



Scottish Information  
Commissioner  
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# Decision Notice 132/2024

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## Notification of UK Government concerns regarding KPMG

**Authority: Scottish Ministers**  
**Case Ref: 202200478**

### Summary

The Applicant asked the Authority for any communications from the UK Government about its concerns regarding KPMG following its “threat” to ban KPMG from bidding for government contracts. The Authority disclosed some information to the Applicant, withholding other information on the basis that disclosure would substantially inhibit the free and frank exchange of views. The Commissioner investigated and found that the Authority was wrong to withhold the information. He required the Authority to disclose the information to the Applicant.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 30(b)(ii) (Prejudice to the effect conduct of public affairs); 47(1) and (2) (Application for decision by Commissioner)

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. On 3 February 2022, the Applicant made a request for information to the Authority. Among other things, they asked for any notifications or communications held by the Authority,

including the dates, sent by the UK Government about its concerns regarding KPMG (which led to it threatening to ban KPMG from public sector work after a series of scandals).

2. The Authority responded on 2 March 2022. The Authority refused to provide the information requested, arguing disclosure of the information would cause substantial harm to the free and frank provision of views and advice, in terms of section 30(b) of FOISA.
3. On 3 March 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that they were dissatisfied with the decision for the following reasons:
  - providing a date would not prevent the free and frank exchange of views and argued that, given the Authority awarded a contract to KPMG in December 2021, it was in the public interest to understand whether it had been alerted to the UK Government's concerns at that time
  - a free and frank exchange of views required more than a notification of concern; it required a response from the Authority
  - given that the Authority and KPMG had ultimately accepted the UK Government's concerns, they could not see why those views should be withheld
  - they disputed that disclosure of the withheld information would cause substantial harm.
4. The Authority notified the Applicant of the outcome of its review on 22 April 2022. The Authority disclosed the date of a UK Government-led meeting attended by Authority officials (at which KPMG was discussed) and supplied an extract of the meeting note. The Authority withheld the remainder of the information under section 30(b)(ii) of FOISA for the following reasons:
  - discussions related to a potential ruling on a supplier's financial probity, which it considered to be a sensitive matter
  - in order to come to a settled view, Ministers and officials needed a private space where all options can be freely and frankly considered
  - disclosure would undermine frank discussion between Ministers and officials and, consequently, reduce the quality of decision-making, which would not be in the public interest.
5. On 26 April 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that they were dissatisfied with the outcome of the Authority's review because they believed section 30(b)(ii) did not apply to the withheld information and that, in any case, the public interest favoured disclosure of the withheld information.

## **Investigation**

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

7. On 1 June 2022, 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, and the case was subsequently allocated to an investigating officer.
8. 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 primarily related to why the Authority believed that section 30(b)(ii) was engaged and what its public interest arguments were.

## Commissioner's analysis and findings

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

### Context

10. KPMG provide audit, advisory and consultancy services to private and public sector organisations.
11. The Financial Reporting Council (FRC) announced sanctions against KPMG, including a £13m fine, regarding misconduct in relation to one of its clients (Silentnight), on 5 August, 2021<sup>1</sup>.
12. The FRC subsequently announced a Formal Complaint against KPMG, on 1 September 2021, in relation to its provision of "false and misleading" information to the FRC regarding the audits of two further clients (Carillion and Regeneris)<sup>2</sup>.
13. On 1 December 2021, it was reported in the media that the UK Government was actively considering banning KPMG from bidding for government contracts<sup>3</sup>. However, on 13 December 2021, the Authority awarded a contract worth approximately £550,000 to KPMG in relation to the mapping of current health and social care delivery across Scotland.
14. KPMG withdrew from bidding for UK Government contracts on 17 December 2021. On 30 January 2022, it was reported in the media that KPMG had also withdrawn from bidding for contracts with the Authority<sup>4</sup>.
15. On 10 January 2022, the FRC opened a disciplinary tribunal into KPMG, in respect of its audits of Carillion and Regeneris<sup>5</sup>. Later that month, the FRC fined KPMG £3m in relation to failures in respect of another company (Conviviality)<sup>6</sup>.
16. In February 2022, the UK Government brought legal action against KPMG seeking £1.3bn in damages in relation to audit negligence in respect of Carillion<sup>7</sup>.

