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# Decision Notice 123/2022

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## Minutes of Asylum Board meetings

**Authority: Glasgow City Council**

**Case Ref: 202100191**

### Summary

The Applicant asked the Authority the minutes of the Glasgow Regional Partnership Board (Asylum) meetings from 23 March 2020 to 26 October 2020. The Authority provided redacted versions of the minutes, with information withheld under various exemptions. The Commissioner investigated and found that the Authority had partially complied with FOISA in responding to the request, but had incorrectly relied on all of the exemptions claimed at points in the minutes.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions); 30(b) and (c) (Prejudice to effective conduct of public affairs); 38(1)(b), (2A)(a), (5) (definitions of "the data protection principles", "data subject", "personal data", "processing" and "the UK GDPR") and (5A) (Personal Information); 47(1) and (2) (Application for decision by Commissioner)

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

Data Protection Act 2018 (the DPA 2018) section 3(2), (3), (4)(d), (10), (14)(a), (c) and (d) (Terms relating to the processing of personal data)

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

## Background

1. Following an attack at the Park Inn Hotel in Glasgow (which was being used to accommodate asylum seekers) on 26 June 2020, on 26 October 2020, the Applicant made a request for information to the Authority. She asked for the minutes for the Glasgow Regional Partnership Board (Asylum) (the RPB) meetings, with effect from 23 March 2020 to the date of the request.
2. The Authority responded on 27 October 2020, withholding the information requested under section 30(b)(i) and (ii) of FOISA (Prejudice to effective conduct of public affairs).
3. On 12 November 2020, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that she was dissatisfied with the decision because she did not accept that section 30(b) applied: attendees were able to request parts of the conversation be omitted from minutes and therefore free and frank views or deliberation would not be inhibited. As the request was made of public bodies and private contractors providing a public service, she considered the public interest in transparency and accountability required that the minutes were published in their entirety.
4. The Authority notified the Applicant of the outcome of its review on 9 December 2020, upholding the original decision to withhold and stating that the public interest in disclosure was outweighed by significant public interest in ensuring the RPB was able to meet and discuss these matters of critical importance without inhibition.
5. On 15 February 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of the Authority's review because she did not consider section 30(b)(i) and (ii) should apply and believed there to be a significant public interest in the activity and decisions of the RPB. She was dissatisfied that the Authority appeared to be operating a different response to transparency for these minutes than for other comparable boards and committees whose minutes and reports were regularly published.
6. The Applicant stated that she was not requesting publication of named individuals, asylum cases or details of decisions in these cases, as she acknowledged these were rightly confidential. She submitted that consistency in transparency had not been applied and she had received no substantive reasoning why the public interest in withholding the information was greater than in their publication. The Applicant considered it important for the people of Glasgow and the wider public to have scrutiny over decisions affecting the city and communities, which included asylum seekers.

## Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 4 March 2021, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was allocated to an investigating officer.

9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to:
  - whether section 30(b)(i) and (ii) of FOISA had been correctly applied to all the information in the minutes withheld, in particular whether all the information in the minutes would cause the requisite harm if disclosed;
  - whether personal data required to be withheld under section 38(1)(b) of FOISA;
  - whether some of the information could be provided to the Applicant at that stage, or to explain why the minutes of these specific meetings should be treated differently to other minutes of meetings regularly published or provided with redactions by the Authority;
  - what substantial inhibition would be caused by the disclosure of the advice or views in the withheld information;
  - who was likely to be inhibited by disclosure; and
  - details of why the public interest in withholding the information would outweigh its disclosure.
10. Following receipt of the request for submissions, the Authority provided the Applicant with redacted copies of minutes from the meetings of the RPB from March to October 2020 (having previously failed to provide copies of the minutes from August to October 2020), while maintaining the view that some of the information was exempt from disclosure.
11. The Applicant then provided further submissions to the investigating officer regarding her dissatisfaction with the application of exemptions to the redacted information, which she considered had been applied in blanket fashion rather with reference to specific information.
12. The Authority provided details to the Commissioner and the Applicant of the exemptions it now considered to apply to the minutes in addition to the previous reliance on section 30(b)(i) and (ii). These included section 38(1)(b) of FOISA, which was applied to details of attendees and contributors to the minutes, and section 30(c) of FOISA.
13. As these exemptions had not previously been notified to the Applicant and she had expressed her dissatisfaction at their use in redacting the minutes, the investigating officer advised that the application of these exemptions would be considered within the process of the investigation.

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

14. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

### **Section 38(1)(b) – Personal information**

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

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

*Is the information personal data?*

17. The first question the Commissioner must address is whether the information withheld by the Authority under this exemption is personal data for the purposes of section 3(2) of the DPA 2018, i.e. any information relating to an identified or identifiable living individual. "Identifiable living individual" is defined section 3(3) of the DPA 2018 – see Appendix 1. (This definition reflects the definition of personal data in Article 4(1) of the UK GDPR.)
18. Information will "relate to" a person if it is about them, is linked to them, has biographical significance for them, is used to inform decisions affecting them, or has them as its main focus.
19. The Commissioner is satisfied that the information being withheld under section 38(1)(b) is personal data: it comprises the names and contact details of living individuals and, as such, it is information that clearly relates to those individuals.

