this appeal will be published next Tuesday, 19 December (see attached). The Law Officers will recall that the court gave an *ex tempore* decision to refuse the appeal on 6 December, with written reasons to follow.

SGLD will receive the reasons between 9am and 9.30am on Tuesday and will consider these with a view to sharing it at 10am or as close as we can thereafter. I have asked our policy/FOI Unit colleagues to alert Ministers and anyone else internally who needs to know of the timing of the court's written reasons and have also indicated to them that while Ministers are considering the decision once available on Tuesday, the usual lines on not commenting on live litigation should be preserved. The deadline for any application for permission to appeal to the Supreme Court remains 3 January 2024.

We will be in touch again with the written reasons and briefing as close to 10am as possible on Tuesday next week.

Kind regards,

[redacted - section 38(1)(b)]

[redacted - section 38(1)(b)] | Lawyer & [redacted - section 38(1)(b)] | [redacted - section 38(1)(b)] |

Scottish Government Legal Directorate

[redacted - section 38(1)(b)]@gov.scot

CJSM address: [redacted - section 38(1)(b)] @gov.scot.cjism.net

I am mainly working from home, so please contact me by email or MS Teams in the first instance. Working hours may vary.



**From:** [redacted - section 38(1)(b)]

**Sent:** Tuesday, March 14, 2023 1:49 PM

**To:** Solicitor General <SolicitorGeneral@gov.scot>; Ferguson SE (Shirley) <Shirley.Ferguson@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; Fisher G (Graham) <Graham.Fisher@gov.scot>

**Cc:** Hannaway K (Kenneth) <Kenneth.Hannaway@gov.scot>; Lord Advocate <LordAdvocate@gov.scot>; Legal Secretariat to the Lord Advocate <DLPCEALSLA@gov.scot>; Solicitor to the Scottish Government <solicitor@gov.scot>

**Subject:** Submission to the Lord Advocate -Scottish Ministers v Scottish Information Commissioner - sgld to psia - update -14 March 2023

Lord Advocate

Following final discussions with policy colleagues and counsel, SGLD have now lodged the appeal in process alongside a motion to dispense with service on the interested party (Mr Harrop who originally made the freedom of information request giving rise to this appeal).

In furtherance of yesterday's internal consultation with the Lord Advocate and Deputy First Minister, SGLD tendered advice to those policy colleagues who are providing instructions in this matter concerning witness management. Counsel have been appraised of the Lord Advocate's instructions to undertake a full fact-finding exercise including the taking of precognitions and preparation of affidavits where required. SGLD have requested advice from counsel regarding this and this will be taken forward in early course once counsel have advised.

We will provide further briefing in due course. If anything further is required in the meantime, please do let me know.

Kind regards

[redacted - section 38(1)(b)] | Solicitor | [redacted - section 38(1)(b)] | Scottish Government Legal Directorate

[redacted - section 38(1)(b)] @gov.scot |

1F North | Victoria Quay | Edinburgh EH6 6QQ | **DX** 557000, Edinburgh-20

This correspondence is from the Scottish Government Legal Directorate. To the extent that it may contain legal advice, it is legally privileged and therefore may be exempt from disclosure under the Freedom of Information (Scotland) Act 2002 or the Environmental Information (Scotland) Regulations 2004.

**From:** [redacted - section 38(1)(b)]

**Sent:** 07 March 2023 12:54

**To:** Solicitor General <SolicitorGeneral@gov.scot>; Ferguson SE (Shirley) <Shirley.Ferguson@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; Fisher G (Graham) <Graham.Fisher@gov.scot>

**Cc:** Hannaway K (Kenneth) <Kenneth.Hannaway@gov.scot>; Lord Advocate <LordAdvocate@gov.scot>; Legal Secretariat to the Lord Advocate <DLPCEALSLA@gov.scot>; Solicitor to the Scottish Government <solicitor@gov.scot>

**Subject:** OFF -SEN - Urgent - SCOTTISH INFORMATION COMMISSIONER - DECISION 004/2023 - Mr Benjamin Harrop application – Appeal – Further Advice - sgld to law officers- comment on submission - 7 March 2023

[redacted - section 38(1)(b)]

SGLD [redacted – section 38(1)(b)] have had input in to this briefing and are content.

SGLD would particularly note:

- Counsel advises there are reasonable prospects but there are presentational risks for Ministers and this may not be the best case in which to test the point of law whether information is held on behalf of Ministers in terms of s.3 of FOI(S)A 2002 (paragraph 16 of the briefing);
- the fact that SGLD and counsel have concerns regarding the factual background here (paragraph 22 of the briefing); and,
- that a full and formal fact finding exercise has not been possible in the timeframes (paragraph 17 of the briefing).

Thanks

[redacted - section 38(1)(b)]

### **Overarching Principles**

1. This note has been prepared to assist with interacting with those people within Scottish Government who were involved in the Hamilton Inquiry and the subsequent related FOI request giving rise to the above noted appeal. I use the term witness or proposed witness below to refer to such people. This is at the sharp end of what would be required as (i) it is relatively unusual to advance evidence in a statutory appeal to the Inner House of the Court of Session on a point of law and (ii) it is near non-existent for such appeals to require the leading of oral evidence or the cross-examination of witnesses. However, if a precognition exercise is undertaken with relevant individuals and/or they are asked to provide affidavits, the points below remain relevant to guiding our engagement with such individuals. All of that said, we want to have a constructive engagement with such people and this advice is subject to the caveat of an issue by issue appraisal of relevant issues as they may arise.
2. The overarching duties of both counsel and SGLD solicitors are to act in the best interests of their clients, only act upon the proper instructions and to maintain privilege<sup>1</sup>. The clients in this context are the Ministers collectively with the DFM allocated as the leading Minister for instruction with Penny Curtis and David Rogers operating with delegated decision making power. The Lord Advocate is the leading Law Officer. Any witnesses involved in providing precognitions, affidavits or oral testimony are not in control of Ministers' position and any sharing of information with witnesses must be carefully handled and only on the instruction of clients (whether by DFM or Penny Curtis/David Rogers acting with delegated authority).
3. Another key duty of both counsel and SGLD solicitors is that we must not do or say anything which could affect evidence or induce a witness, a party to an action, or an accused person to do otherwise than give in evidence a truthful and honest account of that person's recollection.<sup>2</sup>
4. Taken together, any engagement with witnesses or other civil servants must be carefully handled to ensure that we:
  - (i) are only acting with the instruction of Ministers (particularly if sharing any information which would waive privilege which requires Ministerial and Law Officer consent);
  - (ii) do not engage with witnesses or other civil servants in a way which makes them part of the decision making process in responding to the litigation as that may prejudice the interests of Ministers insofar as Ministers' preferred position may be adverse to witness(es) and unresolvable conflicts could arise;
  - (iii) do not provide information, guidance or support in a way which may affect the evidence a witness may give.

### **Specific concerns: decision making and witness involvement**

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<sup>1</sup> [Law Society of Scotland Rules 2011, Rule B1.4 and B1.5](#). Counsel have associated duties and obligations in terms of the Faculty of Advocates Rules.

<sup>2</sup> [Law Society of Scotland Rules 2011, Rule B1.13.2](#)

5. When engaging with potential witnesses who are not involved in the instruction of the case, care should be taken to ensure that we maintain privilege (see 11 onwards below) but also that any updates given or discussions had do not prejudice the Ministers' interests as the client.
6. General updates can be provided by Penny Curtis and David Rogers where this is felt to be necessary but we should never involve potential witnesses in a *decision making* capacity. We can obtain their views and factor in their views to what Ministers may ultimately decide. For example, if a witness becomes uncooperative then this will factor into our consideration as to prospects if a key witness becomes a potentially hostile or unreliable witness but should not mean we risk Ministers' interests to make them cooperative again by giving assurances on our position.. We should be alive to the risk of perceived or actual bias arising and avoid such issues in the present appeal to ensure the advice provided to Ministers and instructions received from Ministers are not tainted by relying too heavily on the input of anyone with a vested personal/professional interest in the progress of the appeal.
7. When providing updates to potential witnesses, policy officials should not disclose advice or the balancing exercise conducted by Ministers following such advice. Rather, updates should be given which outline the policy decision arrived at. For example, the previous Lord Advocate recognised in a recent parliamentary inquiry (at a stage before privilege was waived) that "*the Government takes a legal position, either implicitly or explicitly, when it adopts a policy decision. Legal positions underpin policy decisions and the Government takes a legal position in a litigation, for which ministers are answerable and accountable: the court might tell them that they are wrong*"<sup>3</sup>. Put in another way, there is a difference between explaining the position adopted by the Scottish Government and providing a detailed account of the consideration of legal advice and issues underlying the ultimate decision. It will of course be a sensitive balancing exercise as to how we involve named individuals (e.g. [redacted - section 38(1)(b)]) whilst we are *developing* the policy decision and advice should be sought on specific circumstances but the safest approach is to do so afterwards.
8. Finally, policy colleagues should bear in mind what might happen to a witness under cross-examination in the (unlikely<sup>4</sup>) event such evidence is required at an appeal hearing. Questions may be put to witnesses as to the extent of their involvement in the preparation of the Appeal to the case and their role in shaping the decisions of Ministers etc. If a witness has been too heavily involved in preparing the appeal then this will come out in cross-examination. There are presentational and reputational risks that may arise if a witness is too heavily involved in a context where our position is that the Hamilton Inquiry was fully independent and responsible for relevant information in terms of FOI(S)A 2002. More fundamentally, it could ultimately damage the Ministers' position. For

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<sup>3</sup> Committee on the Scottish Government Handling of Harassment Complaints, Session 5, 8 September 2020, page 52,

<sup>4</sup> It is unlikely that evidence in chief will be required in a statutory appeal to the Inner House on a point of law as this is very rare in practice. However, if we conduct precognitions or take affidavits and come to have to rely on these then there is always a chance that oral evidence and cross-examination may be required.

example, if Ministers were to adopt a position which protects the interests of a potential witness and that unravels, that would seriously damage the credibility of Ministers' case.

**Specific concerns: coaching witnesses**

9. As noted above, it is a breach of professional standards for solicitors or counsel to be involved in the coaching of a witness.<sup>5</sup> Policy colleagues should be cautious not to provide assurances or comfort which lead a witness to alter the evidence they would otherwise give. For example, at no point should we assure a named individual that the Ministers will align with their concerns and not make adverse admission/comments about that person's conduct when handling the case.
10. The Court of Session has provided guidance on dealing with witnesses in the commercial context, which is useful when engaging with witnesses.<sup>6</sup>

**Specific concerns: privilege and FOI**

11. Legal professional privilege has two categories: legal advice privilege and litigation privilege. There are some differences between the two but for present purposes litigation privilege will attach to documents created, and discussions that take place, in contemplation of litigation with SGLD and counsel. It will cover expert reports, witness statements and precognitions, opinions, advice notes, emails and drafts of steps of process (i.e. grounds of appeal, Notes of Argument etc.). Privilege survives only insofar as the material attracting privilege remains confidential.<sup>7</sup>
12. Within SG, it is imperative that privileged material is not circulated too widely within and not discussed externally, as that can cause it to lose its confidential character and so its privileged status. Summaries of legal advice in internal reports or minutes can jeopardise privilege, as can discussing that advice without a lawyer present.<sup>8</sup> Therefore, oral and written advice from SGLD/counsel should be shared only insofar as necessary for the purpose of taking instructions from the clients (i.e. Ministers). It is also good practice in a case of this type to restrict access to mailboxes and document storage systems (e.g. eRDM).
13. If precognitions, draft parts of the court process, counsel's Opinions etc. are shared with witnesses who are not involved in the instruction of the litigation could lead to such documentation losing its privileged status therefore rendering it liable to recovery under the Freedom of Information (Scotland) Act 2002 if no other exemptions apply or even to recovery by the pursuer in the litigation (albeit this is less likely). Indeed, sharing widely gives rise to risks of deliberate or inadvertent external disclosure.
14. If, in exceptional circumstances, Ministers feel that the balance of public interest lies in disclosing either the source or the contents of legal advice on a particular

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<sup>5</sup> *Watson v Student Loans Co Ltd* [2005] CSOH 134; [Law Society of Scotland Rules 2011, Rule B1.13.2](#)

<sup>6</sup> [Guidance by the Commercial Judges, 'The use of signed witness statements or affidavits in commercial actions'](#)

<sup>7</sup> Stair Memorial Encyclopaedia of the Laws of Scotland, (Reissue) Paragraph 206

<sup>8</sup> *R (Prudential plc & anor) v Special Commissioner of Income Tax & anor* [2013] UKSC 1, paragraph 108; Stair Memorial Encyclopaedia of the Laws of Scotland, (Reissue) Paragraph 206

matter, the Law Officers must be consulted and their prior consent obtained. Such consent will only be granted where there are compelling reasons for disclosure in the particular circumstances<sup>9</sup>. Therefore, policy colleagues should be mindful of the Ministerial Code when considering disclosing documents that are otherwise privileged in a way that may cause them to lose privilege. This would apply to sharing privileged documents externally but careful thought will need to be given to disclosing such documents to internal civil servants who have no role in instructing the litigation.

**Specific concerns: pastoral concerns for witnesses**

15. Ministers will have duties in terms of pastoral concerns that may arise for potential witnesses. Colleagues who are potentially involved in providing evidence to support the appeal should be signposted to the relevant support services as required.
16. Colleagues who are asked to provide precognitions or evidence as a result of their employment may be entitled to receive funding towards legal advice in accordance with the Civil Service Management Code<sup>10</sup>. Propriety and Ethics Division may be able to provide support or guidance on these matters.
17. Ministers will be entitled to factor in pastoral concerns to decision-making. However, action to support colleagues on a pastoral basis must not prejudice the instruction of the case or development of advice to Ministers per paragraphs 4-7 above.

[redacted - section 38(1)(b)]

[redacted -section 38(1)(b)]

Scottish Government Legal Directorate

13 March 2023

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<sup>9</sup> [Scottish Ministerial Code \(2018 edition\), paragraph 2.40](#)

<sup>10</sup> [Civil Service Management Code 2016, Ch. 12.2.3.](#)

**From:** Penelope Curtis <Penelope.Curtis@gov.scot>

**Sent:** Monday, April 17, 2023 11:13 AM

**To:** Deputy First Minister and Cabinet Secretary for Finance <DFMCSF@gov.scot>; Minister for Parliamentary Business <MinisterPB@gov.scot>; Lord Advocate <LordAdvocate@gov.scot>; Solicitor General <SolicitorGeneral@gov.scot>

**Cc:** Permanent Secretary <PermanentSecretary@gov.scot>; DG Corporate <dgcorporate@gov.scot>; DG Strategy and External Affairs <DGSEA@gov.scot>; David Rogers <David.Rogers@gov.scot>; solicitor@gov.scot.cjsm.net; Ian Mitchell <Ian.Mitchell@gov.scot>; Andrew Bruce <Andrew.Bruce@gov.scot>; Graham Fisher <Graham.Fisher@gov.scot>; Kenneth Hannaway <Kenneth.Hannaway@gov.scot>; [redacted - section 38(1)(b)]@gov.scot; [redacted - section 38(1)(b)]@gov.scot; Shirley Ferguson <Shirley.Ferguson@gov.scot>; S[redacted - section 38(1)(b)]@gov.scot; Legal Secretariat to the Lord Advocate <DLPCEALSLA@gov.scot>; Colin McAllister <Colin.McAllister@gov.scot>; [redacted - section 38(1)(b)]@gov.scot; [redacted - section 38(1)(b)]@gov.scot

**Subject:** OFF - SEN - SCOTTISH INFORMATION COMMISSIONER - DECISION 004/2023 - Mr Benjamin Harrop application – Appeal – Process Update

Deputy First Minister  
Minister for Parliamentary Business

[redacted - section 38(1)(b)], SGLD, provided the Law Officers with an update on the progress of this FOI appeal to the Court of Session which I am forwarding for Ministers' information. We will provide Ministers with advice ahead of the Court's deadlines.

I am happy to provide any further information that would be helpful.

Penny Curtis  
Deputy Director Elections and FOI  
Directorate for Constitution  
Scottish Government  
2W.02A | St Andrew's House | Regent Road | Edinburgh | EH1 3DG  
0131 244 [redacted - section 38(1)(b)] | Mobile [redacted - section 38(1)(b)]

## UPDATE

Lord Advocate,

### Purpose

1. To update the Law Officers on the progress of this FOI appeal in the Court of Session.

### Priority

2. Routine

### Background

3. The Lord Advocate will recall that instructions were given to proceed with the appeal against the decision of the Scottish Information Commissioner (No



004/2023) dated 31 January 2023. This related to information held in relation to the former First Minister's self-referral to an independent adviser (in this case James Hamilton) as to whether there had been a breach of the Ministerial Code. Scottish Ministers' position was that information stored by and on behalf of Mr Hamilton and his secretariat on the Scottish Government IT system was held on behalf of Mr Hamilton acting in his capacity as an independent adviser and was not held by Scottish Ministers in terms of section 3(2) of FOISA.

4. The Commissioner decided that the referral to Mr Hamilton was instructed and carried out, evidence was obtained, and the report produced, all for the purpose of considering whether the former First Minister's conduct complied with the Code and advising on appropriate sanctions if it did. He took the view that information was obtained and created for that purpose and that this amounted to an appropriate connection with the Authority such that information was held by it for the purposes of section 3(2).

