

# Decision Notice

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## **Decision 125/2019: Mr J and the Scottish Ministers**

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### **Complaints against former First Minister, Alex Salmond**

Reference No: 201900128

Decision Date: 19 August 2019



Scottish Information  
Commissioner

## Summary

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The Ministers were asked for anonymised copies of complaints made against Alex Salmond, the former First Minister, and for any guidance given to female members of staff on being alone with Mr Salmond during his time as First Minister.

The Ministers initially refused to confirm whether they held any of this information. During the investigation, the Ministers confirmed they held the complaints against Mr Salmond, but still refused to confirm or deny whether any guidance existed.

The Commissioner found that the Ministers should have confirmed they held the complaints when responding to the request, but was satisfied that the complaints were exempt under section 26(c) of FOISA. He also found that the Ministers were entitled to refuse to confirm or deny whether they held any information about guidance given to female members of staff.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(b) (Effect of exemptions); 18(1) (Further provisions as respects responses to request); 26(c) (Prohibitions on disclosure); 35(1)(c) (Law enforcement)

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

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

## Background

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1. On 16 November 2018, Mr J made two requests for information to the Scottish Ministers (the Ministers) about the management of Bute House while Alex Salmond was First Minister. The requests are set out in full in Appendix 2. In summary, he asked:
  - (i) about guidance given to female members of staff on whether they should be alone with Mr Salmond and what had led to the guidance being put in place (“the guidance request”) and
  - (ii) for copies of anonymised complaints made against Mr Salmond during his time as First Minister (“the complaints request”).
2. When Mr J made his requests, Mr Salmond had already commenced judicial review proceedings against the Scottish Government in relation to the manner in which complaints against him were investigated and Lord Pentland and Lord Woolman had made orders banning the publication of the names and designations of the two individuals who had made complaints against Mr Salmond, or any information which would lead to their identification. (Lord Woolman had also made an Order under section 11 of the Contempt of Court Act 1981 (the 1981 Act) restraining the publication of information relating to the complainants.)
3. Although the complaints request was widely drawn, the Ministers treated it as a request for anonymised copies of the complaints made by the individuals, the investigation of whose

complaints was the subject of the judicial review proceedings. Mr J has not disputed this and, in the circumstances, the Commissioner is satisfied it was reasonable for the Ministers to interpret Mr J's request in this way.

4. The Ministers responded to the requests on 13 December 2019. They refused to confirm or deny whether the information Mr J requested existed or was held on the basis that:
  - (i) to reveal whether the information existed would be contrary to the public interest (section 18(1) of FOISA) and
  - (ii) if the information did exist, it would be exempt from disclosure under section 35(1)(c) (Law enforcement) and section 38(1)(b) (Personal information) of FOISA.
5. Mr J was dissatisfied with this response and, on 18 December 2018, wrote to the Ministers requesting a review of their decision. He commented that:
  - (i) it was clear that there was an overwhelming public interest in establishing the facts requested
  - (ii) given that the civil proceedings in question (the judicial review proceedings raised by Mr Salmond) were taking place without a jury, there was no risk of legal proceedings being prejudiced and
  - (iii) disclosing anonymised complaints would not breach data protection rules.
  - (iv) the Ministers were at risk of being perceived to be protecting their own reputation. He considered this to be the wrong approach.
6. While carrying out the review, the Ministers were aware that a criminal investigation into complaints made against Mr Salmond was ongoing. The Ministers notified Mr J of the outcome of their review on 21 January 2019. They confirmed their original decision without modification.
7. On 22 January 2019, Mr J applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr J stated he was dissatisfied with the outcome of the Ministers' review, reiterating the arguments he had made in his request for review.
8. Two days later, on 24 January 2019, Mr Salmond was arrested and charged with 14 offences, including attempted rape and sexual assault. Both Police Scotland and the Crown Office published statements advising the public that the criminal proceedings were now "live" for the purposes of the 1981 Act.