*Would disclosure contravene one of the data protection principles?*

20. The Authority argued that disclosure would breach the data protection principle in Article 5(1)(a) of the UK GDPR. Article 5(1)(a) states that personal data shall be processed "lawfully, fairly and in a transparent manner in relation to the data subject."
21. "Processing" of personal data is defined in section 3(4) of the DPA 2018. It includes (section 3(4)(d)) disclosure by transmission, dissemination or otherwise making available personal data. The definition therefore covers disclosing information into the public domain in response to a FOISA request.
22. The Commissioner must consider whether disclosure of the personal data would be lawful. In considering lawfulness, he must consider whether any of the conditions in Article 6 of the UK GDPR would allow the data to be disclosed.
23. The Commissioner considers that condition (f) in Article 6(1) is the only condition which could potentially apply in the circumstances of this case.

*Condition (f) – legitimate interests*

24. Condition (f) states that processing shall be lawful if it is necessary for the purposes of legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.
25. Although Article 6 states that this condition cannot apply to processing carried out by a public authority in the performance of their tasks, section 38(5A) of FOISA makes it clear that public authorities can rely on Article 6(1)(f) when responding to requests under FOISA.
26. The three tests which must be met before Article 6(1)(f) can be met are as follows:
  - (i) Does the Applicant have a legitimate interest in the personal data?
  - (ii) If so, would the disclosure of the personal data be necessary to achieve that legitimate interest?

- (iii) Even if the processing would be necessary to achieve the legitimate interest, would that be overridden by the interests or fundamental rights and freedoms of the data subjects which require protection of personal data (in particular where the data subject is a child)?

27. There is no presumption in favour of the disclosure of personal data under the general obligation laid down by section 1(1) of FOISA. Accordingly, the legitimate interests of the Applicant must outweigh the rights and freedoms or legitimate interests of the data subjects before condition (f) will permit the data to be disclosed. If the two are evenly balanced, the Commissioner must find that the Authority was correct to refuse to disclose the personal data to the Applicant.

*Does the Applicant have a legitimate interest?*

- 28. The Applicant has stated that, while she does not require the publication of any asylum cases or details on the decisions of these cases, she is concerned that the minutes requested have been treated differently by the Authority to other similar boards and committees, the minutes and reports of which are routinely published, and that other comparable strategic and advisory groups at national level such as, the Scottish Government Homelessness Prevention Strategy or the Covid-19 Advisory Groups, publish their minutes.
- 29. The Applicant also noted that the Authority was the only local authority in Scotland to have a voluntary agreement with the Home Office to act as dispersal area for asylum seekers. She submitted that it was important for the people of Glasgow, as well as the wider public, to have scrutiny over decisions affecting their city and communities.
- 30. The Authority acknowledged that it had not asked the Applicant what her legitimate interests were, but it submitted that the Applicant had referred to the public interest in the disclosure of the information and made specific references to the incident at the Park Inn Hotel.
- 31. The Commissioner agrees that, in the circumstances, the Applicant has a legitimate interest in the personal data. He also considers there is a wider interest in understanding the decision-making processes of the Authority, and its involvement in the placement, transfer and support of asylum seekers, particularly in light of the Park Inn Hotel incident.

*Is disclosure necessary to achieve that legitimate interest?*

- 32. Here, “necessary” means “reasonably” rather than absolutely or strictly necessary. The Commissioner must therefore consider whether the disclosure is proportionate as a means and fairly balanced as to the aims to be achieved, or whether the Applicant’s legitimate interests can be met by means which interfere less with the privacy of the data subjects.
- 33. The Commissioner notes that, if the information the Applicant has requested is disclosed in response to a FOISA request, it is, in effect, disclosed into the public domain.
- 34. While the Authority acknowledged that there was significant public interest in the housing and support of asylum seekers, it argued that the disclosure of personal data would not be necessary to achieve any legitimate interest that the Applicant might have in the information sought and that there could be no public interest in disclosing individual identities which could allow staff to be targeted.
- 35. The Commissioner notes the Applicant’s reasons for believing the Authority should disclose information in line with other similar publication of minutes and he accepts that the Applicant has a legitimate interest in understanding which individuals or organisations expressed views during the RPB meetings. The Commissioner can identify no other viable means of meeting

the Applicant's legitimate interests than providing the withheld information. In all the circumstances, the Commissioner is satisfied that disclosure of the information is necessary for the purposes of the Applicant's legitimate interests.