### **Update on position**

5. A copy of the Appeal as lodged is attached. It has been served on the Commissioner and on the interested party, Benjamin Harrop, who is the requester in the underlying FOI request.
6. The Commissioner has now lodged brief Answers to the Appeal. A copy of those is attached. We have discussed the Answers with counsel, James Mure KC and Paul Reid, and there are no surprises in the arguments made on behalf of the Commissioner. Our understanding is that David Johnston KC is instructed for the Commissioner and drafted the Answers.
7. The Commissioner's position remains that the information is held by Scottish Ministers, not Mr Hamilton. He avers that Mr Hamilton has completed the task he was charged with and, in those circumstances, the information in question is not held by him. Even if the information is in fact held by Mr Hamilton, it can also be (and is) held by Scottish Ministers. The Commissioner avers that the information is held in Scottish Government document management systems and there is nothing in the restrictions under which the secretariat staff worked which binds the Scottish Government. It chose to impose those restrictions, and it could choose to lift them. He says that none of that constitutes a relevant restriction on access which has the effect that the information is not held by the Scottish Government. He invites the court to refuse the appeal on the basis that the Commissioner was correct (and entitled) to decide that, for the purposes of section 3(2) of FOISA, Scottish Ministers held the information requested.

### **Further procedure**

8. Now that the Answers have been lodged, the court sent us the timetable yesterday for further procedure in the appeal. The relevant dates are:
  - 28 June 2023 – deadline for notes of argument, productions/appendices, estimates of duration of appeal hearing; and
  - 12 July 2023 at 10.00 am – procedural hearing



9. Counsel have been instructed to prepare the note of argument, and a draft of that will be provided to the Lord Advocate in good time before the deadline for lodging it.

### **Other matters**

6. As requested by the Lord Advocate, SGLD is carrying out the precognition exercise so that we have a full picture of the factual background in relation to how information was stored and who had access to that information. It is hoped that will be completed in the next two to three weeks.

10. Having had service of the appeal, Mr Harrop has confirmed he will not be taking part in the appeal itself.

### **Recommendation**

11. The Lord Advocate is asked to note that Answers have now been lodged by the Commissioner, that the court has fixed further procedure, and that SGLD is carrying out the precognition exercise.

I would be happy to discuss any of the above with the Law Officers, but otherwise further briefing will be provided in due course.

Kind regards,

[redacted - section 38(1)(b)]

**[redacted - section 38(1)(b)]** | Lawyer & [redacted - section 38(1)(b)] | Scottish  
Government Legal Directorate  
[redacted - section 38(1)(b)]@gov.scot

**From:** [redacted - section 38(1)(b)]@gov.scot>

**Sent:** 14 April 2023 09:48

**To:** Lord Advocate <LordAdvocate@gov.scot>

**Cc:** Solicitor General <SolicitorGeneral@gov.scot>; Solicitor to the Scottish Government <solicitor@gov.scot>; Legal Secretariat to the Lord Advocate <DLPCEALSLA@gov.scot>; Rogers D (David) (Constitution and Cabinet Director) <David.Rogers@gov.scot>; Curtis PS (Penelope) <Penelope.Curtis@gov.scot>; Ferguson SE (Shirley) <Shirley.Ferguson@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; Fisher G (Graham) <Graham.Fisher@gov.scot>; Hannaway K (Kenneth) <Kenneth.Hannaway@gov.scot>; [redacted - section 38(1)(b)]@gov.scot>

**Subject:** FOI Appeal - Scottish Ministers v Scottish Information Commissioner & Harrop - SGLD to Law Officers with routine update - 14 April 2023

Lord Advocate,

## **Purpose**

1. To update the Law Officers on the progress of this FOI appeal in the Court of Session.

## **Priority**

2. Routine

## **Background**

3. The Lord Advocate will recall that instructions were given to proceed with the appeal against the decision of the Scottish Information Commissioner (No 004/2023) dated 31 January 2023. This related to information held in relation to the former First Minister's self-referral to an independent adviser (in this case James Hamilton) as to whether there had been a breach of the Ministerial Code. Scottish Ministers' position was that information stored by and on behalf of Mr Hamilton and his secretariat on the Scottish Government IT system was held on behalf of Mr Hamilton acting in his capacity as an independent adviser and was not held by Scottish Ministers in terms of section 3(2) of FOISA.
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I would be happy to discuss any of the above with the Law Officers, but otherwise further briefing will be provided in due course.

Kind regards,

[redacted - section 38(1)(b)]

**[redacted - section 38(1)(b)]** | Lawyer [redacted - section 38(1)(b)] | [redacted - section 38(1)(b)] | Scottish Government Legal Directorate  
**[redacted - section 38(1)(b)]@gov.scot**  
CJSM address: [redacted - section 38(1)(b)]@gov.scot.cjsm.net

I am mainly working from home, so please contact me by email or MS Teams in the first instance.  
Working hours may vary.

**Note of meeting to discuss approach to Scottish Information Commissioner's  
Decision 004/2023  
Monday 13 March 2023**

**Present:**

Deputy First Minister, Minister for Parliamentary Business, Lord Advocate, Lesley Fraser, David Rogers, Penny Curtis, [redacted - section 38(1)(b)] [redacted - section 38(1)(b)], [redacted - section 38(1)(b)], Colin McAllister, [redacted - section 38(1)(b)], [others from MPO?]

1. DFM had requested a meeting having considered the submission (of 7 March) that provided further advice (following the submission of 17 February). In responding to the 7 March submission he noted that he had originally fed back that he thought this decision needed to be appealed, and that the revision of the prospects for success and the underlying reasons gave him pause to reflect further on that view. He had requested the meeting with officials and the Lord Advocate accordingly.
2. DFM indicated his view that the Commissioner's Decision stretched the definitions in FOISA and that the matter would be better determined by the Court. He said that we operate according to an understanding of how the relationship between Scottish Ministers and an Independent Adviser on the Ministerial Code in respect of FOISA, and that the Decision therefore needs to be tested. He noted that Counsel's view of the prospects of success, which reflected the circumstances of this particular case and how information was handled. He also noted that if the Scottish Government were not to appeal the Decision, it would lose the opportunity to seek clarification on the points of law.
3. The Lord Advocate said that there were 3 sound arguments:
  - the relationship between Mr Hamilton and the Scottish Ministers is not such that information acquired or generated by Mr Hamilton in the course of performing his (non-statutory) function can properly be said to be held on behalf of the Scottish Ministers;

## OFFICIAL SENSITIVE

- information acquired or generated by Mr Hamilton has been held with restricted access in Scottish Government document management system, albeit with complexity in how the information was handled;
  - the information held by Mr Hamilton does not relate to the functions of the Scottish Ministers.
4. The Lord Advocate indicated that she thought the Decision should be tested. She noted the information about how the information had been managed including the theoretical possibility for up to 10 officials to access a mailbox, although the understanding is that such access has not been taken. While there could be awkwardness in how the case is presented, the fundamental points remain The Lord Advocate noted that a full fact-finding exercise had not yet been undertaken per the terms of the recent briefing.
  5. The Lord Advocate emphasised the critical importance of a rigorous precognition exercise, and that it should be undertaken urgently, taking precognitions from people who had access to the information involved (and where required turning these into affidavits) In order to clarify the factual position.
  6. DFM noted the risks of the case, as set out in Counsel's advice. He noted that it was necessary to balance the risk of letting the Commissioner's Decision stand and the implications of that, a significant shift from how SG has interpreted FOISA and beyond what Parliament probably intended, versus the risk of appealing the Decision with a number of unknowns
  7. **DFM decided that the Commissioner's Decision should be appealed to the Court of Session.** He also indicated that he was satisfied that it was appropriate that he take the decision (noting he would be demitting office) due to the deadline for a decision of 14 March.

Elections and FOI Division

13 March 2023

**From:** [redacted - section 38(1)(b)]@gov.scot> **On Behalf Of** Solicitor General

**Sent:** 08 March 2023 15:05

**To:** Penelope Curtis <Penelope.Curtis@gov.scot>; Deputy First Minister and Cabinet Secretary for Covid Recovery <DFMCSCR@gov.scot>; Minister for Parliamentary Business <MinisterPB@gov.scot>; Lord Advocate <LordAdvocate@gov.scot>; Solicitor General <SolicitorGeneral@gov.scot>

**Cc:** Permanent Secretary <PermanentSecretary@gov.scot>; DG Corporate <dgcorporate@gov.scot>; DG Strategy and External Affairs <DGSEA@gov.scot>; David Rogers <David.Rogers@gov.scot>; solicitor@gov.scot.cjsm.net; Ian Mitchell <Ian.Mitchell@gov.scot>; Andrew Bruce <Andrew.Bruce@gov.scot>; Graham Fisher <Graham.Fisher@gov.scot>; Kenneth Hannaway <Kenneth.Hannaway@gov.scot>; [redacted - section 38(1)(b)] @gov.scot>; [redacted - section 38(1)(b)]@gov.scot>; Shirley Ferguson <Shirley.Ferguson@gov.scot>; [redacted - section 38(1)(b)] @gov.scot>; Legal Secretariat to the Lord Advocate <DLPCEALSLA@gov.scot>; Colin McAllister <Colin.McAllister@gov.scot>

**Subject:** OFF -SEN - Urgent - SCOTTISH INFORMATION COMMISSIONER - DECISION 004/2023 - Mr Benjamin Harrop application – Appeal – Further Advice

Penny,

The Lord Advocate has noted your submission with thanks. On the basis of Counsel's revised advice she agrees it remains open to Ministers to appeal this decision if they wish, noting the decreased prospects of success and the risks associated with that. She would be happy to discuss with Ministerial colleagues if that would be helpful.

Thanks,

[redacted - section 38(1)(b)]

[redacted - section 38(1)(b)] – Solicitor General

Crown Office

25 Chambers Street

Edinburgh, EH1 1LA

**Email:** SolicitorGeneral@gov.scot

**Phone:** 0300 020 [redacted - section 38(1)(b)]

*All e-mails and attachments sent by a Ministerial Private Office to any other official on behalf of a Minister relating to a decision, request or comment made by a Minister, or a note of a Ministerial meeting, must be filed appropriately by the recipient. Private Offices do not keep official records of such e-mails or attachments.*

## OFFICIAL SENSITIVE

Deputy First Minister and Cabinet Secretary for Covid Recovery  
Minister for Parliamentary Business  
Lord Advocate  
Solicitor General

### **SCOTTISH INFORMATION COMMISSIONER - DECISION 004/2023 - Mr Benjamin Harrop application – Appeal – Further Advice**

#### **Purpose and Priority**

1. To (i) provide further advice on lodging an appeal relating to Decision 004/2023 (“the Decision”) of the Office of the Scottish Information Commissioner (“OSIC”) including a Second Opinion from counsel, (ii) offer a meeting to discuss the advice further, and (iii) to request instructions whether to prepare lodge an appeal.
2. Urgent. An appeal against the Decision would need to be lodged in the Court of Session by 14 March 2023, or we will need to undertake a review and issue a response by 17 March 2023.

#### **Context and Issues**

3. The background to the Decision (attached for reference), initial advice and Counsel’s First Opinion (attached for reference) was provided to Ministers in a submission of 17 February 2023. DFM and the Minister for Parliamentary Business indicated that they were inclined to appeal the Decision. The Lord Advocate indicated that she considered that it was open to Ministers to appeal this decision if they are minded to do so. Given the wider potential implications of OSIC’s decision that were set out in that submission, the Lord Advocate also considered that the balance was in favour of appealing.
4. Counsel posed some questions in the First Opinion which we have explored further and sought further views from counsel to enable Ministers to take a final decision. Counsel have now provided a Second Opinion and a draft Appeal (both attached).
5. Counsel’s First Opinion raised questions about the practical detail of (i) the scope of role of the secretary to Mr Hamilton and (ii) how records were managed. Further information on each of those points is set out below.

#### *(i) The role of the secretary to the inquiry*

6. The Scottish Government has stated in the submissions to OSIC that:

*“In carrying out their secretariat functions, those civil servants understood that they owed their duties to Mr Hamilton as the independent adviser, rather than to the Scottish Ministers.”*



OFFICIAL SENSITIVE

7. The secretariat to Mr Hamilton comprised a single official – described as the “the secretary” below – except for a short time prior to publication of his report when several officials from the Organisational Continuity Team were seconded to the secretariat to take forward necessary redactions from his finalised report before publication. Those officials did not have access to the evidence that is the subject of this FOI case except to the extent that it was in the report.
8. The secretary was assigned to Mr Hamilton on 18 August 2020, two weeks after the remit for the referral had been announced in the answer to a written PQ on 3 August 2020. A minute to the secretary from James Hynd set out the terms under which the secretary would provide support to the independent advisor, including measures to protect his independence in that role.
9. The secretary role was not a full-time one and would not have merited that. The official concerned, continued – with an adjustment of workload – to work in the team leading on [redacted - section 38(1)(b)].
10. The 18 August 2020 minute of appointment to the secretary also said that:

*“The First Minister has delegated to the Deputy First Minister responsibility for overseeing this referral. When any matter arises that requires a Ministerial decision, you should refer that matter to DFM. No papers should be copied to the First Minister or her office, which, for these purposes, should extend to include the First Minister’s Chief of Staff.”*
11. The official concerned did on several occasions refer matters to the DFM. Those related to matters such as the procurement of legal advice for Mr Hamilton, and the provision of draft written PQ answers setting out a position that had already been taken by FM about the interpretation of the remit of the referral. None of the advice involved sharing of evidence that had been given to Mr Hamilton or in any other way breached confidentiality or Mr Hamilton’s independence, and none of it was about the substance of Mr Hamilton’s considerations or conclusions.
12. The director responsible – David Rogers – is satisfied that the involvement of the secretary in the development of the advice on these logistical and administrative matters was appropriate and necessary. It was of course subject to input and clearance from relevant interests (finance, policy, legal) in the normal way. However, it would have made for a clearer delineation of the secretary’s role if the advice had been put up from another official rather than directly to Ministers from the secretary.
13. Counsel has been asked to consider whether the above affects the arguments about whether the information held on Mr Hamilton’s behalf is held by the Scottish Ministers in terms of FOISA.

*(ii) How records were managed*

14. Counsel was also asked to consider the day-to-day practical arrangements that the secretary used to manage the Inquiry's work and, subsequently, to store the information. The secretary used her normal Scots Outlook account for work both as secretary to the inquiry and for other SG activity. As is not unusual several SG officials had permissions to access that mailbox, providing contingency to access the mailbox for example if there were an urgent business requirement in the case of unexpected absence. We are not aware that anybody accessed the mailbox during the period when information about the inquiry would have been present in mailbox. It is, however, theoretically possible that it could have been accessed by other SG officials.
15. The secretary transferred material from Outlook to personal information storage areas available on Scots, including the H drive, OneDrive and eRDM. No other officials would have had access to these areas. This provided a secure storage solution pending final decisions about records retention.

**Second Opinion from Counsel**

Summary of Prospects of success

16. Counsel advises in the Second Opinion that the Decision is challengeable on a point of law and that there remains a reasonable prospect of success. However, counsel has advised that prospects have been revised downwards since the First Opinion, presentational risks are increased in light of the additional information above. He comments that this case is not ideal to seek authoritative guidance from the Court of Session on the meaning of "held by" in terms of Freedom of Information (Scotland) Act 2002 ("the 2002 Act"). In counsel's view, ideally this legal point would be litigated in future a case with stronger arguments for the Scottish Government.
17. The Opinion of counsel and views of SGLD should be caveated by the fact that a full precognition (statement) taking exercise has not been undertaken so the factual matters arising in this Appeal have not been subject to a full and formal fact-finding exercise in litigation terms.

Key points of the Second Opinion from Counsel

18. Counsel advises at paragraph 5 of the Second Opinion, that OSIC's comments that that any restrictions on information security or disclosure imposed on the Secretary have been imposed by more senior officials of Ministers and could therefore be waived by Ministers, display an error of law that should be taken in any appeal but that, alone, this point would not sustain an appeal. The error we would argue is that manifestly inadequate weight has been accorded to restrictions on access to documentation. Otherwise, the decision remains challengeable for the reasons set out at paragraph 17 of the in the First Opinion, and this is set out in the draft Appeal as follows:

OFFICIAL SENSITIVE

(i) the relationship between Mr Hamilton and the Scottish Ministers is not such that information acquired or generated by Mr Hamilton in the course of performing his (non-statutory) function can properly be said to be held on behalf of the Scottish Ministers. On the contrary, given the fundamental importance of Mr Hamilton acting independently of the Scottish Ministers, an expectation that he would be obliged to share with the Scottish Ministers information generated by him in the performance of his functions is inconsistent, and incompatible, with the very function he was undertaking.

(ii) Secondly, information acquired or generated by Mr Hamilton has been held within a restricted access area of the Scottish Government document management system. The concern expressed by the Commissioner (at para.27 of the Decision) that access to the restricted area could be varied without Mr Hamilton's express consent and/or instruction is unrealistic and contrary to the evidence presented to the Commissioner.

(iii) the information held by Mr Hamilton does not relate to the functions of the Scottish Ministers as Ministerial Code investigations are not a statutory function;

(iv) when regard is had to (a) the management and control of the information (which rests with Mr Hamilton); (b) the inability to edit and delete information without Mr Hamilton's consent; (c) the restricted access to the information; and (d) that it is Mr Hamilton who determines who has access to the information and what retention policy is appropriate for it, it cannot properly be said that the information is held by Mr Hamilton on behalf of the Scottish Ministers.

19. Counsel advises at paragraph 7 of the Second Opinion that the roles held by the Secretariat to the Hamilton Inquiry and the briefing provided to Ministers by the Secretariat need not be ventilated on appeal and give rise to presentational issues rather than issues of substance. However, he does set out concerns about both of the matters above.