## **Investigation**

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9. The application was accepted as valid. The Commissioner confirmed that Mr J made requests for information to a Scottish public authority and asked the authority to review its response to those requests before applying to him for a decision.
10. On 7 February 2019, the Ministers were notified in writing that Mr J had made a valid application and the case was subsequently allocated to an investigating officer.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and to answer specific questions. These related to their refusal to confirm

or deny whether the information was held and the exemptions which they considered would apply if they did in fact hold the information.

12. Submissions were received from the Ministers on 22 March 2019. These are considered in more detail below.

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

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

### **The Ministers' change in approach**

14. During the investigation, the Ministers changed their approach to both requests.

#### *Complaints request – new approach*

15. The Ministers had initially refused to confirm or deny whether they held any information falling within the complaints request. However, it had become apparent to the Ministers that the existence of the two complaints against Mr Salmond was in the public domain at least by the time that judicial review proceedings were commenced, i.e. before Mr J made his information request. The Ministers therefore concluded that the decision to refuse to confirm or deny whether the information sought in the complaints request could not be maintained.
16. The Ministers therefore conceded that they should not have responded to the complaints request by issuing a refusal notice by virtue of section 18(1) of FOISA. They submitted instead that the Ministers should have withheld the complaints under sections 26(c) and 35(1)(c) of FOISA.
17. Given that it was public knowledge that the complaints existed before Mr J made his information request, the Commissioner finds that the Ministers failed to comply with Part 1 of FOISA (and, in particular, with section 1(1)), in initially refusing to confirm or deny whether the complaints were held.

#### *Guidance request – new approach*

18. The Ministers had also refused to confirm or deny whether they held any information falling within the scope of the guidance request, on the basis that, if it existed and was held, the information would be exempt from disclosure under sections 35(1)(c) and 38(1)(b) of FOISA. During the investigation, the Ministers withdrew their reliance on section 38(1)(b), having taken the view that, if the information did exist, it would not be personal data.

### **The complaints request**

19. Mr J asked for anonymised copies of the complaints. The Ministers refused to disclose them on the basis that they could not be suitably anonymised and that they were exempt from disclosure under sections 26(c) and 35(1)(c) of FOISA.

#### *Is it possible to anonymise the complaints?*

20. The Ministers took the view that it would not be possible to anonymise the complaints such that there would be no realistic prospect of identifying the complainers. In other words, unless the complaints were withheld in their entirety, there would be a realistic prospect that the complainers would be identifiable.

21. The Ministers explained to the Commissioner why they considered there was a realistic prospect of identification. They noted that it is already in the public domain that the complainers are civil servants and female, and explained how other civil servants could combine information in the complaints with other readily-accessible information, or their own knowledge, and thereby identify the complainers.
22. The Ministers gave further reasoning, including during a meeting with the Commissioner on 1 August 2019, as to why it would not be possible to anonymise the complaints without making them unintelligible, and how others, outside the civil service, could combine information in the complaints with other readily-accessible information and thereby identify the complainers.
23. In *Scottish Ministers v Scottish Information Commissioner* [2006] CSIH 8<sup>1</sup>, at paragraph [18], the Court of Session recognised that:

“in giving reasons for his decision, [the Commissioner] is necessarily restrained by the need to avoid, deliberately or accidentally, disclosing information which ought not to be disclosed.”
24. In this case, the Commissioner is unable to set out the Ministers’ (or his own) reasoning in full as doing so could itself lead to the individual complainers being identified.
25. The complaints set out times, dates, places, etc., all of which could, for reasons given by the Ministers, realistically lead to the complainers being identified. The Commissioner is aware that he must consider all of the means reasonably likely to be used by third parties to identify the individuals in question. The amount of speculation as to the identities of the complainers, particularly given the high profile of Mr Salmond, means that any information disclosed from the complaints is highly likely to be scrutinised, in conjunction with other information already in the public domain, in an attempt to identify the individuals.
26. This means that the effect of taking out anything which would realistically identify the individuals would, in the Commissioner’s view, lead to the complaints being unintelligible. He is therefore satisfied that the complaints cannot be anonymised. In coming to this view, the Commissioner took account of the 2016 judgment of the First Tier Tribunal (Information Rights) in *Boam v the ICO and Ofsted*.<sup>2</sup> In that case, the Tribunal accepted that there are limits to reasonable redaction, for example in cases where “the excisions required for anonymisation must be so drastic that what remains is incoherent or even meaningless” meaning that it is reasonable to redact entire documents. The Commissioner is satisfied that this is one such case.