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<sup>1</sup> [FRC announces sanctions against KPMG in relation to Silentnight](#)

<sup>2</sup> [FRC announces Formal Complaint against KPMG](#)

<sup>3</sup> [KPMG threatened with ban on bidding for UK government contracts \(ft.com\)](#)

<sup>4</sup> [KPMG withdraws from ScotGov contract bids after string of scandals | The Herald \(heraldscotland.com\)](#)

<sup>5</sup> [FRC opens disciplinary tribunal re: KPMG and Carillion/Regeneris audits](#)

<sup>6</sup> [Sanctions against KPMG LLP and Nicola Quayle \(frc.org.uk\)](#)

<sup>7</sup> <https://www.bbc.co.uk/news/business-60243464>

## **Section 30(b)(ii) – Free and frank exchange of views**

17. The Authority relied on the exemption in section 30(b)(ii) of FOISA to withhold information in this case. The Commissioner notes that the withheld information consists of the remainder of a meeting note which took place on 25 November 2021, at which KPMG was discussed.
18. Section 30(b)(ii) provides that information is exempt information 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.
19. The chief consideration when applying the exemption in section 30(b) of FOISA 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 free and frank exchange of views. The inhibition must be substantial and therefore of real and demonstrable significance.
20. Each request must be considered on a case-by-case basis, taking into account the effect (or likely effect) of disclosure of that particular information on the future exchange of views. The content of the withheld information will require to be considered, taking into account factors such as its nature, subject matter, manner of expression, and also whether the timing of disclosure would have any bearing.
21. As with other exemptions involving a similar test, the Commissioner expects authorities to demonstrate or explain why there is a real risk or likelihood that actual inhibition will occur at some time in the near future, not simply a remote or hypothetical possibility.

### *The Applicant's submissions*

22. The Applicant disagreed that disclosure of the information in this case would meet the Commissioner's own tests regarding "likelihood" and "significant inhibition"<sup>8</sup>. The Applicant considered that:
  - there could be no inhibiting effect where the exchange was, as was the case here, simply part of officials' jobs
  - the exemption should not apply where the exchange related to steps taken to protect against fraud (as opposed to policy formulation)
  - as the Authority awarded the contract prior to receiving the information request, its deliberations were clearly complete and any sensitivity was therefore lessened.
23. The Applicant explained that they considered any original notification of concern would not form part of an exchange of views, as it only prompted such a discussion.
24. The Applicant also argued that as KPMG<sup>9</sup> and the Authority had ultimately accepted the UK Government's concerns, it was difficult to comprehend why the views of Authority officials' views should be withheld.
25. In summary, the Applicant did not consider that, in the specific circumstances of this case, substantial harm would be caused by disclosure of the withheld information.

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<sup>8</sup> [BriefingSection30PrejudicetotheEffectiveConductofPublicAffairs.pdf \(itspublicknowledge.info\)](#)

<sup>9</sup> [Ban threat prompts KPMG to stop bidding for new government contracts \(bingj.com\)](#)