20. On the question of the role of the secretary, counsel expressed the view that "it appears somewhat unfortunate that more distance was not enforced between on the one hand the Secretariat and those serving it, and on the other hand the Scottish Ministers and those advising them". He fully accepts "that it is not unusual for civil servants to perform a variety of functions which do not necessarily come into conflict". However, he concludes on this point as follows: "I sense that SGLD has some concerns that the documents show a lack of proper separation between the ongoing work of Ministers and civil servants, and the need for a scrupulously independent Secretariat. For what it is worth, I share those concerns. If it were, or became, necessary to lay these matters out before the court, I consider that they would likely be the subject of comment by the Inner House."

21. On the second point, counsel says that “while agents are not aware of any other official taking access, it would not be accurate to advise the court that such records were not accessible” [to other officials]. Counsel advises, per paragraph 14 of the Second Opinion, that on appeal, it would be necessary to criticise OSIC’s reasoning whilst at the same time correcting any part of the Scottish Ministers’ earlier submissions that is now known not to be wholly accurate. In the event of a successful appeal, require OSIC to reconsider on the true factual position which may require an affidavit from the Secretary to the Hamilton Inquiry.
22. The concerns of SGLD are (i) what we advised OSIC happened was not wholly accurate and (ii) whether the Secretariat had proper separation between the work of Ministers to ensure the necessary degree of independence for the Secretariat. In relation to (ii), a full precognition exercise has not yet been undertaken to examine these issues and in the time available a full consideration of whether, in hindsight, the necessary degree of independence was achieved has not been possible. As such, there is a risk of presentational issues arising on these matters but also an appeal may not be the best context in which to corporately reflect on these matters.
23. Counsel concludes as follows: “Ministers may consider that even though there are grounds for challenging this decision, to do so against this particular factual background risks the Court handing down an authoritative judgment on section 3(2) in a case that is far from perfect for Ministers. Ideally this legal point would be litigated in a case with stronger arguments for the Scottish Government.”

## **Options**

24. Implications of the further advice for the two options of how to proceed.

### Option 1 - Appeal against the Decision

25. Counsel advises that there are reasonable prospects of an appeal against the Decision. This is caveated:
- a. The assessment of prospects has decreased since last advised;
  - b. There are handling and presentational risks in an appeal against this Decision. Those risks are that Ministers will have to correct the factual position as originally put to OSIC regarding document management. Moreover, there is a potential for queries to be raised regarding the nature of the independence of the Inquiry’s Secretariat (although we are not obliged to bring those matters out in the appeal, they may arise);
  - c. this could draw unwelcome comment from the Inner House and may shade the way in which the Court deals with the substantive legal issues upon appeal (paragraph 7 of the Second Opinion).
  - d. whilst there are reasonable prospects this is not an ideal case in which to test the question of whether information is held by Ministers for the purposes of the 2002 Act;

## OFFICIAL SENSITIVE

- e. even if Ministers are successful in the appeal, the matter would revert to OSIC for a new decision to be taken and the OSIC may demand a full affidavit from the Secretariat to bottom out any factual inconsistencies (per paragraph 14 of the Second Opinion).
26. In short, if Ministers are successful, it may settle the substantive question of whether information of independent inquiries of this nature is held by Ministers for the purposes of the 2002 Act in line with Ministers' position on this point. However, even if successful, presentational and handling difficulties could arise as narrated above.
27. If Ministers are unsuccessful, the same presentational issues could arise. Moreover, there would be presentational difficulties flowing from an unsuccessful appeal and financial consequences as Ministers would be liable for the expenses of OSIC in addition to their own. Furthermore, the substantive legal question of whether information is held by Ministers in these contexts would be authoritatively determined by the Court of Session contrary to Ministers' current position.

### Option 2 – Do not appeal OSIC's decision and conduct a further review

28. As set out to Ministers in the submission of 17 February 2023, if Ministers do not appeal the OSIC's Decision, we will require to undertake a further review and respond to Mr Harrop afresh by 17 March 2023.
29. In undertaking such a review we would be assessing the information requested by Mr Harrop on the basis that it is held by the Scottish Ministers in their own right for the purposes of FOISA and not merely on behalf of the Inquiry, in this particular case.
30. The review would therefore focus on whether any exemptions apply to the information or whether it requires to be disclosed in full. We are not able to give an indication of the likelihood as to the application of the exemptions at this stage, as the material remains restricted pending a decision on conducting a review. In order to undertake the review, a new reviewer would need to be appointed and granted access to the information. The reviewer will require to take particular care in undertaking the review in light of the Court Order.
31. It would then be open to Mr Harrop to seek a further appeal on the response to this review. Any such appeal would focus on Ministers' application of exemptions to the information. There should be no need to correct the inaccuracies in the submissions of the previous appeal as we would no longer be arguing as to whether Ministers held the information for the purposes of FOISA and so the risk of presentational damage arising from those inaccuracies is removed.
32. In theory OSIC could decide some or all of the information should be released. If that were the case, the Scottish Ministers would then need to decide whether to appeal that further Decision.

33. The implications arising from this case, should Option 2 be pursued remain as set out in the minute of 17 February 2023. The Decision may attract the attention of others seeking similar material, or information in relation to other independent Reviews and Inquiries. Accepting the Decision raises serious handling consequences for government business in other areas. Further assessment would be needed on the current arrangements for information governance, with a view to exploring what mitigations might be available in the short and longer term and putting those measures in place. We will work with relevant colleagues as a matter of priority to scope out the work that would be required.
34. It is possible that there may be further Decisions by OSIC on similar cases, at which point Ministers could choose to appeal to the court and defend the underlying principle on the specifics of the case in question. However, by accepting this Decision, Ministers are accepting that an advisor appointed under the Scottish Ministerial Code and by extension, reviews, panels and short-life working groups are not necessarily independent for the purposes of FOISA. Whilst Decisions do not strictly speaking set a precedent, OSIC will have regard to them in any future appeals. The extent to which we may be able to argue that the present case may be distinguished from future ones will depend on the specific circumstances, as well as any available mitigations.

### **Conclusion and Next Steps**

35. The arrangements put in place for independent reviews and to provide independent advice to Ministers, including the independent advisors on the Ministerial Code need to provide participants a level of confidence about how information is handled, especially in circumstances where the information is sensitive.
36. Counsel considers the prospects of success at appeal to be reasonable, but that there are significant presentational risks for Ministers and this is not the ideal case in which to seek authoritative guidance from the Court of Session as to the meaning of “held by” in the context of the 2002 Act.
37. If Ministers decide not to appeal the Decision, we will need to undertake a review of the original request. Further work will also be needed to explore and put in place mitigations in light of this Decision on how information is handled for the purposes of FOISA in future independent reviews or groups.
38. You are invited to:
1. Indicate your preferred approach to the Decision; and
  2. If you are minded to appeal the Decision, agree that Counsel should be instructed to finalise the draft grounds for appeal for review by the Law Officers and thereafter lodge them with the Court of Session by 14 March 2023.

OFFICIAL SENSITIVE

3. If you are minded not to appeal, we will need to undertake a review of the written statements held on behalf of Mr Hamilton and issue a response to the requester by 17 March 2023. Ministers will receive advice on the draft response.

4. Indicate whether you wish to meet to discuss the Decision and the advice before deciding on the approach.

PENNY CURTIS  
 DD: Elections and FOI Division  
 7 March 2023

Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constit Interest	General Awareness
Permanent Secretary DG Strategy and External Affairs DG Corporate David Rogers Ruairaidh Macniven Andy Bruce Ian Mitchell Graham Fisher, SGLD Kenneth Hannaway, SGLD Shirley Ferguson, SGLD [redacted - section 38(1)(b)], SGLD [redacted - section 38(1)(b)] SGLD [redacted - section 38(1)(b)] LSLA Colin McAllister, Special Adviser					

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**OPINION OF SENIOR COUNSEL**  
**FOR**  
**THE SCOTTISH GOVERNMENT**  
**in the matter of the Scottish Information**  
**Commissioner’s Decision Notice 004/2023**

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**Introduction and summary**

1. I refer to [REDACTED] Minute to Counsel dated 7 February 2023 asking me to provide urgent initial advice on the prospects of success if the Scottish Ministers appeal this Decision Notice (“the Notice”)<sup>1</sup> under section 56 of the Freedom of Information (Scotland) Act 2002 (“the 2002 Act”). I am grateful for the further information provided to me at my request. The key issue here is whether the information sought by Mr Harrop is information that is “held” by the Scottish Ministers for the purposes of the 2002 Act.
2. In summary, I consider that there are reasonable prospects of success in an appeal: see §17 below. However, there are risks inherent in an appeal: see §18 below. Despite the efforts made to date, there are lessons to be learned about information handling in these and similar circumstances: see §19 below.

**The factual background**

3. The question whether particular information is “held” by a public authority is fundamentally an issue of fact.<sup>2</sup> I begin by setting out briefly my understanding of the factual background.

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<sup>1</sup> While my instructions state that the Decision has not yet been published online, I note that it is now available on the Commissioner’s website and has been the subject of an online article in the Scotsman by Conor Matchett.

<sup>2</sup> *University of Newcastle v Information Commissioner* [2011] UKUT 185 (AAC) and [2010] UKFTT 525 (GRC); *McBride v Information Commissioner* (EA/2007/0105) §27.



4. The Scottish Ministerial Code (“the Code”) is published on the website of the Scottish Government.<sup>3</sup> The Code has no statutory basis. However, it is regarded as an important document the terms of which bind all Scottish Ministers and Junior Scottish Ministers. In her Foreword to the present edition, the First Minister wrote:

I will lead by example in following the letter and spirit of this Code, and I expect that Ministers and civil servants will do likewise.

5. Paragraph 1.7 of the Code states:

Where he or she deems it appropriate, the First Minister may refer matters to the independent advisers on the Ministerial Code to provide him or her with advice on which to base his or her judgment about any action required in respect of Ministerial conduct. The findings of the independent advisers will be published.

Independent advisers were first introduced in the June 2008 edition of the Code. By letter dated 8 July 2015, the First Minister confirmed the appointment of Mr James Hamilton as an independent adviser. That letter<sup>4</sup> stated (among other things):-

I value very much your independence of judgment and will not hesitate to refer any matter to you on which I consider your contribution would be beneficial. Your role is to act as a source of independent advice on matters relating to the Scottish Ministerial Code, where I feel it appropriate to refer such matters to you. Your appointment is voluntary and unpaid and does not carry a fixed term.

[...]

Reference to you would be on the basis that you would provide advice to me so as to enable me to make an informed judgment about any action required in respect of a Minister’s conduct.

[...]

In carrying out work on any matter which I may pass to you under these arrangements, the Permanent Secretary will ensure that you have full access to information held by civil servants, and that you receive all necessary Civil Service

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<sup>3</sup> The present edition is dated February 2018.

<sup>4</sup> Apart from this letter and the remit mentioned below, I have not been provided with any other appointment letter or contract governing the work carried out by Mr Hamilton.

secretariat and administrative support, including background research, arranging and documenting meetings and drafting.

6. On 13 January 2019 it was announced that the First Minister was making a “self-referral” under the Code. In a written answer in the Scottish Parliament on 3 August 2020, the Deputy First Minister explained that the referral would be “led” by Mr Hamilton as independent adviser. That answer set out the background and the terms of the remit for Mr Hamilton, including the following:-

The First Minister has, accordingly, referred the matter for consideration by one or both Independent Advisers for advice on which to base her judgment about any action required in accordance with the Code.

#### Remit

The remit for the referral is to:

[1-4: *gather evidence etc.*]

5. Provide the Deputy First Minister with a report setting out the findings and conclusions with regard to:

- (i) whether the Ministerial Code is engaged regarding the meetings and discussions;
- (ii) whether there has been any breach of the Code and the nature of any such breach; and
- (iii) if a breach has occurred, advice on the appropriate remedy or sanction.

[...]

The final report will be published. If required, the report will be redacted to remove the risk of any complainer being identified and otherwise to ensure compliance with the terms of the order made by the court in the criminal proceedings.

#### Payment

Appointment as an Independent Adviser does not attract payment. Reasonable travel and subsistence costs will be paid in line with normal Civil Service rules.

#### Secretariat

The Scottish Government will provide secretariat support as required.

7. The arrangements for the Secretariat are described in five documents provided to me: (i) a minute dated 18 August 2020 from James Hynd in the Cabinet Secretariat to ██████████, whose appointment as head of secretariat support to Mr Hamilton had been agreed two days before; (ii) a minute dated 15 March 2021 by David Rogers, Director Constitution and Cabinet, addressed to four civil servants and copied to ██████████, explaining the terms on which the addressees would the following day begin their roles in providing short-term support to Mr Hamilton as part of the secretariat; (iii) a “short statement” by ██████████ about the arrangements that were then put in place; (iv) a letter of submissions dated 13 September 2021 addressed to the Scottish Information Commissioner (“the Commissioner”) by ██████████ ██████████ in the FOI Unit of the Elections and FOI Division in the Scottish Government’s Constitution and Cabinet Directorate; and (v) a further letter of submissions dated 22 June 2022 addressed to the Commissioner by ██████████ ██████████, then ██████████ in the Elections and FOI Division of the Scottish Government’s Constitution and Cabinet Directorate. The key points that I take from these documents are as follows.

7.1 In their minutes Mr Hynd and Mr Rogers were at pains to emphasise the independent role of Mr Hamilton. For example, Mr Rogers wrote:-

5. Mr Hamilton’s role is independent of the Scottish Government. For your work in the Secretariat you will report to him and not to Ministers or your normal line managers. The Head of the Secretariat is ██████████, and you should look to ██████████ and Mr Hamilton for direction.

6. In supporting Mr Hamilton it is of the highest importance that you take all necessary steps to protect his independence and the confidentiality of his inquiry. In particular:

- any documents that you see or prepare as part of the work, such as Mr Hamilton’s draft report, should not be shared with anyone outside Mr Hamilton’s secretariat without authorisation from him or ██████████;
- you should not discuss any aspect of the evidence that he has taken, or the conclusions he may be drawing with officials outside the secretariat, with Scottish Government ministers, or with anyone else;

- you should take direction from [REDACTED] on document handling. You should not retain any secretariat documentation when you cease providing support and no documents should be saved on systems in a manner that is accessible to anyone outside the secretariat.

Mr Hynd wrote:-

5. Mr Hamilton's role is independent of the SG. He is free to follow the evidence as he considers necessary in order to finalise his report. In supporting Mr Hamilton it is of the highest importance that you take all necessary steps to protect that independence.

[...]

Record Keeping and FoI

10. Information created in the course of the referral should be held securely on behalf of Mr Hamilton. You will wish to consider creating a restricted access folder in Objective, with permissions restricted to the smallest possible number of people. For the avoidance of doubt, I should not be given access to this folder or provided with papers unless there is a specific, and recorded, need to refer a matter to me.

11. It will be important to maintain a full record of the conduct of the referral.

12. You should seek advice from the FoI unit in respect of the application of FoI to information held by the Scottish Government on behalf of Mr Hamilton.

Legal Advice

13. As an independent adviser, SGLD may not be able to take instructions from Mr Hamilton, or you on his behalf. It may be necessary to secure external legal advice for Mr Hamilton, consistent with normal procurement rules.<sup>5</sup>

7.2 In her statement [REDACTED] states that in discussion with the Scottish Government's own FOI Unit they:-

"agreed the Scottish Government approach on FOI arrangements for such independent advisors and commissions where the Secretariat was staffed by Scottish Government civil servants. We agreed that I was acting independently in my role of the Secretariat and FOI matters received by Mr Hamilton would be

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<sup>5</sup> Mr Hamilton took advice from his own independent legal adviser: see §3 of his "Note on the publication of a redacted report" issued along with the report itself on 22 March 2021.

treated on that basis. We also agreed that material relating to the investigation was held on behalf of Mr Hamilton, rather than Scottish Government.”

██████████ added:-

“In undertaking my role as head of the Secretariat, I was careful to emphasise, both to those within the Scottish Government, and to any external stakeholder that I interacted with, that I was accountable to Mr Hamilton (not to Ministers) and was representing his interests. I took direction on day to day actions from Mr Hamilton, and did not share details of the progress of the investigation with the Scottish Government or with any other person or organisation, save where Mr Hamilton had specifically authorised me to provide an update. I also maintained a clear boundary regarding the information held on behalf of Mr Hamilton, and did not share this material with anyone beyond the Secretariat in any format.”

7.3 In her letter to the Commissioner, ██████████ explained at p2:-

In line with the standard approach to storing information held on behalf of an independent person or body, the secretariat created and maintained separate electronic files in a restricted access area with the Scottish Government electronic records management system for the purposes of the investigation. The files were only accessible by the secretariat staff and Mr Hamilton. This in effect created an electronic partition and ensured access to the files was restricted to only the individuals providing secretariat support to Mr Hamilton. While we accept that these files may presently be maintained on a system owned by the Scottish Government, the files continue to be restricted within the partitioned section of that system to enable and protect the former secretariat’s record keeping. The technical benefits of the IT system in terms of security and backup are important to the work in view and it is not considered that it would be a good use of public resources to establish or procure a separate IT system to replicate those benefits when they can, in a technical sense, readily be separately and securely made available to support the work of independent advisers on the Scottish Ministerial Code.

Mr Hamilton remains the decision maker for retention of the records of the investigation, and discussions on transmission of the information in these files to the National Records of Scotland for permanent preservation proceed on that

basis (rather than forming part of the Scottish Government's records management arrangements).

Taken together, we consider that these factors confirm that the Hamilton investigation files, although technically stored on an SG IT system, are not held by the Scottish Ministers for the purposes of FOISA because the files are held on behalf of Mr Hamilton acting in his capacity as an independent advisor.