*Balancing the legitimate interests of the Applicant and the legitimate interests or fundamental rights and freedoms of the data subjects*

36. Having found that disclosure is necessary for the purposes of the Applicant's legitimate interests, the Commissioner must now balance the legitimate interests in disclosure against the individuals' interests or fundamental rights and freedoms.
37. The Commissioner's [guidance on section 38 of FOISA](#)<sup>1</sup> lists certain factors that should be taken into account in balancing the interests of the parties. He makes it clear that, in line with Recital (47) of the General Data Protection Regulation, much will depend on the reasonable expectations of the data subjects and that these are some of the factors public authorities should consider:
  - (i) Does the information relate to an individual's public life (their work as a public official or employee) or their private life (their home, family, social life or finances)?
  - (ii) Would disclosure cause harm or distress?
  - (iii) Whether the individual has objected to the disclosure.
38. As noted above, disclosure under FOISA is public disclosure; information disclosed under FOISA is effectively placed into the public domain.
39. The Applicant has questioned why, in this case, identification of the individuals concerned would pose any issues. The Applicant submits that the Authority has not identified which of the conditions for section 38(1)(b) are met and questions why the public interest favours the processing of the data as all individuals attending the RPB meetings hold substantial levels of seniority and are well aware of the public nature of their role and the responsibilities. The Authority has not, in the Applicant's view, stated whether it believes distress or damage would be caused to the data subjects nor whether the data subjects have refused consent. She submitted that the RPB meetings related only to individuals' public roles and professional function and in no way to their private lives, contact data or other personal data.
40. The Commissioner acknowledges that some of the withheld information relates to individuals' public life (as employees of specific organisations), and this adds some weight in favour of disclosure.
41. The Authority told the Commissioner that it generally considers staff on its leadership grades (grade 9 and above) should have a reasonable expectation that their identities will be disclosed on the basis of seniority. However, it did not take this approach in this case due to the sensitive nature of the information and the possible fallout from releasing their names into the public domain in connection with these issues.
42. The Authority explained that it had taken the same approach with the other individuals from external organisations whose personal data was contained within the requested information. The Authority argued that individuals from private sector companies were unlikely to have any expectation that their personal data would be released into the public domain in response to an FOI request.

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<sup>1</sup> <https://www.itspublicknowledge.info/sites/default/files/2022-04/BriefingSection38PersonalInformationGDPR.pdf>

43. The withheld information concerns the housing and support of asylum seekers in Glasgow, a subject that is important to many people across Scotland. There is no doubt that there is a large body of people who would like to know who was involved in making decisions affecting their communities. The Authority have suggested that those attending the RPB meetings could be targeted if their names were disclosed, given the contentious nature of the subject.
44. The Commissioner is satisfied that the legitimate rights and freedoms of individuals who hold junior or less public facing roles in their organisation are not outweighed by the Applicant's legitimate interests in obtaining the information.
45. However, the Commissioner does not agree that the names of individuals holding senior or public-facing roles should be withheld. In his view, individuals employed in a senior or public facing role should be disclosed, regardless of whether they are employed by the Authority or an external organisation.
46. The Authority has argued that individuals from private sector organisations would be unlikely to have any expectation that their personal data would be released into the public domain in response to an FOI request, but the Commissioner does not accept these arguments. All organisations involved with Scottish public authorities are aware that FOI legislation exists and that disclosure in response to an FOI request is a real possibility. It is the Commissioner's view that senior or public facing members of these organisations must (or should) have an expectation that their personal data may be disclosed.
47. In reaching this view, the Commissioner has considered the [guidance](#)<sup>2</sup> produced by the (UK) Information Commissioner regarding the personal data of representatives from other organisations, which states (at page 21):
- The more senior the representative of the other organisation, the more likely it is that it is reasonable to release their names.*
- Also, if someone normally acts [as] a spokesperson for the other organisation, disclosure of their name is more likely to be reasonable.*
48. The Authority has referred to the "potential fallout" from disclosing the names, and has argued that there is "...a significant risk of the individuals being targeted if their names and contact details were to be released into the public domain." However, the Authority has not provided the Commissioner with any evidence to indicate what form this "fallout" might take, or the nature or likelihood of the "targeting" that might be caused by disclosure of the personal data.
49. After carefully balancing the legitimate interests of the Applicant against the interests or fundamental rights and freedoms of the data subjects, the Commissioner finds that the legitimate interests served by disclosure of the names of more junior or less public-facing staff are outweighed by the unwarranted prejudice that would result to the rights and freedoms or legitimate interests of individuals who hold these junior roles. Condition (f) in Article 6(1) of the GDPR cannot, therefore, be met in relation to the names of junior members of staff.
50. In the absence of a condition in Article 6 of the GDPR allowing personal data to be disclosed, the Commissioner has concluded that disclosing the names of individuals who hold junior roles would be unlawful.

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<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1187/section\\_40\\_requests\\_for\\_personal\\_data\\_about\\_employees.pdf](https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf)

51. However, the Commissioner also finds, that the legitimate interests served by disclosure of the withheld personal data are not outweighed by the unwarranted prejudice that would result to the rights and freedoms or legitimate interests of individuals who hold senior or public facing roles. These individuals already have a public profile and a level of seniority whereby their expectations of disclosure of their personal data are significantly greater than those of more junior staff. It is the Commissioner's view that condition (f) in Article 6(1) of the GDPR can, therefore, be met in relation to the names of individuals who hold senior posts or have public facing roles.