### *The Authority's submissions*

26. The Authority stated that KPMG was discussed at the Commercial Function Leadership Group (CFLG). The Authority explained that the CFLG is a cross-government meeting, led by the UK Government, where attendees exchanged views on key UK public services suppliers (in what is considered a private forum) for the purposes of deliberation.
27. The Authority submitted that information relating to key suppliers can be highly sensitive, and it is not in the public domain. The Authority considered that disclosure of such information could impact on the share-price (and therefore financial stability) of major suppliers of UK public services, and that disclosure would impact negatively on its relationships with suppliers and other government departments.
28. The Authority explained that the withheld information was a frank exchange about a "potential" ruling from the FRC in relation to KPMG and its financial probity. The Authority submitted that the information withheld was not the UK Government's actual, settled assessment, and it was not expected that this information would be disclosed outside the meeting's participants.
29. The Authority argued that putting such "speculation" into the public domain would represent a breach of confidence and trust between parties on the CFLG. The Authority submitted that this would inhibit discussions in the future, as members would be reluctant to engage in free and frank exchanges with Authority officials if they believed their views were likely to be made public in future.
30. The Authority also provided a specific example of an "early warning" it had received via the CFLG regarding the insolvency of a key supplier, which had enabled it to take proactive steps to safeguard key public services. The Authority submitted that disclosure in this case could result in such a warning not being provided in future.
31. In all the circumstances, the Authority argued that disclosure of the withheld information would substantially inhibit future free and frank discussions in the CFLG.

### *The Commissioner's view*

32. The Commissioner has considered all of the submissions made by the Authority, along with the withheld information under consideration and media reporting relating to KMPG at the time of the request.
33. The Commissioner does not consider that the exemption in section 30(b)(ii) of FOISA applies to some of the withheld information for the following reasons:
  - some of the information simply noted matters already manifestly in the public domain at the time the request was submitted; or
  - the information was conveyed as part of individuals' professional functions (and of a type consistent with these functions) and disclosure would not inhibit the sharing of similar (broadly factual) information in future.
34. The Commissioner therefore does not consider that disclosure of that information, given its nature, would substantially inhibit individuals from exchanging their views in future.
35. As no other exemptions have been applied to this information, the Commissioner requires the Authority to disclose to the Applicant the information he has found is not exempt under section 30(b)(ii) of FOISA.

36. For the remaining withheld information, the Commissioner accepts that officials who attend CFLG meetings, or who represent administrations who attend the CFLG, require a private space to discuss matters freely and frankly, particularly when those matters are of a sensitive nature and/or relate to suppliers of public services.
37. The Commissioner notes that the remaining withheld information consists of a view which is frank in nature (though the provider of this view is not identified).
38. The Commissioner considers that disclosure of the remaining withheld information would be likely to dissuade those attending the CFLG from communicating similar views in future. It is clear to the Commissioner that, if similar views were not exchanged in future, this would be to the detriment of the UK administrations' decision-making in relation to suppliers of public services.
39. The Commissioner also considers that disclosure of the remaining withheld information would be likely to impact significantly on trust between the Authority and other attendees at the CFLG and, in turn, lead to all parties being less likely to participate fully in similar discussions in future.
40. In all of the circumstances, the Commissioner accepts that the Authority was entitled to rely on the exemption in section 30(b)(ii) of FOISA to withhold the remaining information.

#### **The public interest test**

41. 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.
42. The "public interest" is not defined in FOISA, but has been described as "something which is of serious concern and benefit to the public", not merely something of individual interest. The public interest does not mean "of interest to the public" but "in the interest of the public", i.e. disclosure must serve the interests of the public.

#### *The Applicant's submissions*

43. The Applicant submitted that the public needed to understand why the Authority had awarded a contract worth around £0.5m to KPMG on 13 December 2021, after being made aware of concerns in relation to KPMG (and particularly as KPMG had withdrawn from bidding for Authority contracts shortly thereafter).
44. The Applicant also considered that there were strong links between the Authority and management consultancies (including KPMG) and stated their view that a number of individuals who had worked for KPMG now worked for the Authority (including in senior positions). The Applicant provided an example to support this.
45. In all the circumstances, and in light of the connections they considered existed, the Applicant considered it vital that the Authority disclosed the withheld information to demonstrate openness and transparency (which it had, to date, failed to demonstrate).

#### *The Authority's submissions*

46. The Authority acknowledged a public interest in disclosing information as part of open, transparent and accountable government. The Authority also recognised the public interest in understanding, in the specific context, what it knew regarding the UK Government and KPMG.