- 7.4 Documents received by Mr Hamilton and the secretariat, and documents sent by them, would appear to be stored within the bespoke restricted access area described above. Some documents sent by or on behalf of Mr Hamilton during the course of his work will inevitably now be held on other parties' systems outside that restricted access area, most obviously by the Scottish Government in so far as it was the recipient. Importantly, it appears that also outside the restricted access area there is held on Scottish Government servers certain written evidence obtained by Mr Hamilton from persons working within the Scottish Government: see the schedule of information contained in the Annex to [REDACTED] letter of 13 September 2021. This seems to have happened because when responding to Mr Hamilton's requests for information, individuals who were employed by the Scottish Government used their work emails and stored their outgoing communications on Scottish Government servers outside the restricted access area – to which such individuals did not of course have access.
- 7.5 I infer that access to the information contained within the restricted access area can presently be taken by Mr Hamilton, who is also believed to be responsible for the information's retention. It is not clear whether access can also currently be taken by those civil servants who, during the course of the referral, served in the secretariat; or by IT specialists within or retained by the Scottish Government who might in theory be asked to find a means to access the restricted area. I infer from the documents provided to me that the Scottish Ministers know for a fact that the information created and retained by the secretariat within the restricted access area remains there at present. Their submissions to the Commissioner make sense only on that basis. If that is the case, then it raises the questions (i) whether they know that because they checked directly with Mr Hamilton;

and (ii) if not, whether they know it because they either (a) asked a former member of the secretariat who checked the position despite his or her membership of the secretariat having come to an end, or (b) otherwise accessed the restricted access area in order to verify the true position before responding to the Commissioner on 22 June 2022.

8. Mr Hamilton's report was redacted by the Scottish Ministers after they received it. The redactions were carried out in order to comply with applicable court orders. Mr Hamilton was aware that such redactions were required by law, having taken his own independent legal advice on the point: see his Note issued on 22 March 2021. Mr Hamilton's conclusions included at §18.2 of his report:-

For the reasons set out in detail above in this Report I am of the opinion that the First Minister did not breach the provisions of the Ministerial Code in respect of any of these matters.

The precise course of events on delivery of the report to the Deputy First Minister is not wholly clear to me. The remarks of both the First Minister and the Deputy First Minister in the Scottish Parliament on 23 March 2021, however, show that Mr Hamilton's report was regarded less as advice to either or both ministers, but more as a finding, as "independent verification" that no breach of the Code had occurred, and as a verdict exonerating the First Minister. This fitted with the position adopted by the Scottish Parliament's Committee on the Scottish Government Handling of Harassment Complaints, whose report issued on the same day had stated: "James Hamilton's report is the most appropriate place to address the question of whether or not the First Minister has breached the Scottish Ministerial Code." In the very particular circumstances of the case, therefore, the independent adviser was in substance elevated to the position of final decision maker rather than merely an adviser assisting the First Minister's judgment. The formal position remained that his report was advice: but in practice it was not possible (nor indeed politically desirable) to do other than accept his conclusions.

## The legal context

9. The question whether information is “held” by a public authority covered by the Act – in this case, the Scottish Ministers – is governed by section 3(2), which (so far as relevant) provides:-

(2) For the purposes of this Act [...], 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.<sup>6</sup>

10. The provisions at s3(2)(a)(i) and at s3(2)(b) raise slightly different issues. The latter provision is essentially an anti-avoidance provision where an authority enters into an agency agreement or other contract for an external party to hold its information. In relation to the former provision, the courts have held that in order for the information to fall outside the access regime it is necessary that the authority holds the information solely on behalf of another person. If the information is to any extent held on behalf of the authority itself, then it will fall within the Act. In order for s3(2)(a)(i) to apply in the present case therefore, Scottish Ministers would need to show that in so far as they held the information they did so solely on Mr Hamilton’s behalf. Similar considerations may apply when seeking to determine whether one or other provision applies: e.g. questions of control, contract, access, legal context. The question whether information is held by a public authority is essentially a factual issue to be determined on the evidence<sup>7</sup>; and it must be made in respect of each piece of information, not by reference to the document(s) on which any piece of information is recorded<sup>8</sup>. The issue whether information is “held” by a public

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<sup>6</sup> The terms of section 3(2) of the Freedom of Information Act 2000, by reference to which various court and tribunal decisions have been made, and guidance issued by the UK Information Commissioner, is in substantially identical terms: “(2) For the purposes of this Act, information is held by a public authority if—

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority.”

<sup>7</sup> *McBride v Information Commissioner and Ministry of Justice* Information Tribunal EA/2007/0105 at §27.

<sup>8</sup> *Department of Health v Lewis* [2017] 1 WLR 3320 (CA) at §54.



authority for the purposes of the Act is to be determined on the balance of probabilities.

11. In *University of Newcastle upon Tyne v Information Commissioner* [2011] UKUT 185 (AAC), the Upper Tribunal approved at §27 the following remarks made by the First-tier Tribunal below (Case EA/2010/0064 at §48<sup>9</sup>):-

‘Hold’ is an ordinary English word. In our judgment it is not used in some technical sense in the Act. We do not consider that it is appropriate to define its meaning by reference to concepts such as legal possession or bailment, or by using phrases taken from court rules concerning the obligation to give disclosure of documents in litigation. Sophisticated legal analysis of its meaning is not required or appropriate. However, it is necessary to observe that ‘holding’ is not a purely physical concept, and it has to be understood with the purpose of the Act in mind. Section 3(2)(b) illustrates this: an authority cannot evade the requirements of the Act by having its information held on its behalf by some other person who is not a public authority. Conversely, we consider that s1 would not apply merely because information is contained in a document that happens to be physically on the authority’s premises: there must be an appropriate connection between the information and the authority, so that it can be properly said that the information is held by the authority. For example, an employee of the authority may have his own personal information on a document in his pocket while at work, or in the drawer of his office desk: that does not mean that the information is held by the authority. A Government Minister might bring some constituency papers into his departmental office: that does not mean that his department holds the information contained in his constituency papers.

The Upper Tribunal added at §28 that the word “holds” was not used in a technical sense, and the test was not to be read as intending to focus simply on control, possession or ownership. While the last part of this paragraph 48 was clearly about information in a document that happens to be located on the authority’s premises, counsel for the parties in the *Lewis* case cited above agreed that “there must be an appropriate connection between the information and the department so that it can properly be said that the information is held by the department” (per Sir Terence Etherton at §54). The concept of “appropriate

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<sup>9</sup> Mis-numbered in the Upper Tribunal decision as §47.

connection”, however, has been said not to be a strict legal test: see *Coppel QC: Information Rights* (5<sup>th</sup> edn, 2020) at §20-009 under reference to *King’s College, Cambridge v Information Commissioner* (FTT 15 October 2013) at §38.

12. In *Graham v Scottish Information Commissioner* 2020 SC 199 at §§17-18, the Second Division of the Court of Session agreed with the Upper Tribunal in the *University of Newcastle* case, noting that on the facts of the case before it (an applicant seeking from a local authority information about contracts that enabled the authority to provide electoral services to a returning officer) the council required full information about the contracts for its own purposes. As the court explained at §18:-

Section 3(2)(a)(i) of FOISA does not undermine this analysis. For it to have any impact in this case it would have to be shown not only that the council held the relevant information about these contracts on behalf of the returning officer, but also that it had no (or no material) interest of its own (see *University of Newcastle v Information Commissioner*, paras 21, 22, with which we agree). So even if it could be shown that the returning officer had a direct interest in this information (eg in a case where the council was acting as agent for the returning officer) that would not alter the position. The council would still have its own interest, since it acquired rights and undertook obligations of its own under the call-off contracts.<sup>10</sup>

13. Where a department contracts for external professional advisers to provide services, and the advisers retain letters along with drafts and copies of their report to the department, documents that they were free to destroy or delete, the First-tier Tribunal has held that even though there were restrictions on the advisers’ right to use or disclose the information, on the facts the information was not held by them on behalf of the department: *The Chagos Refugees Group in Mauritius Chagos Social Committee (Seychelles) v Information Commissioner and FCO* (EA/2011/0300) at §§63-64.
14. The Commissioner has issued guidance on these issues: see “FOISA Guidance Section 17: Information not held” (2021). So too has the Information Commissioner: “Information you hold for the purposes of FOIA” (updated 8

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<sup>10</sup> The *Graham* case is a good example of the court overturning the Commissioner’s view of the application of section 3 and the term “held” to the facts of a particular case.

January 2023). In the interests of brevity I do not narrate the guidance, but I have taken these documents into account in my advice below. While the guidance cites various decisions by tribunals, and a few by courts, the determination of this issue is highly fact sensitive.

### **Analysis and advice**

15. The Commissioner summarised the submissions for the Scottish Ministers at §§14-20 of his Notice. In summary, the Scottish Ministers submitted that Mr Hamilton’s investigation files (i.e. those handled by Mr Hamilton and the secretariat) “although technically stored on an SG IT system, are not held by the Scottish Ministers for the purposes of FOISA because the files are held on behalf of Mr Hamilton acting in his capacity as an independent advisor” (letter dated 22 June 2022 at p2). The argument therefore depends upon the information being held by Scottish Ministers but solely on behalf of Mr Hamilton: a section 3(2)(a)(i) argument. The alternative argument, which was not made to the Commissioner, would be that the information contained within the restricted access area was held by Mr Hamilton for his own purposes and was not held by him on behalf of the Scottish Ministers: a section 3(2)(b) argument.
16. The Commissioner cites both these provisions in §13 of his Notice. When it comes to his reasoning, however, it appears that the Commissioner considered (contrary to the Ministers’ submission recorded at §20) that the information was in practice held by Mr Hamilton. At §21, the Commissioner identified the critical question as:-

“whether the information which Mr Hamilton holds is, for the purposes of section 3(2) of FOISA, held by the Authority”. (emphasis added)

The logic of this approach would appear to be that section 3(2)(b) is in play and that therefore the Commissioner should have asked himself whether Mr Hamilton held the information on behalf of the Scottish Ministers. In fact, the Commissioner’s subsequent reasoning makes no distinction between the two sub-paragraphs, but simply approaches the matter broadly on the basis that for the reasons he gives, the information is “held” by the Scottish Ministers for the

purpose of section 3(2) of the Act: see §26 of the Notice. His point of departure, however, is clearly section 3(2)(b) and not, as Ministers had argued at §20, section 3(2)(a)(i).

17. The following indicators support an argument that Mr Hamilton was not and is not holding information on behalf of the Scottish Ministers.

- 17.1 The information was created, gathered and considered by Mr Hamilton in his capacity as an independent adviser on the Code. His independence from Ministers is clear from *inter alia* his appointment letter; the terms of the referral; the minutes establishing the secretariat; and the fact that when taking legal advice he obtained it from a source independent of the Scottish Ministers. It was Mr Hamilton who required to obtain such information in order for him to perform the advisory function that he had agreed to undertake. The information was not sought or required by the Scottish Ministers, or in particular by the First Minister or the Deputy First Minister. What the First Minister required was that Mr Hamilton perform his own function effectively. That function is not a statutory function. All that Mr Hamilton undertook to provide was a report, not any information underlying it or gathered for the purpose of preparing it. The First Minister had an interest in Mr Hamilton obtaining, holding and considering the information that he holds: but that does not mean that she had an interest of the type described in the *Graham* case above. Her interest would be more akin to that of an authority commissioning an external expert to prepare a report, as in the *Chagos* case. Under reference to that case, the authors of *Coppel QC* (op. cit. at §20-010) note that the UK Act (like the Scottish one) does not expressly deal with the situation of a public authority that has contracted with a person who is not a public authority, for the provision of services to that authority. They observe that it is not a normal incident of such a contract that each party is obliged to share with the other the information generated by the service provider in the performance of its contractual obligations. Accordingly:-

“Information acquired or generated by a person with whom a public authority contracts will not, in the absence of some special contractual provision, be held ‘on behalf of’ the public authority.”

The documents that I have seen concerning the appointment of Mr Hamilton, the referral to him, and the arrangements for the secretariat, do not suggest any such special contractual provision in the present case. Indeed, for such an independent adviser to be of service and to perform his intended function, it is vital that those persons from whom he seeks information can be certain that he is operating entirely independently from the First Minister by whom the referral was made.

17.2 The information held by Mr Hamilton has at all times been held within a restricted access area of the Scottish Government’s servers. If it remains the case that the information can only be accessed by Mr Hamilton, or at least only on his order or request (and without the Scottish Ministers thereby obtaining access to it), then that would demonstrate control by Mr Hamilton and an ability to continue to deny access to the Scottish Ministers. The Commissioner considered that the Scottish Ministers could choose to lift the restrictions placed on the handling of information by the secretariat: see §27 of the Notice. However, while working in the secretariat civil servants were in effect not working for the Ministers: to hold otherwise would prevent government from supplying staff on a temporary basis to any number of inquiries that require experienced civil servants to administer them, but before which ministers and civil servants are expected to appear and give evidence. The idea that ministers or senior civil servants might have countermanded the instructions so clearly laid down by Mr Hynd and Mr Rogers, or that officials such as ██████████ would have acquiesced in such a reversal of instructions, seems to me fanciful.

17.3 The fact that the information is as a matter of fact held by Mr Hamilton within a restricted access area in IT infrastructure operated by the Scottish Ministers suggests that they are merely providing storage for his information.

- 17.4 The information held by Mr Hamilton does not relate to the functions of the Scottish Ministers. Those are statutory functions, and the provisions of the Scotland Act 1998 and instruments made under that Act (which are the principal source of the Scottish Ministers' functions) do not lay down any statutory code for ministers.
- 17.5 I agree with agents that the fact that the report was redacted before publication does not point to the information gathered by Mr Hamilton being held by Ministers for the purposes of the Act: §29 of the Notice. Redaction concerned only the publication of the final report. The remit had in any event clearly explained in advance that redaction might be required in order to comply with court orders. Moreover, Mr Hamilton's own independent legal adviser concurred that redaction was required.
- 17.6 The Commissioner fails to address the point recorded at §19, namely that Mr Hamilton remains the decision maker for the retention of records. It would be useful to know exactly how such decisions would fall to be taken by Mr Hamilton now and in the future – including after he has ceased to be an appointed independent adviser.
- 17.7 In *Digby-Cameron v Information Commissioner* (EA/2008/0010), the Information Tribunal required to determine whether information held by Hertfordshire County Council was held on behalf of the Coroner who had chaired an inquest into the death of the applicant's son. Under reference to *McBride* (sup. cit.) and to the then Scottish Information Commissioner's decision in *Mr Shields and the Scottish Parliament* (008/2005), the tribunal considered various criteria, which were then noted by the First-tier Tribunal in the *University of Newcastle* case: can the authority (i) manage and control the information; (ii) edit and delete the information without the owner's consent; (iii) have unrestricted access to the information; (iv) apply its own policies and procedures to the information; or (v) decide whom to send it to or whom to withhold it from. In the present case, these criteria would not appear to be met so far as the Scottish Ministers are concerned in their relationship to the information held by Mr Hamilton – or indeed held by them on his behalf. These matters are not in themselves tests, but

are features that can assist when analysing the evidence to elucidate the true position under section 3 of the Act.

17.8 The case is complicated by the apparent fact that Scottish Ministers do hold, outside of the secretariat's restricted access area, information that was prepared by civil servants, ministers and special advisers (acting, I assume, on an individual and independent basis) for submission to Mr Hamilton for the purpose of his investigation and eventual report: see the Annex to [REDACTED] letter of 13 September 2021, and the discussion on page 5 of that letter about the risk that a partial disclosure of information may paint a misleading picture of the evidence before Mr Hamilton. As Ministers' submissions have noted, the consequence is that there is an unfortunate split in the manner in which, and place where, the information is held. One approach would be to argue that any such information held "directly" by the Scottish Ministers outside the restricted access area is held by them solely on behalf of Mr Hamilton, for the reasons noted principally at §17.1 above.

18. The difficulties with taking an appeal should not, however, be minimised.

18.1 The Commissioner essentially took the view that the Code is of such importance in public life that information obtained for the preparation of Mr Hamilton's report has an "appropriate connection" with the Scottish Ministers, i.e. the information is for the purpose of the carrying out of Ministers' functions as a public authority. The Upper Tribunal in the *University of Newcastle* case at §29 stated that in using that term, the First-tier Tribunal was not laying down a test but "was simply pointing to the need for the word "hold" to be understood as conveying something more than the simple underlying physical concept, given the intent behind section 3(2)". However, the Inner House in *Graham* effectively accepted it as a form of test, and on the face of it the Commissioner's broad approach could be seen as in line with the policy of the Act. There is some risk that the Inner House would echo the response of the First-tier Tribunal in the *University of Newcastle* decision, where they criticised the university's submissions as "artificial and unrealistic", finding that on the facts there

was a “common-sense answer” to the question in that case: see §§53 and 56 of the tribunal’s reasons.

18.2 The fact that some of the information provided to Mr Hamilton is held directly within the Scottish Government’s own IT system might be seen as demonstrating that the information handling here was not seamless, and that therefore all the information relevant to Mr Hamilton’s performance of his functions can be regarded as held by the authority.

18.3 While there might be said to be a chilling effect if such information is to be regarded as held by Scottish Ministers, and therefore subject to the Act’s access regime, I consider that the argument about a chilling effect is more appropriate to the next stage, namely the applicability of the exemptions if the information is found to be held by the authority.

18.4 The somewhat nebulous concept of ministerial oversight is mentioned at §24 of the Notice. This will need to be explained to the court. It is not currently clear to me what matters might have come to the Deputy First Minister for decision during Mr Hamilton’s investigations.