*Section 26(c) of FOISA: contempt of court*

27. Under section 26(c) of FOISA, information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act) would constitute, or be punishable as, a contempt of court.
28. This exemption is not subject to the public interest test in section 2(1)(b) of FOISA (see section 2(2)(b)).
29. The Ministers referred to the order made by Lord Woolman under section 11 of the 1981 Act on 8 October 2018. The order was in the following terms:

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<sup>1</sup> <http://www.scotcourts.gov.uk/search-judgments/judgment?id=a94886a6-8980-69d2-b500-ff0000d74aa7>

<sup>2</sup> [http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1916/Boam,Paul%20EA-2015-0294%20\(03-11-16\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1916/Boam,Paul%20EA-2015-0294%20(03-11-16).pdf)

“The Lord Ordinary ... makes an order in terms of Chapter 102.3(5) of the Rules of Court withholding from the public in these proceedings the names and the designations, past and present, of the complainers referred to in the decision report which is the subject matter of this petition and any other information concerning those complainers which would lead to their identification; orders, in terms of section 11 of the Contempt of Court Act 1981, that no publication by any means, including on social media, of any of the aforementioned information relating to the complainers, be made ...”

30. This order was made over a month before Mr J made his information request to the Commissioner.
31. Given the Commissioner’s finding that the complaints cannot be anonymised, he must find that disclosure would constitute, or be punishable as, a contempt of court. He is therefore satisfied that the complaints are exempt from disclosure under section 26(c) of FOISA.
32. As a result, the Commissioner is not required to, and will not, go on to consider whether the complaints would also be exempt from disclosure under section 35(1)(c) of FOISA.

### **The guidance request**

33. Mr J made eight requests (see Appendix 2) for information about guidance given to female members of staff on whether they should be alone with Mr Salmond.

#### *Section 18(1): neither confirm nor deny*

34. The Ministers refused to confirm or deny whether they held any information falling within the guidance request.
35. Section 18(1) of FOISA allows public authorities to refuse to confirm or deny whether they hold information in the following limited circumstances:
  - (i) a request has been made to the authority for information which may or may not be held by it;
  - (ii) if the information existed and was held by the authority (and it need not be), it could give a refusal notice under section 16(1) of FOISA, on the basis that the information was exempt information by virtue of any of the exemptions in sections 28 to 35, 38, 39(1) or 41 of FOISA; and
  - (iii) the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
36. It is not sufficient simply to claim that one or more of the relevant exemptions applies. Section 18(1) makes it clear that the authority must be able to give a refusal notice under section 16(1), on the basis that any relevant information, if it existed and were held, would be exempt information under one or more of the listed exemptions.
37. In any case where section 18(1) is under consideration, the Commissioner must ensure that his decision does not confirm whether the information requested actually exists or is held by the authority. This affects the ability of the Commissioner to comment on the reliance by the public authority on any of the exemptions listed in relation to section 18(1), or on other matters which could have the effect of indicating whether the information existed.
38. In this case, the Ministers argued that the information, if held, would be exempt information by virtue of section 35(1)(c) of FOISA.

