

Decision Notice



Decision 064/2014 Mr John Pentland MSP and the Scottish Ministers

Review of NHS Lanarkshire mental health services

Reference No: 201300704
Decision Date: 19 March 2014

www.itspublicknowledge.info

Rosemary Agnew
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

On 9 January 2013, Mr Pentland asked the Scottish Ministers (the Ministers) for correspondence about the review of NHS Lanarkshire's mental health services. The Ministers did not respond to the request and Mr Pentland requested a review. The Ministers disclosed some information and withheld the remainder under a number of exemptions in FOISA.

During the Commissioner's investigation, the Ministers disclosed further information to Mr Pentland, and relied upon additional exemptions to withhold information.

The Commissioner found that the Ministers had been entitled to withhold some information. With respect to the remaining information, the Commissioner found that the exemption cited was not engaged or, if the exemption was engaged, that the public interest favoured disclosure.

The Commissioner required the Ministers to disclose the information which she considered had been wrongly withheld as set out in Appendix 2.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 29(1)(a) and (4) (definition of "government policy") (Formulation of Scottish Administration policy etc.); 30 (Prejudice to effective conduct of public affairs)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. Appendices 1 and 2 form part of this decision.

Background

1. On 9 January 2013, Mr Pentland asked the Ministers for the following information:

"...all correspondence since 1 May 2012, which you hold in the form of paper and electronic records including emails, involving any of the undernoted people, regarding the review of NHS Lanarkshire mental health services.

- Nicola Sturgeon MSP and others acting on her behalf,



- Alex Neil MSP and others acting on his behalf,
 - Michael Matheson MSP and others acting on his behalf,
 - five named Scottish Government officials,
 - and any other members of the Health Workforce and Performance team dealing with this matter.”
2. The Ministers acknowledged receipt of this request, but did not respond. On 14 February 2013, Mr Pentland requested a review of the Ministers’ failure to respond.
 3. The Ministers notified Mr Pentland of the outcome of their review on 5 March 2013. The Ministers disclosed some information and withheld the remainder under the exemptions in sections 25(1), 30(b), 30(c) and 38(1)(b) of FOISA.
 4. On 14 March 2013, Mr Pentland emailed the Commissioner, stating that he was dissatisfied with the outcome of the Ministers’ review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
 5. The application was validated by establishing that Mr Pentland made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

6. On 28 March 2013, the Ministers were notified in writing that an application had been received from Mr Pentland and were asked to provide the Commissioner with the information withheld from him. The Ministers provided the information and the case was then allocated to an investigating officer.
7. The Ministers withheld some information under section 25(1) of FOISA (Information otherwise accessible), which had already been disclosed to Mr Pentland by NHS Lanarkshire on 4 January 2013 in response to an earlier information request. Mr Pentland provided the investigating officer with a copy of the information disclosed by NHS Lanarkshire, and agreed that it could be excluded from the investigation and decision. Mr Pentland also confirmed that the personal data of private individuals that had been withheld under section 38(1)(b) of FOISA could also be excluded from the scope of the investigation and decision.
8. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. The Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
9. The Ministers provided their submissions and confirmed that all relevant information had been identified. Mr Pentland also provided submissions as to why it was in the public interest for the information to be disclosed.



10. During the investigation, the Ministers decided to revise the exemptions they were relying upon in respect of some of the withheld information. They now sought to rely upon the exemptions in sections 29(1)(a), 30(a), 30(b)(i) and (ii), 30(c) and 38(1)(b) of FOISA. They provided submissions to support their reasoning. On 15 and 20 November 2013, the Ministers provided Mr Pentland with the information they no longer considered exempt from disclosure.
11. Mr Pentland was informed of the changes in the exemptions being relied upon by the Ministers and provided additional comments on the public interest in disclosure. Mr Pentland confirmed that the personal information considered exempt and withheld under section 38(1)(b) of FOISA and the information disclosed during the investigation could be excluded from the scope of the investigation and decision.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Pentland and the Ministers. She is satisfied that no matter of relevance has been overlooked.