18.5 In his minute of 18 August 2020, Mr Hynd advised ██████████ to “seek advice from the FoI unit in respect of the application of FoI to information held by the Scottish Government on behalf of Mr Hamilton”. This suggests that the Scottish Ministers considered that they would be holding on Mr Hamilton’s behalf the information that he gathered during his investigation. If the court adopted this approach (contrary to §21 in the Notice) then Ministers would need to demonstrate that the information was held solely on his behalf and not to any extent on their own behalf. The court might take the view that providing such a service to Mr Hamilton is evidence of the interest that Ministers had in the due performance of the duties that he had been engaged to perform as an independent adviser. The fact that the secretariat as a whole was provided by Ministers also serves to demonstrate the connection between Scottish Ministers’ interest in the Code and compliance with it, and the provision of information to Mr Hamilton for the purposes of preparing his report.



## Conclusions

19. I consider that for the reasons set out in §17 above there are reasonable prospects of success in an appeal. The Commissioner's Notice has not addressed all of the points made by the Scottish Ministers. The Commissioner's reasoning is somewhat superficial and fails to engage with the submissions made to him. However, there are risks involved in taking an appeal. Apart from the issues noted in §18 above, an appeal to the Inner House of the Court of Session would risk an adverse judgment that elevated some of the Commissioner's approach into authoritative case precedent that would affect current and future handling of inquiries in an adverse way. That said, however, Ministers may take the view that this Notice itself points to the need to tighten up the ways in which the Scottish Government handles staffing and information handling where external advisers and inquiries are involved, including the role of independent advisers on the Code. I have not been asked to advise at this stage on the application of various exemptions to the information if no appeal is taken, but clearly the prospects of success in such arguments may be relevant to the decision whether to take an appeal at this stage on the questions posed by section 3.
20. If agents wish to discuss this advice by telephone or at consultation, they should not hesitate to contact me.

THE OPINION OF

James Mure KC

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9 February 2023

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**OPINION (II) OF SENIOR COUNSEL**

**FOR**

**THE SCOTTISH GOVERNMENT**

**in the matter of the Scottish Information  
Commissioner's Decision Notice 004/2023**

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**Introduction and summary**

1. I refer to my initial Opinion in this matter dated 9 February 2023, to the consultation held on 22 February 2023 and to the further information and Minute issued to me by agents on 28 February 2023. In light of this additional information I am asked to address three further questions, and with junior counsel to prepare draft grounds of appeal if the Decision is challengeable on a point of law. I understand that a final decision has yet to be taken on whether to lodge an appeal in the Court of Session, the last date for lodging being 14 March 2023. In this Opinion I address the three questions posed, before going on to re-consider my earlier advice in light of the new information provided.
  
2. In summary, while I consider that there remain reasonable prospects in an appeal, the additional information now available makes success somewhat less likely and heightens the reputational risks: see §§11-16 below.
  
- I. **Did the Commissioner err in holding that Ministers' ability to waive the Secretariat arrangements, including the information storage arrangements, amounted to the information being held by Ministers for the purposes of the 2002 Act?**
  
3. This question appears to proceed on the basis that the Commissioner's decision that Ministers hold the information requested was based on Ministers' ability to waive the Secretariat arrangements. As I read the Decision, that is not the case.

The basis for the Commissioner's decision is principally set out in §§22-26 of the Decision. The key reasoning is summarised at §26:-

The referral with its associated investigation was instructed and carried out, evidence was obtained, and the report produced, for the purpose of considering whether the First Minister's conduct complied with the Code and advising on appropriate sanctions if it did.<sup>1</sup> Information was obtained and created for that purpose. In the Commissioner's view, this amounts to an appropriate connection with the Authority such that information is held by it for the purposes of section 3(2) of FOISA.

4. The Commissioner goes on at §27 to consider the Scottish Ministers' particular submission that Ministers had made clear to members of the Secretariat that information should not be disclosed outside the Secretariat. The Commissioner's summary of Ministers' submissions at §§14-20 does not expressly include this point in terms, but the language used at §27 reflects the tenor of Ministers' submissions. It is clear from §27 that the Commissioner's view is that on the facts this argument was simply not strong enough to alter his conclusion that the information was held by Ministers for the purpose of section 3(2). The Commissioner accepts that in some cases there may be a "relevant restriction on access to information" which causes the information not to be held by an authority. On the information before him, however, it appears that the Commissioner considers that in this case any restriction put in place was not irrevocable and not sufficiently strong.
5. The nature and strength of any restrictions on access that were put in place are relevant considerations when the Commissioner decides whether an authority holds information for the purposes of the 2002 Act. The weight to place on such relevant considerations is for the Commissioner as decision maker, subject to public law review where, for example, manifestly inadequate weight has been accorded to such a consideration (see the cases noted in *Judicial Review Handbook* (Fordham J) at §56.3.4). While there is a stateable argument that the Commissioner's comments at §27 display an error of law, and the point should

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<sup>1</sup> It is plain that this sentence should end with the additional word "not", i.e. the Independent Adviser should advise on sanctions if the First Minister was found not to have complied with the Code (see §5(iii) of the Remit).

be taken if an appeal is lodged, I consider that on its own this is unlikely to sustain an appeal.

**II. Did the provision of substantive briefing and advice to Ministers in a sponsorship role by [REDACTED] (as opposed to her Secretariat role) amount to the Inquiry information as a whole being held by the Scottish Ministers?**

6. I do not consider that such briefing as [REDACTED] provided to the Scottish Ministers means that the inquiry information as a whole is held by Ministers for the purposes of the 2002 Act. In an email dated 24 February 2023 at 13:52, [REDACTED] advised that as part of her duties she handled “sponsorship requirements” associated with the independent adviser’s investigation, including the following: drafting PQ answers and background notes; drafting FMQ notes; drafting correspondence to issue from the DFM to Mr Hamilton, clarifying the remit; preparing a submission seeking agreement that Mr Hamilton should appoint his own legal adviser, the costs to be covered by the Scottish Government; preparing a submission (including seeking advice from Finance and SGLD) that Mr Hamilton be provided with an indemnity; and helping with the development of communications lines.
7. I have considered the documents prepared by [REDACTED] in 2020 while seconded to the Secretariat that have been provided to me. From these, it does not appear that there was any briefing about the contents of evidence gathered by Mr Hamilton; the tenor of his investigations; or the potential contents of his report. I assume that such matters were never the subject of any communications between [REDACTED] and Ministers. The communications I have seen do not appear to fall within Mr Harrop’s request. They have not to date been mentioned in Ministers’ submissions to the Commissioner, still less produced to him. I do not consider that the existence of these communications is likely to have an impact on any appeal. Nor do I consider that Ministers are required to reveal them, or their existence, to the court or to the Commissioner for what bearing they may have on the question whether the information that is the subject of the request is held by the Scottish Ministers for the purposes of the 2002 Act.<sup>2</sup> I

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<sup>2</sup> As noted in [REDACTED] response to Mr Harrop on 13 May 2021, the request was for: “All written evidence to James Hamilton QC’s investigation into the FM under the ministerial

would hope, therefore, that these matters would not require to be ventilated in any appeal; and that if they were, they would raise presentational and handling issues rather than issues of substance. That said, in this particular case presentational and handling issues may have the capacity to sway members of the court on the substance of the appeal, particularly where the Inner House has used the litmus test of “appropriate connection” as discussed in §§11-12 of my earlier Opinion.

8. Before passing from this topic, however, I offer the following comments on the documents. While I understand that there may be a standard approach where civil servants are serving an independent inquiry but also engaged in some liaison role<sup>3</sup>, I have seen no formal note outlining such an approach. It appears to me somewhat unfortunate that more distance was not enforced between on the one hand the Secretariat and those serving it, and on the other hand the Scottish Ministers and those advising them. Thus ██████████ request that Mr Hamilton be permitted to engage independent legal advice and charge the costs to the Scottish Government was set out in an official minute to the DFM and Lord Advocate dated October 2020, and not in confidential correspondence addressed from and on behalf of the independent adviser. The content of that minute provides a civil servant’s summary of the issues, rather than a request argued from the point of view of the independent adviser. At §15, in relation to the waiving of legal privilege, the minute appears to give ministers the writer’s personal insights into Mr Hamilton’s likely response to possible positions that Ministers might adopt. This again suggests a less than arm’s length and independent position. I can see that from one point of view ██████████ might appear to be the ideal person to brief Ministers on such matters. However, I do not know to what extent Mr Hamilton was aware of this briefing role that ██████████ was performing. It appears to me that such briefing and process questions could have been dealt with by a civil servant not engaged in the Secretariat, and that this would have provided further distance between Ministers and the independent adviser. The fact that ██████████ later came to be

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code. This includes evidence from the FM, her chief of staff Liz Lloyd and any other individuals within the Scottish Government who have submitted evidence.”

<sup>3</sup> See ██████████ letter to the Commissioner dated 22 June 2022 referring to the “standard approach to storing information held on behalf of an independent person or body”.

[REDACTED]  
[REDACTED] only seems to deepen the connection between Ministers and the Secretariat.

9. I fully accept that it is not unusual for civil servants to perform a variety of functions which do not necessarily come into conflict. However, I sense that SGLD has some concerns that the documents show a lack of proper separation between the ongoing work of Ministers and civil servants, and the need for a scrupulously independent Secretariat. For what it is worth, I share those concerns. If it were, or became, necessary to lay these matters out before the court, I consider that they would likely be the subject of comment by the Inner House.

**III. If Counsel agree that OSIC's decision is challengeable on a point of law, we would be grateful if draft grounds of appeal could now be prepared.**

10. It remains my opinion that the Decision is challengeable on a point of law. I have therefore asked junior counsel to begin drafting grounds of appeal in case, having considered this further Opinion, Ministers decide to proceed with an appeal. I will then revise the draft grounds which we will do our best to provide by close of play on Friday 3 March 2023. However, the further information that agents have provided does cause me to revise my views on prospects and, perhaps as importantly, my views about the risks that an appeal might entail. In the remainder of this Opinion, I discuss these matters and note where my earlier advice needs to be revised.

**Analysis and advice on prospects**

11. This section should be read with §§15-19 of my earlier Opinion dated 9 February 2023. At §17 of that Opinion, I set out indicators supporting an argument that Mr Hamilton was not and is not holding information on behalf of Scottish Ministers. In §18, I summarised certain counter-arguments and risks that might cause Ministers to decide not to appeal. And at §19 I noted that the strength of Ministers' arguments on the application of exemptions would be relevant to a

decision whether to appeal. In light of the further information now available to me, it is necessary to revisit these paragraphs.

12. At §4.2, agents' latest Minute states that the Commissioner may not have taken fully into account the handling arrangements as set out in Ministers' submissions. The problem with this point is that those submissions stated that the information held on Scottish Government systems was "accessible only to the Secretariat", which I am now advised is not strictly accurate.<sup>4</sup> Some information was held on ██████████ personal drive to which some ten other officials had access: see §3.3 of the Minute. While agents are not aware of any other official taking access, it would not be accurate to advise the court that such records were not accessible. While it is true that, as ██████████ wrote, "the secretariat created and maintained separate electronic files in a restricted access area with[in] the Scottish Government electronic records management system", at the same time some records were kept in other less secure systems.
  
13. In the same letter ██████████ stressed that Mr Hamilton "remains the decision maker for retention of the records of the investigation, and discussions on transmission of the information in these files to the National Records of Scotland for permanent preservation process on that basis". I understand from last week's consultation that ██████████ is currently engaged in tidying up the information held by the Scottish Government ahead of putting in place a retention policy. Agents should ensure that no information is deleted while this FOI request remains live. I infer that in going over the records at present ██████████ ██████████ is acting on behalf of Mr Hamilton, and thus retains her independent role on his behalf as a Secretariat.<sup>5</sup> I would be grateful for confirmation of the chain of command and reporting in relation to records retention, since all information gathered by Mr Hamilton will, I assume, be for him to consider and deal with retention. The security of this information, and the records retention policy, will

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<sup>4</sup> I can accordingly not support the point made at the start of §17.2 in my earlier Opinion, to the effect that information "has at all times been held within a restricted access area of the Scottish Government's servers"; a point also founded on at §17.3.

<sup>5</sup> This is relevant to the point I mentioned at §17.6 of my earlier Opinion. Along with the new information about records management, it is also relevant to how the Commissioner might consider the five criteria that I mentioned at §17.7 of my earlier Opinion – and more immediately, how the Court would apply these criteria without seeking more detail about how and where information was stored and processed.

need to be dealt with before Mr Hamilton ceases to be an appointed independent adviser, or by special arrangement after his appointment comes to an end.

14. In short, the submissions made by Ministers are now understood as not providing the full picture in various respects. I consider that if Ministers were to pursue an appeal without correcting the slightly false impression given by the original submissions, they would mislead the court by silence – which is clearly not a tenable position for either Ministers or counsel. In an appeal therefore, it would be necessary both to criticise the Commissioner’s reasoning while at the same time correcting any part of Ministers’ earlier submissions that is now known not to be wholly accurate. That necessity brings consequences. It shows that Ministers failed to convey accurately the true position when making submissions to the Commissioner.<sup>6</sup> It dilutes somewhat the force of the submission, since some information related to the inquiry was for a time accessible to persons other than Mr Hamilton and the Secretariat. In general, it brings some reputational risk in any appeal, and a risk that this may be a relatively weak case in which to ask the Inner House to provide appellate guidance on the concept of who “holds” information under section 3(2). Moreover, if the appeal were to be successful, the Commissioner would then require to take his decision anew, this time on the basis of the fuller and accurate information now available about records management. He may wish to have a full sworn affidavit from ██████████ before reaching his re-determination of this preliminary matter.
  
15. Before the Commissioner, Scottish Ministers accepted that for the purposes of the 2002 Act they held some of the information sought by Mr Harrop: see (i) page 2 of ██████████ letter dated 13 September 2021; (ii) the list of documents in the Annex to that letter; and (iii) §§32 & 34 of the Decision.<sup>7</sup> Thus there exists

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<sup>6</sup> See *NLEI Limited v Scottish Ministers* 2023 SLT 149 at §56 per Lord President Carloway, expressing concern at Ministers’ initial failure accurately to answer the appellant’s averments.

<sup>7</sup> It was in light of this concession by Ministers that the subject of the Commissioner’s Decision was only “whether the information which Mr Hamilton holds is, for the purposes of section 3(2) of FOISA, held by the Authority”: see §21 of the Decision. On one reading, ██████████ letter of 22 June 2022 appears similarly devoted only to the information that Ministers did not accept was held by them for the purposes of the 2002 Act. The potential argument that I noted at the end of §17.8 of my earlier Opinion was not, therefore, taken by Scottish Ministers. I would add that there is some lack of clarity in the



information held by Scottish Ministers for the purposes of the 2002 Act and in respect of which, even if the appeal succeeds, the Commissioner will need to consider applying the exemptions cited in that letter – principally section 30(c) on substantial prejudice to the effective conduct of public affairs. I have seen none of the documents, and therefore cannot advise on whether the application of the public interest test would be materially altered if the Commissioner’s decision was overturned on appeal and re-determined in the Ministers’ favour: see §34 of the Decision.

## **Conclusion**

16. In summary, I consider that there remains a reasonable prospect of persuading the Inner House that information held securely by Mr Hamilton is not held by the Scottish Ministers for the purposes of the 2002 Act. However, I do not consider that the prospects are particularly strong, and there are reputational risks, not least in the very conduct of the appeal itself.

16.1 Scottish Ministers will need to correct any misleading statements made in their submissions to the Commissioner, with the potential consequences noted above.

16.2 Given the somewhat complex background, the appeal may best be argued at a relatively high level, inviting the court to consider the submissions and documents that were before the Commissioner (suitably corrected as necessary) and to find that he took an unreasonable view of the role of the independent adviser and of the information provided to him, no matter by whom and how it was physically held. One potential difficulty with such a ground of appeal is that it tends to shade into a section 30(c) exemption argument, which is strictly open only at the next stage of the case. Another

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correspondence on this point. [REDACTED] letter distinguishes on page 2 between (i) written evidence submitted to Mr Hamilton by civil servants and advisers and held by the Scottish Government, as listed in the Annex to the letter; and (ii) written evidence from witnesses outside the Scottish Government, which Ministers did not receive from Mr Hamilton and which Ministers concluded they did not hold. In response to the Commission’s letter of 11 May 2022, [REDACTED] letter at the foot of page 2 speaks more generally of “the Hamilton investigation files” which are said to be “held on behalf of Mr Hamilton acting in his capacity as an independent adviser”. This more straightforward analysis has its attractions.

difficulty is that the criteria noted in the *University of Newcastle* case and listed at §17.7 of my earlier Opinion can only be applied by the court if it has sufficiently detailed information about the form and manner in which the information has been stored and processed.

16.3 Ministers may consider that even though there are grounds for challenging this decision, to do so against this particular factual background risks the Court handing down an authoritative judgment on section 3(2) in a case that is far from perfect for Ministers. Ideally this legal point would be litigated in a case with stronger arguments for the Scottish Government.

THE OPINION OF

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2 March 2023

## OFFICIAL SENSITIVE

Deputy First Minister and Cabinet Secretary for Covid Recovery  
Minister for Parliamentary Business  
Lord Advocate  
Solicitor General

### **SCOTTISH INFORMATION COMMISSIONER - DECISION 004/2023 - Mr Benjamin Harrop application - Appeal**

#### **Purpose and Priority**

1. To provide initial advice on lodging an appeal relating to Decision 004/2023 (“the Decision”), and offer a meeting to discuss the advice further.
2. Urgent. An appeal against the Decision would need to be lodged in the Court of Session by 14 March 2023.