47. However, the Authority believed that, on balance, there was a greater public interest in allowing it a private space to discuss the options and actions open to it when a supplier is the subject of action from its regulator (as was the case here). The Authority argued that the CFLG facilitated cross-governmental communications and enabled all options to be properly considered, in a private space, prior to any decision and it considered disclosure would undermine these discussions.
48. The Authority submitted that such frank discussions had enabled it to prepare, in advance, for the collapse of Carillion in 2018<sup>10</sup> and to take proactive steps to safeguard public services in hospitals, councils and other Scottish public authorities.
49. The Authority explained that its response would have been substantially inhibited without the “advance warning” it received via the CFLG.
50. The Authority submitted that this highlighted the value of the CFLG as a private space and demonstrated how it served the public interest, which would be undermined were information which puts this space at risk disclosed.

#### *The Commissioner's view on the public interest*

51. When applying the public interest test, the Commissioner must take account of the circumstances at the time of the request (or, at the latest, the time of the review outcome).
52. In this case, at the time the Authority responded to the Applicant's request for review, it was a matter of public record (having been extensively reported in the media) that KPMG had twice been fined significant sums by the FRC, that KPMG was subject to further ongoing FRC disciplinary proceedings and that the UK Government was seeking damages in excess of £1bn from KPMG.
53. It was also public knowledge, at the time the Authority responded to the Applicant's request for review, that KPMG had voluntarily withdrawn from bidding for contracts from the UK Government and the Authority.
54. On 25 November 2021, officials from the Authority attended a CFLG meeting in which KPMG was discussed – 18 days prior to the Authority awarding a contract to the KPMG worth £546,000.
55. In the Commissioner's view, the extract of the meeting note disclosed to the Applicant suggests that the prevailing view in the CFLG meeting was that KPMG could be contracted by an authority at that time and KPMG was seeking to demonstrate it was “on path to recovery”.
56. However, the Commissioner considers that the withheld information provides a fuller picture.
57. The Commissioner recognises the public interest in public authorities being able to hold discussions and debate in a private space. The Commissioner acknowledges that the ability to do so, safe in the knowledge that information will not routinely be publicly disclosed, will be required on occasion to allow open and frank exchanges to support informed decision-making by those authorities.
58. The Commissioner has generally found that the public interest in protecting the free and frank exchange of views for the purposes of deliberation outweighs the public interest in disclosure of information would, or would be likely to, cause substantial inhibition. However,

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<sup>10</sup> <https://www.bbc.co.uk/news/business-42687032>

there are cases where a strong public interest in disclosure has swung the balance in favour of disclosure.

59. The Authority is responsible for significant amounts of public spending, and there is a strong public interest in the public understanding the views of which the Authority was aware prior to awarding KPMG a contract involving a significant expenditure of public funds.
60. It is legitimate of the Applicant to seek to establish what information was available to the Authority at the time it awarded the contract to KPMG.
61. The Commissioner considers that the public interest in receiving this information was heightened by the significant media coverage of KPMG's difficulties at the time of the request, and by KPMG voluntarily withdrawing from bidding for contracts from the Authority shortly after the Authority awarded KPMG a contract on 13 December 2021.
62. While finely balanced, the Commissioner is satisfied, having considered the specific circumstances of the case, the public interest arguments discussed above and the media reporting relating to KPMG at the time of the request, that the public interest in disclosing the information outweighs that in maintaining the exemption in section 30(b)(ii) of FOISA.
63. Consequently, the Commissioner requires the Authority to disclose to the Applicant the information he has found to have been wrongly withheld.

## Decision

The Commissioner finds that the Authority failed to comply 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 the Authority failed to comply with section 1(1) of FOISA by withholding information it was not entitled to under section 30(b)(ii).

The Commissioner therefore requires the Authority to provide the Applicant with the information it wrongly withheld by **2 August, 2024**.

## 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.



**David Hamilton**  
**Scottish Information Commissioner**

**18 June 2024**

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

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

#### **1 General entitlement**

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

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

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
  - ...
  - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- ...

#### **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-
  - ...
  - (ii) the free and frank exchange of views for the purposes of deliberation; or
- ...