Background to request

13. In 2004, NHS Lanarkshire outlined its health improvement agenda in "A Picture Of Health"¹. After consultation and development, the Health Board's proposals were approved by the Deputy Minister for Health and Community Care in August 2006.
14. The publication of the Government's "Delivering for Mental Health"^{2,3} required the Health Board to review the Mental Health Framework as part of the wider "A Picture of Health" process. It was agreed that acute treatment should be provided in two custom designed units, one in North Lanarkshire and one at Hairmyres Hospital in South Lanarkshire. However, after the financial position of public services changed with the economic downturn, this could not be delivered.
15. Further options were considered for acute inpatient care and Intensive Psychiatric Care Unit (IPCU) provision. At that time, adult inpatient services were provided from three hospitals, Wishaw, Monklands and Hairmyres. Stakeholders were consulted in early 2011, resulting in a preferred option to concentrate acute adult mental health inpatient facilities for North Lanarkshire at Wishaw General Hospital (rather than Monklands Hospital), supported by an adjacent IPCU. Acute adult inpatient beds for South Lanarkshire would remain at Hairmyres Hospital.

¹ <http://www.scottishhealthcouncil.org/publications/idoc.ashx?docid=b4a619df-8457-4411-98de-929a36b164ec&version=-1>

² SEHD, 2006

³ <http://www.cso.scot.nhs.uk/Publications/ResGov/Framework/RGFEdTwo.pdf>



16. Throughout 2011 and 2012, these proposals were scrutinised and discussed at open days. The finalised proposals were submitted for the approval of the then Cabinet Secretary for Health and Wellbeing (Nicola Sturgeon MSP) in June 2012. An email of 27 July 2013, disclosed by NHS Lanarkshire, shows that Ms Sturgeon was content to give conditional agreement to the proposals. However, the public announcement of this approval was delayed to allow time for Alex Neil, in his capacity as a local MSP, to be involved in the media publicity likely to follow. Mr Neil was known to object to the proposed location of the mental health unit⁴.
17. On 5 September 2012, it was announced that Mr Neil was to be the new Cabinet Secretary for Health and Wellbeing⁵. Shortly after his appointment, he ordered a review of NHS Lanarkshire's Modernising Mental Health proposals⁶. On 26 September 2012, it was announced in the Scottish Parliament⁷ that Michael Matheson MSP would lead the review on the mental health services, as part of the service lay within Mr Neil's constituency. On 30 October 2012⁸, NHS Lanarkshire confirmed publicly that Mr Neil had expressed some reservations regarding the provision of acute mental health services at Monklands, and that it was carrying out a review⁹.
18. Following the announcement on 30 October 2012 of the review of the mental health services¹⁰, several press articles raised the issue of Mr Neil's involvement in the review, and asked whether this might have breached section 7.5 of the Scottish Ministerial Code (the Ministerial Code)¹¹. The matter was also raised in Parliament by Siobhan McMahon MSP during a debate¹² on Scotland's mental health strategy.

Information out of scope

19. In the Ministers' submissions of 14 November 2013, they identified the following information as falling outwith the scope of Mr Pentland's request:
- Document 9, last 3 pages
 - Document 31, last paragraph and title
 - Document 123, paragraphs 4 and 5

⁴ <http://www.acadvertiser.co.uk/lanarkshire-news/local-news/monklands-news/2011/08/17/airdrie-politicians-united-in-opposition-to-potential-loss-of-monklands-mental-health-unit-65864-29246412/>

⁵ <http://www.scotland.gov.uk/News/Releases/2012/09/scottish-cabinet05092012>

⁶ <http://www.nhslanarkshire.org.uk/boards/2013-board-papers/Documents/June/Modernising-Mental-Health-Services--June-2013-Board.pdf>