#### **Context and Issues**

3. On 13 January 2019, the First Minister referred to the independent advisers on the Scottish Ministerial Code the question of whether she had complied with the Code. James Hamilton, one of the independent advisers, was appointed to carry out an investigation in order to answer that question. Secretariat support was provided to Mr Hamilton.
4. The Secretariat collected and held information on behalf of Mr Hamilton. Accordingly, and in line with advice from FOI Unit at the time of the investigation, the Scottish Government did not consider that it held this information for FOISA purposes because the Secretariat held information on behalf of another person. This also reflected the Secretariat’s understanding of earlier Commissioner Decisions, e.g. 158/2013 Mr Sandy Longmuir and the Scottish Ministers.
5. On 22 March 2021, Mr Hamilton’s report was published in a redacted form. Mr Hamilton found no breach of the Ministerial Code by the First Minister.
6. On 5 April 2021, Benjamin Harrop made a request for information to the Scottish Government. He asked for: “All written evidence to James Hamilton's QC investigation into the FM under the ministerial code. This includes evidence from the FM, her chief of staff Liz Lloyd and any other individuals within the Scottish Government who have submitted evidence”. The case handler interpreted this as seeking all written evidence provided to Mr Hamilton, whether from SG and non-SG witnesses. The Commissioner later agreed with this interpretation of scope.
7. In responding to the request, in line with the position set out in Paragraph 4, the case handler did not search records held on behalf of Mr Hamilton; instead, they contacted relevant Private Offices to check whether copies of statements or written evidence sent to Mr Hamilton were held by these offices, in line with the usual record keeping approaches of Private Offices. The schedule of information accordingly included only material held by Scottish Government, namely

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statements from the First Minister, the then Permanent Secretary, the then Chief of Staff, and a Special Advisor.

8. Scottish Government explained that material held on behalf of Mr Hamilton was not subject to FOISA, and that an exemption under 30 (c) (where release would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs) applied to all the information the Scottish Government held.
9. Later that day, Mr Harrop requested a review. He disagreed that the exemption in section 30(c) would apply to all the information within scope.
10. The Scottish Government notified Mr Harrop of the outcome of its review on 9 June 2021. It upheld its original decision, with one modification. It explained that some of the evidence presented by the Permanent Secretary to Mr Hamilton was included within Mr Hamilton's report. This information was withheld under section 25(1) (information otherwise accessible) of FOISA and a link was provided to Mr Harrop to enable him to access the evidence in question. The Scottish Government also sought to address the other areas of dissatisfaction raised by the Applicant in his requirement for review.
11. On 10 June 2021, Mr Harrop wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Scottish Government made appeal submissions, setting out that it considered that the records of the investigation held by the Secretariat were held on behalf of another person, and the reasoning behind the application of exemptions to the material held.
12. On 31 January 2023, the Commissioner informed the Scottish Government that he did not accept that information gathered by Mr Hamilton, and/or his secretariat, for the purposes of his investigation is not "held" by the Scottish Government in terms of section 3(2) of FOISA. Accordingly, the Commissioner has instructed that the Scottish Government conduct a further review of information held. The Commissioner offered no views on the application of 30(c) to the information held.
13. OSIC require us to issue a revised review response by 17 March 2023. We have until 14 March 2023 to appeal the Decision.

### **Counsels' Opinion**

14. Counsel were asked to provide preliminary advice on the prospects of success. We have attached a summary of the advice at Annex A, and the full Opinion at Annex B.

### Prospects of success

15. Counsel's Opinion is very comprehensive and there are a number of points that go to weighing up prospects, which are finely balanced. For that reason we are providing the longer summary alongside the Opinion in the Annexes rather than attempting to paraphrase the advice here. But in short, Counsel consider the prospects of success at appeal to be reasonable overall, for the reasons given in

his detailed Opinion. However, Counsel also indicated there are potential risks associated with the appeal.

#### Impact of the Decision on Expert Independent Groups

16. The Scottish Government routinely appoint individuals on a non-statutory basis to carry out independent reviews or establish various short life work working groups or panels to consider certain issues. This means, that unlike public inquiries, whose independence is provided for in statute, the status of the groups is a matter of convention rather than establishment through a particular legal mechanism. It is not clear as to the exact number of such arrangements although this list gives an indication: Groups - gov.scot (www.gov.scot). Some recent examples are the Independent Review of Inspection, Scrutiny and Regulation, the Independent Review of Qualifications and Assessment and the Review of Adult Social Care. It has been common practice for the terms of reference for such groups to include secretariat support in the form of seconded SG staff or provision of IT systems such as eRDM. This is a pragmatic means of ensuring the work of the reviewer/expert group can proceed expediently, securely and without unnecessary expense- it would be unrealistic to require such individuals/groups to procure a separate IT system or conduct recruitment exercises to engage staff. However, a possible implication of the Decision is that information related to such reviews may also be treated as held by the Scottish Ministers for the purposes of FOISA. This could undermine or be seen to significantly undermine the independence of the appointments.

#### Impact of the Decision on the Scottish Ministerial Code

17. The decision notice has implications for the way in which the First Minister is supported by officials and her Independent Advisers on the Scottish Ministerial Code. Whilst these should not be considered a key driver of the decision to lodge an appeal, they are worthy of consideration. If the decision stands, freedom of information exemptions might still be available, but that would not be guaranteed and may be subject to a public interest test outwith the control of the Advisers or Ministers.

18. The notice therefore indirectly has implications for the way in which the independent advisers are appointed, their remit in general and for specific inquiries they are asked to undertake, and the support offered to them when they undertake those inquiries. Given the trusted position of the advisers as they advise the First Minister this decision potentially puts the current arrangements under great scrutiny. It could also affect the way in which witnesses engage with inquiries and the advisers' propensity to support the First Minister in future. Work would need to be undertaken to identify if mitigations could be developed to reduce these risks.

#### **Options**

19. There are essentially two options of how to proceed.

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### Option 1 - Appeal against the Decision

20. Ministers could choose to lodge an appeal to the Inner House of the Court of Session against the Decision. The primary advantage of doing so is that should the appeal be successful, it would set out a clear precedent for future cases of a similar nature. This would require careful handling and communications to explain why the Scottish Government was going to court to argue this principle.
21. A successful appeal would overrule the Commissioner's Decision, resulting in a finding that it is vitiated by an error of law. Matters should be remitted back to the Commissioner to consider anew (unless the Commissioner appeals to the UK Supreme Court, see paragraph 29 below). The Court cannot direct the Commissioner in his reconsideration, but the Commissioner would be bound to follow the Court and might not have much alternative in how he implements the Court's judgment—although ultimately this depends on the terms of Court's decision.
22. In reaching its decision, the Court may request that the Scottish Government share material explaining the set up and operation of the Hamilton inquiry. This may invite public scrutiny of the details of Secretariat arrangements in this case, and in similar other cases.
23. An unsuccessful appeal would confirm the decision of the Commissioner, and a Court decision may form a wider precedent. The precedential value of the case would depend on the Court's reasons, whether the Scottish Government was successful or unsuccessful in those reasons, and the Opinion of the Inner House (e.g. is the Commissioner afforded a wide margin of discretion when balancing the public interest or depending on what force is given to the factors we say ought to have been considered, or not considered).
24. Either party if unsuccessful could appeal to the UK Supreme Court. The Supreme Court will not entertain an appeal unless it raises an arguable point of law of general public importance.
25. The appeal would be directly to the Inner House of the Court of Session (usually a 3 judge bench) and the respondent would be the Commissioner (rather than the Applicant, Benjamin Harrop). Mr Harrop would be served with the Appeal as an interested party, and could choose to take part. It is rare for the requester to take part in appeals against a decision of the Commissioner, though that is possible.
26. The appeal (the fact that Scottish Ministers have appealed, not the content of the appeal document) will become public at the point that it is lodged in the Court of Session. If you agree that the appeal should be lodged, we will prepare some short factual lines setting out that the appeal has been lodged.

### Option 2 – Accept the decision of the Commissioner and conduct a further review

27. As discussed above, the original request asked for all written statements submitted to Mr Hamilton, and was interpreted as covering statements from all

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witnesses. When handling the initial request and review, information submitted by Scottish Government witnesses was identified from records held by Private Offices.

28. The Hamilton report set out the following regarding written evidence: “in accordance with the remit I sought and received written observations from persons who included the following: the First Minister, Ms Nicola Sturgeon; the former First Minister, Mr Alex Salmond; the Permanent Secretary to the Scottish Government, Ms Leslie Evans; Ms Liz Lloyd, Chief of Staff to the First Minister; Mr Geoffrey Aberdeen, formerly Chief of Staff to the former First Minister; Mr Duncan Hamilton, Mr Kevin Pringle, Mr David Clegg, Mr Stuart Nicolson, Ms Lorraine Kay and Mr Peter Murrell”.
29. Accordingly, if we accept the Commissioner’s Decision, and undertake a further review, it is likely that this will identify further written statements made by the full list of witnesses set out above. This is likely to include statements made by the non-SG witnesses listed above, but it is possible there is additional material submitted by SG witnesses that was not retained by SG and identified in the initial request. This does not necessarily mean that information will be disclosed, although this will be subject to considering the application of any relevant exemptions, including matters relevant to the order made by Lady Dorrian.
30. In order to undertake the review and follow the established process, a new reviewer would need to be appointed and granted access to the records held on behalf of Mr Hamilton. Once this further review is conducted, it would then be open to Mr Harrop to seek a further appeal on the response to this review. The Commissioner has offered no views on the application of Section 30(c) or Section 26(c), and it is possible that, after considering our submissions in that scenario, he could conclude information should be released. If that were the case, the Scottish Government would then need to decide whether to appeal that further Commissioner Decision.
31. Furthermore, as people become aware of the Information Commissioner’s decision, it is likely that there will be more FOI requests seeking material relating to the investigation and held on behalf of Mr Hamilton, so this issue is likely to be recurring. Given the nature of the investigation, further requests are likely to cover highly sensitive material. Consideration would also need to be given to the correct retention strategy for material relating to the investigation.
32. Looking beyond this specific case, there may also be requests for information held on behalf of other independent advisors, expert groups, and advisory groups (including historic groups). On this basis, a great deal of material held on behalf of others and which is sensitive may be subject to the similar considerations as the advice at issue in this case. This material is likely to include a range of documents and correspondence that Ministers have little or no awareness of, as they were gathered and held by independent advisors and groups conducted on an independent basis.
33. The Commissioner’s reasoning serves to undermine the protection conferred by Secretariat arrangements which would apply to a number of previous and ongoing advisory groups and Commissions. This raises serious handling consequences for government business in other areas. Further consideration would need to be

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undertaken on identifying any mitigations regarding how information on previous groups is held, on how ongoing work is undertaken, and on how the set up and running of future arrangements of this type could be adjusted to avoid similar Decisions. We will work with relevant colleagues to scope out the work that would be required.

34. It is unlikely that any statement we make that accompanies the release of the information (i.e. that our complying with the Commissioner's decision does not set any precedent for the Scottish Government's handling of future FOI requests) would mitigate the risk of any precedence in the absence of appealing the decision.
35. It is possible that there may be further appeal Decisions on similar cases, at which point Ministers could choose to appeal to the court and defend the underlying principle on the specifics of the case in question. However, by accepting this Decision, Ministers are accepting that an advisor appointed under the Scottish Ministerial Code- and by extension, reviews, panels and short-life working groups are not necessarily independent for the purposes of FOISA. Whilst Decisions do not strictly speaking set a precedent, the Commissioner will have regard to it in any future appeals. Dependent on the specific circumstances, it may be difficult to distinguish future cases from this one.

### **Quality Assurance**

36. This submission has been approved Penny Curtis, Deputy Director Elections and FOI.

### **Conclusion and Next Steps**

37. The potential implications of the Commissioner's Decision are significant for the functions of government. The arrangements put in place for independent reviews and to provide independent advice to Ministers, including the independent advisors on the Ministerial Code need to provide participants a level of confidence about how information is handled, especially in circumstances where the information is sensitive.
38. Counsel consider the prospects of success at appeal to be reasonable overall, but also indicated there are potential risks associated with the appeal. None of the options are without risk. However, the appeal option is the only one with the potential to "reset the dial" to any extent.
39. You are invited to:
- Indicate your preferred approach to the Information Commissioner's Decision; and
  - If you are minded to appeal the Decision, agree that Counsel should be instructed to finalise the draft grounds for appeal and lodge them with the Court of Session by 14 March 2023.



OFFICIAL SENSITIVE

- If you are minded not to appeal, we will need to undertake a review of the written statements held on behalf of Mr Hamilton, and issue a response to the requester by 17 March 2023. Ministers will receive advice on the draft response in good time to allow compliance with the Decision.
- Indicate whether you wish to meet to discuss the Decision and the advice before deciding on the approach.

[redacted – section 38(1)(b)]  
 Elections and FOI Division  
 17 February 2023

Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constit Interest	General Awareness
Permanent Secretary DG Strategy and External Affairs DG Corporate David Rogers James Hynd Ruairaidh Macniven Andy Bruce Ian Mitchell Penny Curtis Alison Irvine Ashleigh Gray Graham Fisher, SGLD [redacted – section 38(1)(b)] , SGLD Kenneth Hannaway, SGLD Shirley Ferguson, SGLD [redacted – section 38(1)(b)] , SGLD [redacted – section 38(1)(b)] , SGLD [redacted – section 38(1)(b)] , SGLD [redacted – section 38(1)(b)] SGLD [redacted – section 38(1)(b)] [redacted – section 38(1)(b)] [redacted – section 38(1)(b)] LSLA Communications DFM Colin McAllister, Special Adviser					

## ANNEX A

### Summary of Counsel's Opinion

SGLD [redacted – section 38(1)(b)] obtained the Opinion of Senior Counsel (“Counsel”) on the prospects of success of appeal of the Decision Notice (“the Notice”) under section 56 of the Freedom of Information (Scotland) Act 2002 (“the 2002 Act”) by the Scottish Ministers to the Court of Session on a point of law. The Opinion is appended to this summary.

The key issue considered by Counsel was whether the Commissioner erred in his approach to determining if information sought by Mr Harrop is information that is “held” by the Scottish Ministers for the purposes of the 2002 Act.

Counsel outlined various factors which he considered demonstrated that the information was not held by the Scottish Ministers. His analysis of these factors, which is set out in detail at paragraph 17 of the Opinion and the key points can be summarised as follows:

1. Mr Hamilton’s independence from Ministers is clear from the way he was appointed, including his appointment letter, the terms of the referral, the minutes establishing the secretariat and the fact that when taking legal advice he obtained it from a source independent of the Scottish Ministers.
2. The information held by Mr Hamilton has at all times been held within a restricted access area of the Scottish Government’s servers. The Commissioner considered that the Scottish Ministers could choose to lift the restrictions placed on the handling of information by the secretariat (paragraph 27 of the Decision). However, Counsel expressed the view that while working in the secretariat civil servants were in effect not working for the Ministers: to hold otherwise would prevent government from supplying staff on a temporary basis to any number of inquiries that require experienced civil servants to administer them, but before which ministers and civil servants are expected to appear and give evidence. Counsel dismissed the idea that ministers or senior civil servants might have countermanded the instructions so clearly laid down in the documentation establishing the Secretariat, or that officials would have acquiesced in such a reversal of instructions as “fanciful”.
3. The fact that the information is as a matter of fact held by Mr Hamilton within a restricted access area in IT infrastructure operated by the Scottish Ministers suggests that they are merely providing storage for his information
4. The information held by Mr Hamilton does not relate to the functions of the Scottish Ministers. Those are statutory functions, and the provisions of the Scotland Act 1998 and instruments made under that Act (which are the principal source of the Scottish Ministers’ functions) do not lay down any statutory code for ministers.
5. The fact that the report was redacted before publication does not point to the information gathered by Mr Hamilton being held by Ministers for the purposes

of the Act. Redaction concerned only the publication of the final report. The remit had in any event clearly explained in advance that redaction might be required in order to comply with court orders. Moreover, Mr Hamilton's own independent legal adviser concurred that redaction was required.

6. The Commissioner fails to address the point that Mr Hamilton remains the decision maker for the retention of records.

Taken together, Counsel considers that there is a sufficient basis to open up this appeal and invite the Inner House to reconsider the Commissioner's approach to the evidence on which he reached his decision.

Counsel also outlined however that there are risks of taking an appeal, and that these must not be minimised. Citing case law, Counsel advised that there was a risk that the court could take the view that, given that the Ministerial Code under which Mr Hamilton was appointed is of such significance to public life that the purpose for which he held the information was for carrying out of Ministers' functions as a public authority, and that to argue otherwise would be "artificial and unrealistic" to argue otherwise.

Counsel also noted the fact that some of the information provided to Mr Hamilton is held directly within the Scottish Government's own IT system and commented that this might be seen as demonstrating that the information handling here was not seamless, and that therefore all the information relevant to Mr Hamilton's performance of his functions can be regarded as held by the authority

Further, the concept of ministerial oversight which is referenced in the Decision would need to be explained to the court. Counsel noted that he is not currently clear on what matters might have come to the Deputy First Minister for decision during Mr Hamilton's investigations.

Ultimately, if appealed it will be for Ministers to demonstrate that the information was held solely on behalf of Mr Hamilton and not in any way for their own purposes. This may be challenging the court may take the view that the fact of the secretariat as a whole being provided by Ministers demonstrates a sufficient connection between Mr Hamilton and the Scottish Ministers for Ministers to "hold" the information in their own right.

Overall, Counsel considers that there are reasonable prospects of success in an appeal. He notes that the Commissioner's Decision has not addressed all of the points made by the Scottish Ministers and that the Commissioner's reasoning is somewhat superficial and fails to engage with the submissions made to him.

Counsel finally notes that appeal to the Inner House of the Court of Session would risk an adverse judgment that elevated some of the Commissioner's approach into authoritative case precedent that would affect current and future handling of inquiries in an adverse way. Counsel did not specifically comment on any benefits which may come from a court decision. We would suggest that a court opinion could assist in putting the position beyond doubt- and a decision in our favour would endorse the principle of the independence of any advisor in carrying out their role.