#### *Fairness*

52. As the Commissioner has determined that the processing of the personal data of senior individuals would be lawful, and bearing in mind his reasoning in reaching that conclusion, he can identify no reason for finding that the disclosure of the names of individuals in a senior or public-facing role would be other than fair.
53. In relation to the personal data of junior staff, as the Commissioner has concluded that the processing of this personal data would be unlawful, he is not required to go on to consider separately whether disclosure of their names would otherwise be fair and transparent.

#### *Conclusion on the data protection principles*

54. For the reasons set out above, the Commissioner is satisfied that the disclosure of the names of junior or less public-facing staff would breach the data protection principles in Article 5(1)(a) of the GDPR, but disclosure of the names of individuals with senior or public facing roles would not constitute such a breach.
55. Consequently, he is satisfied that, while the personal data of junior staff are exempt from disclosure under section 38(1)(b) of FOISA, the personal data of individuals with senior or public-facing roles have been wrongly withheld under this exemption. The Commissioner also considers that, in order to assist the Applicant and the public in understanding who provided comments within the minutes, where names of junior staff are to be redacted, the organisation they were representing should be inserted in place of the individual names.
56. The Commissioner requires the Authority to provide the Applicant with the names of individuals holding senior or public-facing roles that have been wrongly withheld under section 38(1)(b) of FOISA.

#### **Section 30(b)(i) of FOISA**

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

#### *The Applicant's submissions – sections 30(b)(i) and (ii)*

59. The Applicant provided combined submissions with regard to sections 30(b)(i) and (ii).
60. The Applicant submitted that the Authority had not demonstrated what substantial prejudice would be caused by disclosure, or exactly what substantial inhibition would occur or relating



to which issues specifically. For example, in her view, the Authority did not assert that the minutes contained “genuinely sensitive information” which there was a need to protect. Therefore, the Applicant considered there to be no specified harmful effect as such, beyond vague allusions to “substantial inhibition”.

61. The Applicant also considered that the redactions had been applied in a blanket fashion as there was no differentiation between the diverse items discussed or how they related to the exemptions applied.
62. The Applicant also considered that the Authority had not described or evidenced the magnitude of risk that substantial inhibition would occur, or its link to disclosure. In her view, the Authority has not acknowledged that the representatives at a meeting have discretion over what appears in the minutes and what they would prefer omitted. The Applicant believed that all representatives were of similar seniority and should be well aware of the public nature of their duties and able to manage their discussions and recording of said discussions appropriately.
63. The Applicant noted that, if those attending the meetings understood both the public nature of and public interest in these matters, and were able to conduct their discussions appropriately, the disclosure of the minutes should not inhibit them in future comparable meetings.

#### *The Authority's submissions*

64. The Authority explained that the purpose of the RPB was primarily to improve the outcomes for asylum seekers and communities in relation to asylum dispersal and other wider immigration schemes, as required. It argued that the nature of the information generated from RPB discussions is inherently sensitive.
65. The Authority referred to a specific example of advice contained in the documentation and explained the circumstances around that advice. The Authority contended that the ability of experts to provide professional judgement could be inhibited, if such advice was not able to be provided freely and frankly.
66. The Authority considered it essential that the organisations which are part of the RPB should be able to obtain professional advice in response to emergency situations. It submitted that, there was a real risk that disclosure of this type of information could inhibit advice that might be sought in the future, with the real risk that individuals providing such advice could be substantially inhibited if they felt they were not able to communicate freely and frankly. Given the circumstances, advice of this nature would not be considered part of “day-to-day” professional duties.

#### *The Commissioner's findings*

67. The Commissioner has considered all the submissions made by the Authority and the Applicant, along with the withheld information under consideration.
68. The Commissioner notes that very little information is being withheld under section 30(b)(i) of FOISA. The information that is being withheld is part of a sentence in section 4a. of the 7 July 2020 RPB minutes.
69. The Commissioner accepts that there was a need for RPB members to seek urgent advice at a time of national emergency.

70. However, the Commissioner does not accept that the disclosure of the information withheld in section 4a. of the 7 July 2020 minutes would dissuade RPB members from sharing advice in the future.
71. As the Commissioner has found that section 30(b)(i) of FOISA does not apply to this information, he is not required to consider the public interest at this point. He requires the Authority to disclose this information to the Applicant.

### **Section 30(b)(ii) - substantial inhibition to free and frank exchange of views**

72. The Authority is withholding some information under section 30(b)(ii) of FOISA. Section 30(b)(ii) provides that information is exempt if its disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
73. As is the case with the exemption contained in section 30(b)(i), the chief consideration when applying the exemption in section 30(b)(ii) is not whether the information constitutes opinion or views, but whether the disclosure of that information would, or would be likely to, inhibit substantially the exchange of views. The inhibition in question must be substantial and therefore of real and demonstrable significance.

#### *The Applicant's submissions*

74. As noted above, the Applicant's arguments with regard to the information withheld under sections 30(b)(i) and (ii) were combined and are detailed under the section 30(b)(i) arguments.