*Section 35(1)(c): substantial prejudice to the administration of justice*

39. Under section 35(1)(c) of FOISA, information is exempt information if its disclosure would, or would be likely to, prejudice substantially the administration of justice.
40. The Commissioner's guidance on section 35<sup>3</sup> notes, at paragraph 22, that "administration of justice", although not defined in FOISA, will include the protection of basic rights such as the right to a fair trial and ensuring the individuals have access to justice.
41. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
42. It is important to consider the chronology of this case, particularly in relation to the criminal investigation, as this is relevant in determining whether the exemption in section 35(1)(c) of FOISA could apply to the information, if held.
43. In *Scottish Ministers v Scottish Information Commissioner* (see paragraph 23 above), the Court of Session stated, at paragraph [31]:

"... any issue of alleged failure by a public authority to comply with its statutory obligations falls to be determined as at the date of the authority's notice under section 21(5) of [FOISA]."
44. The Ministers issued a notice under section 21(5) of FOISA (notifying Mr J of the outcome of the review) on 21 January 2019, when they were aware that a criminal investigation was taking place. The Commissioner's determination on section 35(1)(c) must therefore take account of the criminal investigation and the effect that disclosing information, if held, could have on the investigation.
45. The Ministers took the view that, given the nature of the information sought, confirmation of its existence or non-existence would be likely to lead to intense public speculation in advance of trial.
46. The Ministers told the Commissioner that disclosing any information connected to Mr Salmond, to the complaints or to the court proceedings resulting in significant levels of heated discussion on social media. In the Ministers' view, increased speculation would lead to increased pre-trial publicity, which would be likely to prejudice substantially the opportunity for a fair trial.
47. In his application to the Commissioner, Mr J focussed on the civil (judicial review) proceedings and argued that there was no risk of prejudice to any legal proceedings because the civil proceedings were taking place without a jury. He did not refer to the police investigation (Mr Salmond was not charged with any offences until after Mr J made his application). Mr J was given an opportunity to comment on the effect of the criminal investigation, but did not do so.
48. Given that the police investigation was ongoing when the Ministers notified Mr J of the outcome of their review, the Commissioner is satisfied, for the reasons given by the Ministers, that any information held in relation to the guidance request, if held and if it existed, would be exempt from disclosure under section 35(1)(c) of FOISA.

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

#### Section 2(1)(b): public interest test

49. Section 2(1)(b) of FOISA requires the Commissioner to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information, if it existed and was held.
50. The Scottish Ministers acknowledged that, if the information existed, it would relate to the conduct and behaviour of an individual who had held high elected office. The Ministers recognised that there would be a strong public interest in the disclosure such information, particularly as the individual continues to have a high public profile.
51. The Ministers also recognised the public concern about the allegations that have been made, as well as the general public interest in open and transparent government. Taken together, the Ministers considered that these factors would favour disclosure of information, if it existed.
52. However, the Ministers also considered there to be a strong public interest in allowing criminal proceedings to take their course without being prejudiced, potentially fatally, by substantial pre-trial publicity. The Ministers argued that there is a significant public interest in ensuring that the right to a fair trial is protected, and that all individuals whose actions are under scrutiny are treated with fairness and dignity.
53. On balance, the Ministers considered that the public interest in maintaining the exemption would outweigh that in disclosure, on the basis that the public interest in ensuring that (a) criminal proceedings are allowed to take their course unhindered, and (b) the right to a fair trial is protected, would outweigh any interest in disclosure.
54. Mr J, on the other hand, argued that there was an overwhelming public interest in establishing the facts. He commented that the Ministers were at risk of being perceived to be protecting their own reputation and that this approach was wrong.
55. The Commissioner accepts that there is undoubtedly a public interest in the conduct and behaviour of Alex Salmond, given his high profile; the fact that he was, from 2007 until 2014, First Minister of Scotland and the specific allegations now known to have been made about him.
56. There is also a public interest in knowing how public bodies handle complaints and in ensuring that that they do so in a fair and non-discriminatory way.
57. However, the Commissioner must also acknowledge that due weight must be given to the public interest in the proper administration of justice. It is essential, where there is potential for criminal prosecution (as was the case at the relevant time), that the proper administration of justice is not prejudiced, not only for the sake of those accused of offences, but for those individuals who have made complaints.
58. On balance, therefore, the Commissioner finds that the public interest in maintaining the exemption in section 35(1)(c) of FOISA would, if the information were held, outweigh the public interest in disclosure.
59. He is therefore satisfied that the Ministers could have given a refusal notice under section 16(1) if the information existed and was held.