⁷ <http://www.theyworkforyou.com/sp/?id=2012-11-14.4.0>

⁸ <http://www.elament.org.uk/news.aspx?filterby=Mental Health Services>

⁹ http://www.nhslanarkshire.org.uk/Involved/consultation/mental-health/Pages/Mental_Health_Modernisation.aspx

¹⁰ <http://www.elament.org.uk/news.aspx?filterby=Mental Health Services>

¹¹ A Code of Conduct and Guidance on Procedures for Members of the Scottish Government and Junior Scottish Ministers. <http://www.scotland.gov.uk/Publications/2011/12/01141452/8>

¹² <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8352&i=75595&c=1517328&s=mental health>



20. Having considered the above information, the Commissioner agrees that the above information falls outwith the scope of Mr Pentland's request, and also finds that the same applies to the following information:
- Document 53, second point
 - Document 80, last three paragraphs
 - Document 86, first sentence of email
21. The above information does not relate to the review of NHS Lanarkshire mental health services; consequently this information will not be considered any further in the Commissioner's decision.

Information disclosed during the investigation

22. The Ministers disclosed a large volume of information to Mr Pentland during the investigation. In the absence of substantive arguments as to why this information was originally withheld from Mr Pentland (none have been provided by the Ministers), the Commissioner must conclude that the Ministers failed to comply with section 1(1) of FOISA in failing to provide this information in response to Mr Pentland's request. As this information was disclosed during the investigation, the Commissioner does not require the Ministers to take any action as a result of this failure.

Application of exemptions

23. In considering whether the exemptions relied upon by the Ministers should be upheld, the Commissioner must consider two questions in respect of each of them:
- (i) Is the exemption engaged?
 - (ii) If it is, does the public interest in maintaining the exemption outweigh that in disclosure? Unless it does, the information must be disclosed.

Section 30(c)

Is the exemption engaged?

24. 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 section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would be caused to the conduct of public affairs by release of the information, and how that harm would be expected to follow from release.
25. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the harm in question must be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner



that the harm would, or would be likely to, occur and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some point in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.

26. The Commissioner takes the view that it is important for public authorities to treat each request for information on a case by case basis. Release of information in one case should not be taken to imply that communications of a particular type will be routinely released in future. The circumstances of each case, including the content of the specific information under consideration, must be taken into consideration.
27. The Ministers have provided two separate submissions on their application of section 30(c) and the associated public interest test, relating to two distinct groups of documents. These submissions are considered, in turn, below.

Section 30(c), group 1 - paragraph 7.5 of the Ministerial Code

28. Mr Pentland's request covers the time period in which Mr Neil took over as Health Secretary in September 2012, and the period in which questions were raised (e.g. by Ms McMahon in the Scottish Parliament^{13,14} and in the press¹⁵) as to whether he had acted in accordance with the Ministerial Code .
29. On 15 November 2013, the Ministers disclosed a large volume of information that they had previously considered exempt. Of particular note is the partial disclosure of documents 122 and 123. These concern events immediately following Mr Neil's appointment as Health Secretary and deal with the perception of a potential conflict of interest between the views he had expressed as a constituency MSP and his new ministerial responsibilities, in relation to the proposed reconfiguration of mental health services across Lanarkshire. The Ministers stated that the information disclosed from document 122 represented their formal agreed position on this matter.
30. The Ministers provided detailed and candid submissions as to why they considered the exemption in section 30(c) of FOISA applied to other information (see Appendix 2 for details of the documents withheld under each exemption). They stated that these documents were interlinked, so while some might seem innocuous if read on their own, when viewed together they would divulge significant sensitive information.
31. The Ministers did not refer to documents 70 and 86 in their submissions, but withheld information in these documents under section 30(c). The Commissioner finds that it should be considered in this part of the decision, because of the content of the withheld information.
32. The Commissioner has considered all submissions made to her on this matter. She cannot provide a full summary in this decision without revealing information which has been withheld. On the basis of the Ministers' submissions, the Commissioner accepts that disclosing