#### *The Authority's submissions*

75. The Authority submitted that the nature of the issues discussed at the RPB were of a very sensitive nature. The Authority referred to the specific information it was withholding under section 30(b)(ii) of FOISA, and provided the Commissioner with its reasons for considering it to fall under the scope of the exemption.
76. The Authority argued that the examples it referred to related to the views and opinions of individuals relating to proposals and plans regarding asylum delivery. It argued that it was important that these individuals could have honest and difficult discussions in order to come to solutions and improve outcomes for asylum seekers. The Authority submitted that, throughout the withheld information, representatives of the RPB set out their views on numerous contentious issues. It argued that there was a very real risk that such candid discussions would be inhibited if this information were to be released into the public domain, as the individuals concerned would not feel they could express themselves as openly as they otherwise would.
77. The Authority argued that representatives on the RPB would likely be substantially inhibited from exchanging free and frank views if the information requested were to be disclosed. The Authority submitted that this would include officials from the Authority, the Home Office, the Mears Group, Migrant Help, COSLA and the Scottish Government. The Authority argued that RPB meetings contained the free and frank views of these individuals. It was necessary that officers were able to have such discussions and raise issues in a confidential forum.
78. The Authority reiterated that, if this type of information were to be disclosed, there was a real risk that the individuals would be inhibited from having these types of discussions, to the detriment of the services being delivered. In addition, it argued that disclosed would carry a real risk that the external organisations would dispense with or otherwise limit their scope,

membership or agenda, because of concerns as to the proceedings being generally available to the public. Again, this would undoubtedly impact on the work that the Authority carried out with asylum seekers.

79. The Authority referred to the RPB's terms of reference which set out that, as part of the Home Office's commitment to working closer in partnership with local authorities and providers for the delivery of asylum dispersal, they recognise that these forums are essential in ensuring local issues and provider performance are addressed. The Authority submitted that these meetings are intended to improve joint engagement and create effective partnerships between the Authority, the Home office and the service providers, i.e. the Mears Group. The Authority argued that participants at these meetings would expect that most of the issues raised would be on a confidential basis.
80. The Authority submitted that disclosure of the information would be likely to inhibit discussions and impact negatively on the engagement between the organisations. Whilst each of the organisations involved have their own responsibilities and roles with regard to asylum dispersal, the Authority noted that there is no requirement to have these meetings. The Authority submitted that the views would not be communicated and received as part of the individuals expected day-to-day professional duties. This was recognised and was part of the basis of why these meetings were initially established.

#### *The Commissioner's views*

81. The Commissioner notes that information has been withheld under section 30(b)(ii) of FOISA in each set of minutes. The Commissioner has considered all of the submissions made by the Authority, along with the withheld information under consideration.
82. The Commissioner considers that the exemption cannot be upheld in relation to some of the information in the Minutes from 4 March, 15 April, 27 May, 10 June, 22 June , 7 July, 7 September, 6 October and 20 October 2020. In each instance, he does not find the withheld information to be particularly sensitive, nor does he accept that its disclosure would prevent individuals from sharing their views in future. As he finds that the exemption is not engaged, and as no other exemptions have been applied to this information, he requires the Authority to disclose to the Applicant the information that he has found not exempt under section 30(b)(i).
83. The Commissioner accepts, however, that officials who attended RPB meetings or who represent organisations which are members of the RPB, will on occasion require a private space to discuss matters freely and frankly, particularly when those matters are of a sensitive nature.
84. The Commissioner will not go into detail for each case where he finds the exemption applies, but would note that in each case where he has upheld the exemption, it is because he is satisfied that disclosure would lead to the harm claimed by the Authority. Overall, the Commissioner is satisfied that the exemption contained in section 30(b)(ii) applies to some information in the Minutes of 4 March, 15 April, 27 May, 10 June, 22 June, 7 July, 11 August, 7 September, 22 September and 20 October 2020.
85. The Commissioner considers that disclosure of this information would be likely to stifle the frankness and candour of comments on similarly sensitive issues in future and would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. The Commissioner is therefore satisfied that this information is exempt from

disclosure under section 30(b)(ii) of FOISA. He will now go on to consider the application of the public interest test in section 2(1)(b) of FOISA.

### ***Public interest test***

86. The exemption in section 30(b)(ii) is subject to the public interest test required by section 2(1)(b) of FOISA. Where this exemption is correctly applied, the Commissioner must consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

### ***The Authority's submissions***

87. The Authority noted that the purpose of the RPB meetings was to encourage joint working and facilitate a forum whereby issues around asylum could be addressed. It argued that there was a strong public interest in avoiding significant inhibition of officials exchanging free and frank views during these meetings. The Authority submitted that, if officials did not feel comfortable expressing their views, there would be a substantial risk that key points or issues would not be addressed fully. If this occurred, it would have detrimental impact on the RPB's ability to ensure the on-going delivery of asylum dispersal, as key concerns and considerations might be overlooked when decisions were being made.
88. The Authority recognised that there was a public interest in the matters discussed at RPB meetings but, on balance, it took the view that there was a greater public interest in withholding the information than in its disclosure.