#### *Section 18(2): public interest test*

60. The Commissioner must now consider whether the Ministers were entitled to conclude that it would be contrary to the public interest to reveal whether the guidance exists or is held.



61. In the Ministers' view, revealing whether or not this sort of information exists would give rise to public speculation in advance of trial and impact negatively on those proceedings.
62. The Ministers considered that such an outcome would be contrary to the public interest.
63. As noted above, Mr J believes there is an overwhelming public interest in establishing the facts he has requested.
64. In determining whether the Ministers complied with Part 1 of FOISA in responding to Mr J's request, the Commissioner must consider the position as at 21 January 2019, i.e. the date the Ministers notified Mr J of the outcome of their review.
65. In this case, the Commissioner accepts that, for the Ministers to reveal whether the information existed or was held would be contrary to the public interest. It is clear that either confirming or denying whether the information was held would have prejudiced the ongoing police investigation and also would have had the potential to prejudice both the rights of Mr Salmond and those who had made complaints about him, for the reasons out forward by the Ministers.
66. He is therefore satisfied that the Ministers were entitled neither to confirm or deny, in line with section 18(1) of FOISA, whether any information falling within the scope of the guidance requests is held or exists.

## Decision

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The Commissioner finds that the Scottish Ministers (the Ministers) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr J.

The Commissioner finds that the Ministers were entitled to refuse to confirm or deny whether they held any information in relation to the guidance request.

The Commissioner finds that the Ministers were not entitled to refuse to confirm or deny whether they held the complaints in question. This was a breach of section 18(1) of FOISA, but the Commissioner does not require the Ministers to take any action in relation to this breach. He found that the complaints were, in any event, exempt from disclosure in terms of section 26(c) of FOISA.

## **Appeal**

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

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

**19 August 2019**

## Appendix 1: Relevant statutory provisions

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### Freedom of Information (Scotland) Act 2002

#### 1 General entitlement

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

...

- (6) This section is subject to sections 2, 9, 12 and 14.

#### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

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

...

- (b) section 26;

...

#### 18 Further provision as respects responses to request

- (1) Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 28 to 35, 38, 39(1) or 41 but the authority considers that to reveal whether the information exists or is so held would be contrary to the public interest, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.

...

#### 26 Prohibitions on disclosure

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

...

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

## **35 Law enforcement**

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

...

(c) the administration of justice;

...

## **Contempt of Court Act 1981**

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

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

## **Appendix 2: The information requests**

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### **Request 1 (the guidance request)**

My query relates to the management of Bute House while Alex Salmond was First Minister, and staffing around Mr Salmond.

1. Was advice, guidance or instructions given to female members of staff, temporary staff, police officers, security officers, civil servants, freelance staff, catering staff or others working in Bute House on whether they should be alone with Alex Salmond?
2. Were female catering staff – permanent, freelance or otherwise – specifically advised or instructed to avoid being alone with Alex Salmond, or to be cautious about doing so?
3. Who issued any guidance of this kind?
4. What prompted any advice or instructions that were given?
5. What discussions, correspondence or meetings took place arising from this issue?
6. Who was involved in these discussions at each stage?
7. Were these discussions or meetings minuted? If so, please supply full minutes.
8. If emails, texts or written correspondence exists relating to this matter, please supply them to us.

### **Request 2 (the complaints request)**

In addition, my Freedom of information request is also for specific anonymised complaints made against Mr Salmond during his time [as] First Minister.

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