**From:** Lord Advocate <LordAdvocate@gov.scot>

**Sent:** Friday, February 24, 2023 11:37 AM

**To:** Curtis PS (Penelope) <Penelope.Curtis@gov.scot>; Deputy First Minister and Cabinet Secretary for Covid Recovery <DFMCSCR@gov.scot>; Minister for Parliamentary Business <MinisterPB@gov.scot>; Lord Advocate <LordAdvocate@gov.scot>; Solicitor General <SolicitorGeneral@gov.scot>

**Cc:** Permanent Secretary <PermanentSecretary@gov.scot>; DG Corporate <dgcorporate@gov.scot>; DG Strategy and External Affairs <DGSEA@gov.scot>; Rogers D (David) (Constitution and Cabinet Director) <David.Rogers@gov.scot>; Hynd JS (James) <James.Hynd@gov.scot>; Solicitor to the Scottish Government <solicitor@gov.scot>; Bruce A (Andrew) <Andrew.Bruce@gov.scot>; Mitchell IM (Ian) <Ian.Mitchell@gov.scot>; [redacted – section 38(1)(b)] @gov.scot>; Irvine A (Alison) <Alison.Irvine@gov.scot>; Gray A (Ashleigh) <Ashleigh.Gray@gov.scot>; Fisher G (Graham) <Graham.Fisher@gov.scot>; [redacted – section 38(1)(b)] @gov.scot>; Hannaway K (Kenneth) <Kenneth.Hannaway@gov.scot>; Ferguson SE (Shirley) <Shirley.Ferguson@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; Legal Secretariat to the Lord Advocate <DLPCALS@gov.scot>; Communications DFM & Covid Recovery <CommunicationsDFMandCovidRecovery@gov.scot>; McAllister C (Colin) <Colin.McAllister@gov.scot>

**Subject:** RE: OFF - SEN - SCOTTISH INFORMATION COMMISSIONER - DECISION 004/2023 - Mr Benjamin Harrop application - Appeal

Good morning Penny & [redacted – section 38(1)(b)],

The Lord Advocate has noted your submission with thanks. On the basis of Senior Counsel's advice, she considers it is open to Ministers to appeal this decision if they are minded to do so. Given the wider potential implications of the Commissioner's decision that have been set out, the Lord Advocate also considers that the balance is in favour of appealing.

Many thanks,

[redacted – section 38(1)(b)]

[redacted – section 38(1)(b)]– Lord Advocate

Crown Office, 25 Chambers Street, Edinburgh  
E-mail: Lordadvocate@gov.scot

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Lord Advocate

**FREEDOM OF INFORMATION  
DECISION OF THE OFFICE OF THE SCOTTISH INFORMATION COMMISSIONER  
POTENTIAL APPEAL TO THE COURT OF SESSION**

**Purpose**

1. To seek the Lord Advocate's agreement to the instruction of Senior Counsel in connection with a potential appeal by the Scottish Ministers to the Court of Session under section 56 of the Freedom of Information (Scotland) Act 2002 ("FOISA") of a Decision of the Office of the Scottish Information Commissioner ("OSIC") dated 31 January 2023<sup>1</sup>.

**Timing**

2. **Urgent:** The deadline for lodging an appeal of the Decision is 14 March 2023. However, the Deputy First Ministers has asked official for urgent advice, ideally prior to the publication of the Decision by OSIC. This is due to the significant potential implications of the Decision and the specific information sought by the requester, which relates to a complex, high profile and extremely sensitive matter further detailed in the background below. Appeals of OSIC decisions to the Court by the Scottish Ministers are relatively rare and only undertaken when absolutely necessary. As an initial step we suggest obtaining an urgent preliminary note on prospects of success for an appeal from Senior Counsel to properly inform the initial discussion with Ministers as to options. Were the prospects of appeal favourable in principle, we would then follow up with a request to Counsel to provide for a fuller assessment of the wider implications of and risks arising from OSIC's decision. An early response from you to enable us to instruct of Counsel by Tuesday next week would be very helpful.

**Background**

3. On 13 January 2019, the First Minister appointed Mr James Hamilton KC as independent adviser to conduct an investigation into her compliance with the Scottish Ministerial Code ("the Ministerial Code") in connection with issues around the allegations made against Mr Alex Salmond the former First Minister. Mr Hamilton was assisted in this work by a small number of Scottish Government staff, who were appointed by a senior officials to form a separate Secretariat. On 22 March 2021, Mr Hamilton's report was published by the Scottish Government in a redacted form. Mr Hamilton found no breach of the Ministerial Code by the First Minister.

4. On 5 April 2021, Mr Benjamin Harrop (the Requester) made a request for information under section 1(1) of FOISA to the Scottish Ministers. He asked for all

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<sup>1</sup> The decision 004/2023 has not yet been published online by OSIC.

written evidence to Mr Hamilton's investigation into the First Minister, including evidence from the First Minister, her Chief of Staff and any other individuals within the Scottish Government who had submitted evidence.

5. An initial response was issued to the Requester on 13 May 2021. The Scottish Government advised the Requester that Mr Hamilton, as an independent adviser on the Ministerial Code, was not subject to FOISA. Therefore, information held by or on behalf of Mr Hamilton was not within scope of the request. The Scottish Ministers separately applied exemptions from disclosure in relation to the information in scope which was in scope and held by the Scottish Government.

6. Later that day, the Requester asked for a review of its decision. The Scottish Ministers upheld their original decision on disclosure other than one modification (which is not relevant to the immediate issue). On 10 June 2021, the Requester wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA.

7. The FOI Unit made initial submissions to OSIC for the appeal on behalf of the Scottish Ministers on 13 September 2021. OSIC then asked for a further explanation and evidence of the independence of Mr James Hamilton and the Secretariat. Further submissions to fully explain the position were put forward by the FOI Unit (supported by SGLD) on 22 June 2022. Those submissions included copies of the written appointments of SG officials to the Secretariat which set out the detailed arrangements for the Secretariat to maintain separation of roles in support of Mr Hamilton as an independent advisor. An affidavit from [redacted – section 38(1)(b)] as former head of the Secretariat about the arrangements was provided to OSIC as additional evidence.

8. OSIC issued the Decision Notice on 31 January 2023, rejecting the Scottish Government's arguments that the information was held by Mr Hamilton in his capacity as an independent advisor on the Ministerial Code. OSIC was not persuaded that Mr Hamilton and the Secretariat were not sufficiently separate and independent of the Scottish Ministers for the reasons set out in the Decision.

9. The effect of the Decision is that the highly sensitive information (to which access was limited to Mr Hamilton and the Secretariat for the purposes of the Ministerial Code investigation) must now be treated as in scope of the request for disclosure under FOISA and the Scottish Ministers are required to review the original request on that basis. If the Scottish Ministers decide not to appeal the Decision, then the further review response will require to be issued to the Requester by 23 March 2023.

10. It is unclear at this stage as to whether any of the restricted information which had been held separately by Mr Hamilton and the Secretariat would be exempt from disclosure upon review. We think there is a high likelihood that the Requester will appeal any further review decision, which will entail the Scottish Government providing all the withheld sensitive information to OSIC as part of that process (or being compelled to do so by OSIC).

11. In additions to concerns about the potential disclosure of highly sensitive information, Scottish Government officials are also extremely concerned about the implications of the Decision in terms of the ability of appointed advisers to conduct

an independent investigation under the Ministerial Code, as well as any other historic or future individual appointments made by the Scottish Ministers for similar functions, such as charring public inquiries. OSIC appear to have placed considerable weight on the Secretariat staffing arrangements for the investigation, which calls into question what has been a standard practice for many years of seconding SG officials to these roles.

12. Subject to any views from Counsel, SGLD's initial assessment of the Decision is that it may be flawed in various respects and therefore may be challengeable on one or more points of law.

13. In light of concerns of Scottish Government officials and the Deputy First Minister, the high profile and sensitivity of the underlying matter (that is, information connected to the allegations against the former First Minister), the likelihood in the of significant public interest in the Decision and the need to assist Ministers with assessment of their options and risks, it is considered that it would be appropriate to instruct Senior Counsel in this matter.

14. The following Senior Counsel are available to prepare an preliminary Note on prospects of success at appeal and further advice as necessary on the implications of OSIC's decision :

- [redacted – section 38(1)(b)], KC
- James Mure KC
- [redacted – section 38(1)(b)]KC

James Mure KC recently acted for the Scottish Ministers in relation to a previous assessment of prospects and draft grounds of appeal in the potential appeal under FOISA of the OSIC decision for the disclosure of legal advice concerning the Scottish independence referendum.

15. Both [redacted – section 38(1)(b)] KC and [redacted – section 38(1)(b)] KC have extensive experience acting for the Scottish Ministers on a range of public law matters including actions in the Court of Session. All three Counsel have availability in the coming week.

### **Recommendation**

16. That the Lord Advocate agrees to the appointment of Senior Counsel in relation to this matter.

Should you require any further information, please let me know.

[redacted – section 38(1)(b)] SGLD: [redacted – section 38(1)(b)]



	For Action	For Comments	For Information		
			Portfolio Interest	Constituent Interest	General Awareness
Lord Advocate	X				
Solicitor General Solicitor to the Scottish Government Kenneth Hannaway Legal Secretariat to the Lord Advocate					X X X X X

**From:** Fisher G (Graham) <Graham.Fisher@gov.scot>

**Sent:** Tuesday, February 21, 2023 6:00 PM

**To:** Lord Advocate <LordAdvocate@gov.scot>

**Cc:** Solicitor General <SolicitorGeneral@gov.scot>; Legal Secretariat to the Lord Advocate <DLPCEALSLA@gov.scot>; Solicitor to the Scottish Government <solicitor@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; Ferguson SE (Shirley) <Shirley.Ferguson@gov.scot>; Macniven R (Ruaraidh) <Ruaraidh.Macniven@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>

**Subject:** RE: OFF - SEN - SCOTTISH INFORMATION COMMISSIONER - DECISION 004/2023 - Mr Benjamin Harrop application - Appeal

Official: sensitive

Dear [redacted – section 38(1)(b)],

Scottish Information Commissioner - Decision 004/2023 - Mr Benjamin Harrop application - Appeal

1. This is a consolidated SGLD reply, with apologies for missing the 5pm deadline.
2. To confirm, [redacted – section 38(1)(b)] were involved in the preparation of the submission and provided the summary of Counsel's Opinion which was appended as Annex A. The branch continues to provide legal support for the FOI Unit and the wider Directorate for Constitution on this matter. SGLD [redacted – section 38(1)(b)] also considered the Ministerial Code aspects at paras 17 and 18 in particular.
3. Counsel's advice is set out in full in Annex B as indicated in the submission which explains the position generally. We are content collectively with the approach set out and the options for Ministers.
4. We note from the email of 20 February 2023 from the Solicitor General's Office that the Law Officers will provide comments on the paper also.
5. Law Officers may be aware that having considered the submission, the Deputy First Minister has indicated to officials that he is minded to appeal the Decision Notice on the basis that Mr Hamilton has a status independent of Ministers – who do not have access to the information he holds – but requested a meeting to discuss. That meeting is to be convened imminently with DFM and officials to discuss further before a final decision.
6. We are also considering whether a further consultation with Counsel would be helpful. Should Ministers decide to challenge the Decision Notice, SGLD Litigation will proceed to instruct Counsel to prepare draft grounds of appeal for lodging at court prior to the deadline of 14 March.
7. We will keep the Law Officers advised as matters progress, in particular to advise of date and time of the meeting with the Deputy First Minister, should the Law Officers wish to provide comment on the paper ahead of this meeting.

8. Please let us know if any further information would be of assistance.

Kind regards,  
Graham

Graham Fisher, Deputy Director  
Scottish Government Legal Directorate - Constitutional & Civil law  
Teams or [redacted - section 38(1)(b)]

Have you seen? - [Right First Time](#): A practical guide for public authorities in Scotland to decision-making and the law

**From:** Lord Advocate <LordAdvocate@gov.scot>  
**Sent:** Friday, February 24, 2023 11:34 AM  
**To:** [redacted – section 38(1)(b)],@gov.scot>; Solicitor General <SolicitorGeneral@gov.scot>; Legal Secretariat to the Lord Advocate <DLPCEALSLA@gov.scot>  
**Cc:** Lord Advocate <LordAdvocate@gov.scot>  
**Subject:** RE: OFF - SEN - SCOTTISH INFORMATION COMMISSIONER - DECISION 004/2023 - Mr Benjamin Harrop application - Appeal

Morning [redacted – section 38(1)(b)],

The Law Officers were grateful for your advice, and are content with the proposed response, which I'll issue now.

Cheers,

[redacted – section 38(1)(b)],

[redacted – section 38(1)(b)],– Lord Advocate

Crown Office, 25 Chambers Street, Edinburgh  
E-mail: Lordadvocate@gov.scot

**From:** [redacted – section 38(1)(b)],  
**Sent:** Thursday, February 23, 2023 6:02 PM  
**To:** Solicitor General <SolicitorGeneral@gov.scot>; Legal Secretariat to the Lord Advocate <DLPCEALSLA@gov.scot>  
**Cc:** Lord Advocate <LordAdvocate@gov.scot>  
**Subject:** RE: OFF - SEN - SCOTTISH INFORMATION COMMISSIONER - DECISION 004/2023 - Mr Benjamin Harrop application - Appeal

Hi PO

1. This is a submission to DFM, Mr Adam (who has ministerial responsibility for FOI) and the Law Officers about a potential appeal against a decision of the Scottish Information Commissioner. **A response is required, given the Law Officers are top line recipients to this submission.**
2. **DFM and Mr Adam are seeking a meeting to discuss this which is looking like it might take place on Wednesday next week, after the Strikes meeting. Both have indicated a desire to appeal this decision. I think the Law Officers can indicate that it is open to Ministers to do so, on the basis of Counsel's advice, and given the wider potential implications of the Commissioner's decision on SG practice in relation to the staffing of expert advisory groups, that it is worth appealing this decision.**

### *Background*

3. The background to this issue is set out in paragraphs 3-13 of the submission. As Law Officers are aware Mr Hamilton was tasked (following the FM's self-referral) with investigating whether or not the [FM had breached the Ministerial Code](#). This case relates to an FOI request in the following terms – "*All written evidence to James Hamilton's QC investigation into the FM under the ministerial code. This includes evidence from the FM, her chief of staff Liz Lloyd and any other individuals within the Scottish Government who have submitted evidence*".

4. The key question here is whether information sought by the requester is “held” by the Scottish Ministers for the purposes of FOISA. Mr Hamilton was provided with a secretariat when undertaking this work, and that was staffed by SG civil servants, although it was made clear they were not to report to Ministers and not to share any information outside the secretariat. Information was stored on SG IT systems during this investigation, but with access restricted to only those members of the Secretariat. These arrangements are discussed further at para 7 of Counsel’s advice.
5. Ministers’ approach has been that they hold any information within the scope of the request *on behalf of* Mr Hamilton, which in terms of [section 3\(2\)\(a\)\(i\)](#) of FOISA, means that information is not subject to the FOI regime. Scottish Ministers responded on that basis to this request. The requester sought a review, which was undertaken and confirmed that view. The requester then sought a decision from the Commissioner in terms of [section 47\(1\)](#) of FOISA.
6. The Commissioner issued the notice **attached above** in January this year. This found that Ministers *did* hold some of the information sought. The Commissioner ordered Ministers to undertake a further review and respond to applicant afresh.
7. The issue for decision now is whether to appeal the Commissioner’s Decision Notice to the Court of Session under [section 56 of FOISA](#). Advice on the prospects of an appeal from Senior Counsel (James Mure KC) is summarised at **Annex A**, and his full advice is at **Annex B**.

#### *Section 3(2) of FOISA*

8. Section 3(2) of FOISA, which is the key provision here, provides

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.

9. Counsel discusses the legal context from paragraph 9 of his advice. An issue with the Commissioner’s decision which causes a bit of confusion here is described at para 16 of Counsel’s advice. That is, whether the information at issue here is being held by Scottish Ministers on behalf of Mr Hamilton (as Ministers submitted – see para 20 of the Decision Notice), which would fall under s3(2)(a)(i), or whether Mr Hamilton is holding information on behalf of Scottish Ministers, in which case the relevant provision would be section 3(2)(b). As Counsel notes, the Commissioner doesn’t then distinguish between the two provisions in order to find that information is held by Scottish Ministers.
10. Counsel’s reasoning proceeds on the basis that section 3(2)(b) is in play, given the highlighted wording of para 21 of the Commissioner’s decision, which says “*The critical question for the Commissioner to consider is not whether Mr Hamilton, as an independent adviser, is to be regarded as a separate entity, but whether the information which Mr Hamilton holds is, for the purposes of section 3(2) of FOISA, held by the Authority*”.