### ***The Applicant's submissions***

89. The Applicant was concerned that the Authority had not set out the competing arguments for disclosing and withholding the information. The Applicant reiterated that representatives on the RPB sat on many other boards which published their minutes, and the names and positions of representatives, as a matter of course: the Authority had not made any arguments as to why or how these minutes differed from those of other boards, which met to discuss serious, sensitive and complex issues.
90. The Applicant was not satisfied that the Authority recognised that both asylum seekers and communities also formed part of the public and, in this case, asylum seekers, communities and the wider public had a significant interest in the RPB's decisions. Dispersal and the related Asylum Accommodation and Support Contracts were also a UK-wide policy and practice that impact a total of seven regional areas, so the discussions of the RPB were relevant not only to Glasgow and Scotland but also to all other dispersal areas and anyone interested in such important aspects of governance.
91. The Applicant claimed that many of the redacted passages related to very important and ongoing matters, such as the pausing and/or restarting of asylum routing to the city of Glasgow. The Applicant considered it was in the interest of asylum seekers, communities and the public if, for example, the asylum population was to be increased or decreased in the context of continued use of hotel accommodation. She also submitted that the information related to matters of national and local governance, as well as public spending.
92. Understanding and scrutinising how public authorities and their contractors were "improving outcomes for asylum seekers and communities" were, in the Applicant's view, in the interests of and serious concern and benefit to these specific groups and the public at large. The period covered by the original request spanned a global public health crisis, the accommodation of asylum seekers in hotels, the issues regarding the Park Inn incident, all

outcomes of the utmost seriousness, which needed to be scrutinised both by those directly affected and the wider public.

93. The Applicant also believed there were inconsistencies in how the Authority had redacted information across the minutes, and commented that it was not acceptable for the Authority to only disclose more positive information, to avoid embarrassment or possible loss of confidence.

*The Commissioner's conclusions on the public interest test*

94. The Commissioner has considered all of the arguments presented to him in relation to the public interest in withholding or disclosing the information in the RPB minutes. As noted above, the information withheld under section 30(b)(ii) of FOISA is contained in each set of minutes.
95. The Commissioner acknowledges that there is a public interest in allowing RPB members a private space for views to be exchanged and discussed and, having considered the information, it is his view that disclosure of some of these views would, or would be likely to, limit frankness or willingness to comment in similar circumstances in the future. If this occurred, the Commissioner is satisfied that it would diminish the quality of the views provided for the purposes of deliberation, and it would be contrary to the public interest.
96. The Commissioner accepts that some of the information withheld under section 30(b)(ii) of FOISA contains the frank, personal views of RGB members, which were clearly not intended to be placed in the public domain. The Commissioner is satisfied that disclosure of these comments would dissuade other members of the RPB from sharing their views so freely in future, and this would have a negative impact on the openness of the discussions held by the RPB, which would not be in the public interest.
97. In addition to personal comments, the Commissioner notes that some of the withheld sections contain comments on proposed plans, actions and strategies that had yet to be finalised. While there is clearly a public interest in knowing the Authority's comments on specific policies and plans regarding asylum seekers, the Commissioner is satisfied in the circumstances that there is a greater public interest in allowing individuals and authorities a private space to critique proposals that will impact on both asylum seekers and the wider public.
98. The Commissioner notes that most of the views exchanged in these documents relate to new or proposed actions which had not yet been finalised. Other views contain views on past events or proposals. The date of the request was very close to when these comments were sought and provided, and this lends the views more sensitivity. The Commissioner must consider the circumstances at the time of the request (or, at the latest, that of the request for review) and, in his view, disclosure at that time would have had a "chilling" effect on discussions about proposed policies and plans that were still under debate, and this would not have been in the public interest.
99. In relation to the views on past events or proposals, the Commissioner considers that disclosure of such open and reflective assessments is not in the public interest, as he considers it likely that similar views would not be expressed in the future, and this would be to the detriment of future decision-making on policies affecting asylum seekers.
100. On balance, the Commissioner has concluded that there is a significant, and greater, public interest in the Authority (and the RPB) being able to provide and obtain such comments in future, and in preventing individuals from being inhibited from exchanging similar views.

101. Therefore, the Commissioner finds that the public interest in disclosing parts of the withheld information is outweighed by that in maintaining the exemption in section 30(b)(ii) of FOISA. Consequently, he is satisfied that the Ministers have correctly withheld some information in the minutes of 22 June and 7 July 2020, under this exemption.
102. However, the Commissioner has reviewed the remaining information that he had found to be exempt under section 30(b)(ii) of FOISA, and, on balance, he considers that the public interest favours its disclosure in some instances. He is satisfied that these views provide comment or ask questions about actions or decisions taken by RPB members, and they influenced the decision-making processes of the RPB, of which the Authority is a key member.
103. The Commissioner is satisfied that there is an over-riding public interest in knowing how the RPB members discussed and reached decisions on the transfer and housing of asylum seekers in Glasgow. As alluded to previously, the housing of asylum seekers impacts on accommodation availability, community initiatives, health care provision, education, transport and policing across Glasgow. The inhabitants of Glasgow are entitled to know how this process is handled and what considerations are taken into account when decisions are made.
104. While the Commissioner acknowledges the importance of individuals being able to express their views on emerging policies and plans in confidence, he considers there also to be a strong public interest in transparency regarding the views exchanged by RPB members (including the Authority) in relation to the housing and transfer of asylum seekers.
105. Consequently, the Commissioner has concluded that the public interest requires disclosure of some information withheld under section 30(b)(ii) of FOISA, in the minutes of 4 March, 15 April, 27 May, 10 June, 22 June and 7 July 2020. Guidance will be provided to the Authority with regard to the information to be disclosed.

### **Section 30(c) - Prejudice to the effective conduct of public affairs**

106. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs." The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
107. In order for the exemption in section 30(c) to be upheld, the prejudice caused by disclosure must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case-by-case basis, taking into consideration the content of the information and all other relevant circumstances.

#### *The Authority's submissions*

108. The Authority argued that the majority of the information withheld under section 30(c) of FOISA was operationally sensitive and consisted of proposals and plans on how to deal with issues relating to asylum dispersal. It explained that these plans and proposals were often in response to immediate situations, providing examples. In order for the Authority to be able to

carry out its statutory functions with regard to asylum seekers and refugees, the Authority argued that it was essential that officials were able to communicate fully and frankly in order to effectively plan and manage services.

109. The Authority submitted that RPB meetings provided a forum whereby organisations could identify issues and offer solutions. It argued that the Authority should be able to have such free and frank discussions without the adverse effect of public scrutiny, especially in regard to the immediate response to emergency situations. The Authority submitted that release of the information could negatively impact ongoing relationships with the external stakeholders.
110. The Authority explained that RPB meetings were intended to promote joint working and create effective partnerships among the Authority, the Home Office, Scottish Government, service providers and charity organisations. It stressed the importance of the Authority being able to continue to develop collaborative relationships with these stakeholders. The Authority contended that disclosure of this information would dissuade external parties from participating fully in these meetings and, if this occurred, it would be to the substantial detriment of the Authority's ability to deliver services.
111. The Authority explained that, at the time of the initial request, it sought the views of the organisations concerned on the release of the information. It raised this matter at a meeting of the RPB and all of the organisations advised that, in their view, the information should not be disclosed. The Authority provided the Commissioner with subsequent written comments from Mears, Migrant Help and its own departments, maintaining that RPB minutes should be exempt under FOISA.
112. The Authority submitted that, under asylum legislation, there is no statutory requirement for the Home Office or the Mears Group to engage with the Authority when procuring housing stock. It argued that it had an ongoing relationship with these organisations and, as part of the RPB, it worked closely in partnership with them. The Authority contended that, if there were to be a breakdown in these relationships, it would create a substantial risk to its ability to deliver asylum services. The Authority noted that RPB members had agreed that disclosure of the information would substantially inhibit partnership working, particularly if there was no longer a confidential forum for discussions to take place. The Authority provided submissions relating to reluctance to share information with the Authority on these types of issues, if the information was disclosed.

#### *The Applicant's comments*

113. The Applicant provided arguments as to why, in her view, the information withheld was unlikely to evidence substantial prejudice and submitted that the information withheld was likely to refer to the effect of exit planning and movement of asylum seekers from hotels. She considered substantial prejudice was unlikely as there is likely to be a lack of sensitive information in terms of what was likely to be in the minutes: the minutes were unlikely to contain the plan itself. Therefore, she was not satisfied that the sensitivity of the information would necessarily cause substantial prejudice to the conduct of public affairs.
114. The Applicant also noted that the detail of hotel exit planning was public knowledge early in the pandemic and that Mears had published a statement on their website on the same day as the 7 July RPB meeting, outlining their movement of asylum seekers to dispersed accommodation (with former Park Inn residents being prioritised). Mears had also previously published a statement in May 2020, advising on their development of plans to dispersed accommodation.

115. The Applicant also stated that, because the process is by then in the past, the passage of time meant it was much harder to argue that the disclosure of the information could cause significant harm to the process.

*The Commissioner's views on section 30(c)*

116. The Commissioner notes the comments from the Applicant above, but would point out that this investigation and subsequently the decision must consider the information as held at the time of the request and whether the exemptions applied were correctly relied upon at that time (or, at the latest, the time of the review) regardless of the subsequent passage of time.

117. Information can only be exempt under section 30(c) of FOISA if its disclosure would prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. Having considered the nature and content of the withheld information, together with the Authority's submissions, the Commissioner accepts that disclosure of some of the withheld information would be likely to cause substantial prejudice to the effective conduct of public affairs.

118. He finds that disclosure of this information would have a detrimental impact on the RPB's ability to deliver agreed outcomes, which in turn would impede the Authority's ability to carry out its functions in relation to asylum services. If this occurred, the Commissioner is satisfied that it would, or would be likely to, prejudice substantially the effective conduct of public affairs and that the Authority was entitled to apply the exemption in section 30(c) of FOISA to this information.

119. However, the Commissioner also finds that some of the information has been wrongly withheld under this exemption. In particular, he finds that there is information contained in the minutes of 4 March, 27 May, 10 June and 7 July 2020 which has been wrongly withheld under section 30(c) of FOISA.

120. In these cases, it appears to the Commissioner that the Authority has incorrectly applied this exemption to certain information or comments. As the Commissioner does not accept the application of section 30(c) to this information, he is not required to consider the public interest test in section 2(1)(b) of FOISA.