## Discussion

11. Counsel's advice notes that there are "reasonable prospects" of success in any appeal taken here. The key paragraphs of Counsel's advice are **17** where he sets out the arguments that support Ministers' position and **18**, where he sets out the risks. Counsel notes at para 18 that "*the difficulties should not be minimised*". The main risk here is a court could find that Ministers' argument (that they don't hold this information) "artificial and unrealistic" when having regard to the purpose of FOISA (see para 18.1) given the factual situation here.
12. Two options are set out in the submission, either to appeal or not appeal. The consequences of an appeal being successful or unsuccessful are set out at paras 21-26 of the submission. The consequences of not appealing are described at paras 27-35. In the event that Ministers were required to undertake a further review in this case (either as a result of unsuccessful appeal or not appealing), then there would be a question of assessing any further information within the scope of the request against the various exemptions in FOISA, so it would not mean that any or all information would be released.
13. As noted at paragraphs 16 and 17 of the submission, there are wider implications for the staffing of independent expert groups that could arise if this decision is allowed to stand. Staffing and support for such bodies is commonly provided by civil servants on secondment – this is a pragmatic way of dealing with such matters which does not create unnecessary expenditure from the public purse. Accepting this decision would in effect accept that those bodies are not independent for the purposes of FOISA. That is a significant change from Ministers' current position.
14. On the basis of this, coupled with Counsel's advice that the prospects of success are reasonable, I think it is open to Ministers to decide to appeal here. Given the potential wider consequences I think it is important that they do.
15. As noted above, DFM and MfPB have both indicated (i) a desire to appeal this decision; and (ii) a wish to meet to discuss. I have suggested a response below that indicates that the Law Officers consider it is open to Ministers to appeal this decision and that it is worth doing so given the wider implications. It may be that, if DFM and Mr Adam have reassurance from the Law Officers about the course of action here, there isn't a need (for the Law Officers in any case) to attend a meeting next week, but we can perhaps see how things go.

## DRAFT RESPONSE

"[redacted – section 38(1)(b)],

The Lord Advocate has noted your submission with thanks. On the basis of Senior Counsel's advice, she considers it is open to Ministers to appeal this decision if they are minded to do so. Given the wider potential implications of the Commissioner's decision that have been set out, the Lord Advocate also considers that the balance is in favour of appealing."

**[redacted – section 38(1)(b)]**

[redacted – section 38(1)(b)] to the Lord Advocate

Mob. [redacted – section 38(1)(b)]

**From:** [redacted – section 38(1)(b)]

**Sent:** Friday, March 10, 2023 9:39 AM

**To:** Lord Advocate <LordAdvocate@gov.scot>

**Cc:** Solicitor General <SolicitorGeneral@gov.scot>; Legal Secretariat to the Lord Advocate <DLPCEALSLA@gov.scot>

**Subject:** RE: OFF -SEN - Urgent - SCOTTISH INFORMATION COMMISSIONER - DECISION 004/2023 - Mr Benjamin Harrop application – Appeal – Further Advice

[redacted – section 38(1)(b)]

Sorry – just further to the emails below – Ruaraidh had been in touch to say that in his view this perhaps isn't a case where Ministers should appeal, on the back of the further information provided and Counsel's revised advice. He thinks we should wait for another case where there are better circumstances. He thinks our position appears counterintuitive given we did hold information on our servers and given there was apparently not strict separation between the roles. He would be minded not to encourage Ministers to appeal in this case.

I would tend to agree, for the reasons Counsel sets out in para 14 of his second opinion. There he notes that that the force of any submissions that we make here might be undermined by having to correct what was said to the Commissioner in submissions to him, coupled with the fact that the factual circumstances generally are fairly weak for Ministers in this case.

I think there will be concern about the consequences here from a policy/Ministerial perspective (see submission of 17 Feb at paras 16-17, attached above) so they will be worried about letting this decision lie.

If you could pass this to the LA that would be great thanks

[redacted – section 38(1)(b)]

**[redacted – section 38(1)(b)]**

[redacted – section 38(1)(b)] to the Lord Advocate

Mob. [redacted – section 38(1)(b)]

**From:** [redacted – section 38(1)(b)]@gov.scot>

**Sent:** Monday, June 26, 2023 4:50 PM

**To:** Lord Advocate <LordAdvocate@gov.scot>; Legal Secretariat to the Lord Advocate <DLPCEALSLA@gov.scot>

**Cc:** Solicitor General <SolicitorGeneral@gov.scot>

**Subject:** RE: URGENT SUBMISSION FOR CONSIDERATION/CLEARANCE - FOI Appeal - Scottish Ministers v Scottish Information Commissioner & Harrop - SGLD to Law Officers/DFM with draft Note of Argument for consideration - 23 June 2023

Hi [redacted – section 38(1)(b)]

1. This is the draft note of argument for the above case – it is due to be lodged by **Wednesday (28<sup>th</sup>) at the latest. A response is required. I think the Law Officers can clear the note.**
2. The Law Officers are aware of the background to this appeal – the Lord Advocate discussed the case with the then DFM in March this year.
3. In that discussion, the Lord Advocate asked for further work to be undertaken in order to establish the full facts about the document storage of information in this case, as it had been recognised there were inaccuracies in submissions which had been made to the Commissioner in the course of the FOI request being considered by him.
4. This work was undertaken (although some aspects are still being finalised) and Counsel (James Mure KC and Paul Reid) produced a note on 22 May discussing the outcome. This is included in the papers. There is a consultation with Counsel tomorrow (27 June). Some changes may be made to the draft NoA following that but these are not expected to be substantial.
5. In terms of the further work undertaken on the facts of the case, the need to ensure that the court is given accurate information is recognised, and these further precognitions provided will assist with that. Ultimately, though, Counsel's view is that the further precognitions, which concern the precise manner in which the information was stored on SG systems, don't change the underlying approach to this appeal, and will not themselves be determinative of it. The appeal is on a point of law, rather than fact. The approach in the appeal is essentially that the Commissioner has determined the issue of whether the information was "held" by the Scottish Ministers "as a matter of form rather than substance" and as such had erred in law.
6. I think that approach must be right. As has been noted previously in this appeal, the way in which the information is stored on SG systems, and who had access to it, is perhaps slightly more lax than would have been ideal, and I think getting drawn into the technical way in which the information was stored is likely to have a number of risks for the SG case – so I think if we can avoid that, as Counsel suggests, that is the best way to go. Paragraph 15 of the Note of Argument does seek to explain the factual position for the court, but the primary submission is contained in paragraphs 11 and 16.
7. As noted, the prospects for this case are not thought to be particularly good. Counsel thinks the court is likely to take a broad view on what "held" means in the context of FOISA. We seek to make "common sense" arguments about the way in which this information was treated by the Commissioner i.e. to say that the Commissioner's approach was too technical, overly formalistic and unrealistic in saying that just because information was on SG servers, it had to be "held" by them. The flipside of that is that the information was on SG servers, and the access to it was not completely sealed off, so



taking a broad and “common sense” view could lead to the court reaching the opposite view.

8. I have read the note of argument and I think it reads well – as I say, the primary submission is at paragraphs 11 and 16, which is that it cannot be correct to say that information ingathered by an independent body charged with investigating that body is also held by that body. We argue that there is no “appropriate connection” with Ministers that would mean the information is held by them (or by Mr Hamilton on their behalf). So the Commissioner erred by taking an overly formalistic view of what “held” meant in the context of this case.
9. As noted previously, Ministers are keen to have clarity on this point as it could have wider implications for how the Scottish Government organises independent advisory work.
10. I think the Law Officers can respond to [redacted – section 38(1)(b)] in Litigation indicating they are content for the note of argument to be lodged, noting that there may be minor changes following the consultation tomorrow. A draft response is below

[redacted – section 38(1)(b)]

The Law Officers are content for the draft Note of Argument to be lodged once finalised, and they look forward to receiving an update following the consultation tomorrow.

**[redacted – section 38(1)(b)]**

[redacted – section 38(1)(b)] to the Lord Advocate

Mob. [redacted – section 38(1)(b)]

**From:** [redacted – section 38(1)(b)]@gov.scot>

**Sent:** Wednesday, June 28, 2023 10:08 AM

**To:** Lord Advocate <LordAdvocate@gov.scot>; Solicitor General <SolicitorGeneral@gov.scot>

**Cc:** Deputy First Minister and Cabinet Secretary for Finance <DFMCSF@gov.scot>; Minister for Parliamentary Business <MinisterforPB@gov.scot>; Permanent Secretary <PermanentSecretary@gov.scot>; DG Strategy and External Affairs <DGSEA@gov.scot>; DG Corporate <dgcorporate@gov.scot>; David Rogers <David.Rogers@gov.scot>; Solicitor to the Scottish Government <solicitor@gov.scot>; Andrew Bruce <Andrew.Bruce@gov.scot>; Ian Mitchell <Ian.Mitchell@gov.scot>; Helen Webster <Helen.Webster@gov.scot>; Ashleigh Gray <Ashleigh.Gray@gov.scot>; Graham Fisher <Graham.Fisher@gov.scot>; Kenneth Hannaway <Kenneth.Hannaway@gov.scot>; Shirley Ferguson <Shirley.Ferguson@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; Legal Secretariat to the Lord Advocate <DLPCEALSLA@gov.scot>; Colin McAllister <Colin.McAllister@gov.scot>; Penelope Curtis <Penelope.Curtis@gov.scot>; Lorna Gibbs <Lorna.Gibbs@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>

**Subject:** For information - FOI Appeal - Scottish Ministers v Scottish Information Commissioner & Harrop - SGLD to Law Officers with finalised Note of Argument - 28 June 2023

Lord Advocate  
Solicitor General

For information, I attach the slightly revised Note of Argument for Scottish Ministers following the consultation yesterday afternoon. SGLD will lodge this note today, as today is the deadline for doing so. The changes are very minor. Counsel have tweaked some of the language a little. In particular, the way in which we say the Commissioner has erred in law is now spelled out in terms.

The consultation itself was very brief and counsel outlined the approach to be taken in relation to this appeal. Nothing has changed in the approach. Prospects remain the same as before and counsel indicated that we have arguments available to us which they are happy to make. The court may take what counsel described as “the line of least resistance” and side with the Commissioner’s view, asking the question “is this not a case better dealt with through the FOISA exemptions?”. However, we and counsel feel that Ministers have arguable lines to take and there are prospects of persuading the court otherwise.

We will update the Law Officers when we have a date for the hearing, which is likely to be some time in the Autumn or early Winter period.

Kind regards,

[redacted – section 38(1)(b)]

**[redacted – section 38(1)(b)]** Lawyer & **[redacted – section 38(1)(b)]** **[redacted – section 38(1)(b)]** Scottish Government Legal Directorate

**[redacted – section 38(1)(b)]@gov.scot**

CJSM address: **[redacted – section 38(1)(b)]@gov.scot.cjism.net**

I am mainly working from home, so please contact me by email or MS Teams in the first instance. Working hours may vary.

**From:** [redacted – section 38(1)(b)]@gov.scot> **On Behalf Of** Solicitor General

**Sent:** Monday, June 26, 2023 5:18 PM

**To:** [redacted – section 38(1)(b)]@gov.scot>; Deputy First Minister and Cabinet Secretary for Finance <DFMCSF@gov.scot>; Minister for Parliamentary Business <MinisterforPB@gov.scot>; Lord Advocate <LordAdvocate@gov.scot>; Solicitor General <SolicitorGeneral@gov.scot>

**Cc:** Permanent Secretary <PermanentSecretary@gov.scot>; DG Strategy and External Affairs <DGSEA@gov.scot>; DG Corporate <dgcorporate@gov.scot>; David Rogers <David.Rogers@gov.scot>; Solicitor to the Scottish Government <solicitor@gov.scot>; Andrew Bruce <Andrew.Bruce@gov.scot>; Ian Mitchell <Ian.Mitchell@gov.scot>; Helen Webster <Helen.Webster@gov.scot>; Ashleigh Gray <Ashleigh.Gray@gov.scot>; Graham Fisher <Graham.Fisher@gov.scot>; Kenneth Hannaway <Kenneth.Hannaway@gov.scot>; Shirley Ferguson <Shirley.Ferguson@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; Legal Secretariat to the Lord Advocate <DLPCEALSLA@gov.scot>; Colin McAllister <Colin.McAllister@gov.scot>; Penelope Curtis <Penelope.Curtis@gov.scot>

**Subject:** RE: URGENT SUBMISSION FOR CONSIDERATION/CLEARANCE - FOI Appeal - Scottish Ministers v Scottish Information Commissioner & Harrop - SGLD to Law Officers/DFM with draft Note of Argument for consideration - 23 June 2023

Good afternoon [redacted – section 38(1)(b)],

The Law Officers are content for the draft Note of Argument to be lodged once finalised, and they look forward to receiving an update following the consultation tomorrow.

Thanks,

**[redacted – section 38(1)(b)]**

[redacted – section 38(1)(b)]– Solicitor General  
Crown Office  
25 Chambers Street  
Edinburgh, EH1 1LA  
**Email:** SolicitorGeneral@gov.scot  
**Phone:** 0300 020 [redacted – section 38(1)(b)]

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**From:** [redacted – section 38(1)(b)]@gov.scot>

**Sent:** Friday, June 23, 2023 4:55 PM

**To:** Deputy First Minister and Cabinet Secretary for Finance <DFMCSF@gov.scot>; Minister for Parliamentary Business <MinisterforPB@gov.scot>; Lord Advocate <LordAdvocate@gov.scot>; Solicitor General <SolicitorGeneral@gov.scot>

**Cc:** Permanent Secretary <PermanentSecretary@gov.scot>; DG Strategy and External Affairs <DGSEA@gov.scot>; DG Corporate <dgcorporate@gov.scot>; David Rogers <David.Rogers@gov.scot>; Solicitor to the Scottish Government <solicitor@gov.scot>; Andrew Bruce <Andrew.Bruce@gov.scot>; Ian Mitchell <Ian.Mitchell@gov.scot>; Helen Webster <Helen.Webster@gov.scot>; Ashleigh Gray <Ashleigh.Gray@gov.scot>; Graham Fisher <Graham.Fisher@gov.scot>; Kenneth Hannaway <Kenneth.Hannaway@gov.scot>;

Shirley Ferguson <Shirley.Ferguson@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; [redacted – section 38(1)(b)]@gov.scot>; Legal Secretariat to the Lord Advocate <DLPCEALSLA@gov.scot>; Colin McAllister <Colin.McAllister@gov.scot>; Penelope Curtis <Penelope.Curtis@gov.scot>  
**Subject:** URGENT SUBMISSION FOR CONSIDERATION/CLEARANCE - FOI Appeal - Scottish Ministers v Scottish Information Commissioner & Harrop - SGLD to Law Officers/DFM with draft Note of Argument for consideration - 23 June 2023

## **FOR CONSIDERATION/CLEARANCE – Deadline for lodging: 28 June 2023**

Lord Advocate, Solicitor General, Deputy First Minister and Cabinet Secretary for Finance,

### **Purpose**

1. The Law Officers and the Deputy First Minister are asked if they would be content with the recommendation that the attached draft Note of Argument be lodged once finalised.

### **Priority**

2. **Urgent:** the Note of Argument is due to be lodged with the Court no later than Wednesday 28 June. I apologise for the tight timescales.

### **Background**

3. The Law Officers and the Deputy First Minister will recall that instructions were given to proceed with the appeal against the decision of the Scottish Information Commissioner (No 004/2023) dated 31 January 2023. This related to information held in relation to the former First Minister's self-referral to an independent adviser (in this case James Hamilton) as to whether there had been a breach of the Ministerial Code. Scottish Ministers' position was that information stored by and on behalf of Mr Hamilton and his secretariat on the Scottish Government IT system was held on behalf of Mr Hamilton acting in his capacity as an independent adviser and was not held by Scottish Ministers in terms of section 3(2) of FOISA.
4. The Commissioner decided that the referral to Mr Hamilton was instructed and carried out, evidence was obtained, and the report produced, all for the purpose of considering whether the former First Minister's conduct complied with the Code and advising on appropriate sanctions if it did. He took the view that information was obtained and created for that purpose and that this amounted to an appropriate connection with the Authority such that information was held by it for the purposes of section 3(2).
  -
5. A copy of the Appeal as lodged is attached for ease of reference together with Answers to the Appeal lodged on behalf of the Commissioner. Having had service of the appeal, Mr Harrop (the requester in the underlying FOI request) confirmed he will not be taking part in the appeal itself.
  -

6. Notes of Argument are due by 28 June, with a procedural hearing on 12 July. Following a meeting on 31 May (the policy briefing for which is attached for ease of reference), the Deputy First Minister indicated that she considered it necessary to continue with the appeal.

### **Update on position and Note of Argument**

7. Counsel have today provided us with the attached draft Note of Argument. This has been prepared with reference to the further information ingathered during the precognition exercise carried out by SGLD. A consultation has been scheduled for 1 pm on Tuesday 27 June ahead of the lodging deadline on 28 June. It may be that following that consultation, some changes to the draft will be required – any changes are not anticipated to be substantial. An update shall follow after the consultation but in the interests of time, the working draft is provided for consideration now.
8. As summarised in paragraph 16 of the draft Note of Argument, “the Scottish Minister’s primary submission is that the Commissioner has determined the issue of whether information was “held” by the Scottish Ministers as a matter of form rather than one of substance and in so doing has erred in law.” Counsel are of the view that it may be helpful if the Scottish Ministers confirm how the written evidence provided to Mr Hamilton as part of his investigation was stored at the relevant date of 5 April 2021 (details are included at paragraph 7 by way of context) noting however at paragraph 8 that “the precise manner in which the information was stored at the relevant date is unlikely to be determinative of this appeal”.

### **Recommendation and instructions sought**

9. **The Law Officers and the Deputy First Minister are asked if they would be content with the recommendation that the attached draft Note of Argument be lodged once finalised.**
10. **In light of the instructions following the meeting on 31 May, the Deputy First Minister may be content for the draft Note of Argument to be cleared by the Law Officers and policy officials and we should be grateful for confirmation on that point.**

If further information would be of assistance at this stage or if the Law Officers or the Deputy First Minister would like to discuss any issues arising from the draft Note of Argument, I would be happy to make arrangements.

Kind regards,

[redacted – section 38(1)(b)]

[redacted – section 38(1)(b)] | Solicitor | [redacted – section 38(1)(b)] | Scottish Government Legal Directorate

**Working pattern: [redacted – section 38(1)(b)]**