121. The Commissioner will now go on to consider the public interest test in relation to the information that he has found to be correctly withheld under section 30(c) of FOISA.

***Public interest test***

122. As mentioned above, the exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.

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

*The Authority's submissions about the public interest*

124. The Authority acknowledged the significant public interest in openness and transparency and recognised that any request for information under section 1(1) of FOISA was potentially in



the public interest. The Authority also considered the subject matter of the request, and accepted that there was a public interest in disclosure of matters relating to the provision of services for asylum seekers.

125. However, the Authority also considered the factors in favour of maintaining the exemption, and reiterated that disclosure of the information would, or would be likely to, prejudice substantially, the effective conduct of public affairs. The Authority stated that it had taken into account the likely negative impact that disclosure of the information would have on its ability to plan and deliver services, as well as its ability to work with external organisations. On balance, the Authority concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure of the information.

#### *The Applicant's submissions about the public interest*

126. The Applicant reiterated her previous argument that asylum seekers (as well as refugees, civil society organisations etc), are not the only parties with an interest in this subject matter: so are members of the public. More widely, she submitted that hotel exit planning pertains to the use of public funds and procurement, and it is therefore squarely in the public interest to have information on how these funds are spent. The use of hotels to accommodate asylum seekers was a highly significant event in Glasgow, involving hundreds of people and significant amounts of public money. The Applicant noted that some of the minutes took place after the incident at the Park Inn, also noting the Commissioner's guidance that "possible embarrassment to government or other public authority officials" should not be taken into account when applying the public interest test.

#### *The Commissioner's view on the public interest - section 30(c)*

127. The public interest, in the context of FOISA, should be considered as "something which is of serious concern and benefit to the public". The nature of this case and the people affected by these circumstances determine that there is a public interest in ensuring that such policies and planning are considered in detail and planned and implemented adequately, to ensure benefit and safety for the asylum seekers and the communities in which they are placed.
128. The Commissioner has taken account of all the relevant submissions, together with the withheld information in this case.
129. The Commissioner understands the situation surrounding housing of asylum seekers, especially in light of the Park Inn incident and the additional impact of the pandemic on those plans in a rapidly changing environment. He acknowledges that public authorities have been required to make decisions, implement plans and processes, and consider their impacts, in difficult circumstances.
130. Having carefully considered the circumstances of this case, the Commissioner notes that, while he considered that the Authority correctly relied upon section 30(c) to withhold some of the information in the minutes, in a number of cases the public interest favours disclosure – where, in all the circumstances, the public interest in adequate scrutiny should prevail over the public interest in securing the effective delivery of a key public service.

#### **Guidance to the authority on disclosure**

131. Where the Commissioner has decided that further information should be disclosed to the Applicant, guidance will be provided to the Authority to assist in its preparation of the information in the minutes for disclosure.

## **Decision**

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

The Commissioner finds that by correctly withholding some information under section 38(1)(b), section 30(b)(i) and (ii), and section 30(c) of FOISA, the Authority complied with Part 1.

However, by wrongly withholding other information under section 38(1)(b), section 30(b)(i) and (ii), and section 30(c) of FOISA, the Authority failed to comply with Part 1 (specifically, section 1(1)).

The Commissioner therefore requires the Authority to provide the Applicant with a revised copy of the minutes from March 2020 to October 2020, including the information wrongly withheld, by 28 December 2022.

## **Appeal**

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

## **Enforcement**

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

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

**11 November 2022**

## **Appendix 1: Relevant statutory provisions**

### **Freedom of Information (Scotland) Act 2002**

#### **1 General entitlement**

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

...

- (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 –

...

- (e) in subsection (1) of section 38 –
  - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied.

#### **30 Prejudice to effective conduct of public affairs**

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-
  - (i) the free and frank provision of advice; or
  - (ii) the free and frank exchange of views for the purposes of deliberation; or
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

...

#### **38 Personal information**

- (1) Information is exempt information if it constitutes-

...

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

...

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

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

...

...

(5) In this section-

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

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

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

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

...

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

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

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

...

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

(1) A person who is dissatisfied with -

(a) a notice under section 21(5) or (9); or

(b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

(2) An application under subsection (1) must -

(a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);

(b) state the name of the applicant and an address for correspondence; and

(c) specify –

(i) the request for information to which the requirement for review relates;

- (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);  
and
- (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

...

## UK General Data Protection Regulation

### Article 5 Principles relating to processing of personal data

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

...

### Article 6 Lawfulness of processing

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

...

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

...

## Data Protection Act 2018

### 3 Terms relating to the processing of personal data

...

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

...

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

...

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

...

(14) In Parts 5 to 7, except where otherwise provided –

(a) references to the UK GDPR are to the UK GDPR read with Part 2;

...

(c) references to personal data, and the processing of personal data, are to personal data and processing to which Part 2, Part 3 or Part 4 applies;

(d) references to a controller or processor are to a controller or processor in relation to the processing of personal data to which Part 2, Part 3 or Part 4 applies.

...