¹³ [http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8296&i=75125&c=0&s=NHS Lanarkshire](http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8296&i=75125&c=0&s=NHS%20Lanarkshire)
Appointment of Chair

¹⁴ [http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8352&i=75595&c=1517328&s=mental health](http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8352&i=75595&c=1517328&s=mental%20health)

¹⁵ <http://scottishpol.blogspot.co.uk/2012/11/war-of-wards.html>



information from documents 98 and documents 101 to 122 would, or would be likely to, prejudice substantially the effective conduct of public affairs, and that the exemption in section 30(c) of FOISA is engaged. The Commissioner will go on to consider the public interest in disclosing or withholding this information.

33. With respect to the remaining documents, the Commissioner takes the view that the Ministers' arguments are weak. It is a matter of public record that Mr Neil, in his capacity as a constituency MSP, objected to the proposed changes, and that this led some observers to question whether his actions following his appointment as Health Secretary were in compliance with paragraph 7.5 of the Ministerial Code¹⁶. The fact that NHS Lanarkshire had decided to disclose information to Mr Pentland under FOISA (putting it into the public domain) before he made his request to the Ministers also weakens the case for withholding similar information.
34. The Commissioner considers that the remaining documents in this group do not reveal anything of substance that was not already known at the date of the request, and do not divulge anything of sensitivity, either individually or taken together. The Commissioner does not accept that disclosure of the information in these documents would, or would be likely to, cause substantial prejudice to the effective conduct of public affairs, as required for the exemption in section 30(c) to be engaged.
35. The Commissioner therefore finds that the exemption in section 30(c) of FOISA was wrongly applied to the information in the remaining documents in this group (see Appendix 2), and that the information should be disclosed to Mr Pentland.

Consideration of the public interest test

36. Section 30(c) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Therefore, having decided that some of the withheld information in this group of documents is exempt under section 30(c), the Commissioner must now go on to 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. Unless it is, the Commissioner must order the information to be disclosed.
37. In their submissions, the Ministers recognised a public interest in release of this information, to promote transparency, but noted that there is also a strong public interest in ensuring the smooth running of government and avoiding excessive scrutiny of internal processes. They argued that it was in the public interest for the Government to present a united front.
38. The Ministers considered that, on balance, the public interest in safeguarding the smooth running of the Scottish Government outweighed the public interest in release of the information, particularly as the Government's agreed position on the issue (as presented in document 122) had been disclosed to Mr Pentland.

¹⁶ <http://www.eveningtimes.co.uk/news/minister-under-fire-over-mental-health-services-113502n.19947074>



39. Again, due to the sensitivity of the information being withheld, the Commissioner is unable to summarise the Ministers' submissions on the public interest test in full, but she has considered them in detail.
40. In his submissions on the public interest, Mr Pentland did not advance separate arguments as to why he considered the public interest favoured the disclosure of this particular information. (The Commissioner appreciates that it is difficult to provide detailed submissions without knowledge of the information withheld.) His arguments referred back to his interest in understanding whether the current Health Secretary was directly or indirectly involved (his views being influential) in the discussions taking place on a matter from which it was publicly stated he had withdrawn.

Commissioner's conclusions

41. The question as to whether events and decisions following Mr Neil's appointment as Health Secretary constituted a breach of paragraph 7.5 of the Ministerial Code was the subject of much media attention and speculation, but is also a matter of considerable public interest, given that it relates to conduct in the highest level of public office. The Commissioner accepts that there is significant public interest in understanding the Scottish Government's reaction to this question. In this respect, the Commissioner agrees with the Ministers that there is a public interest in disclosure of information which promotes transparency.
42. The Commissioner also finds there is a significant public interest in understanding the reasons for the change in policy regarding NHS Lanarkshire's mental health services provision. The review of these services had taken many years to complete, and had required substantial sums of public money. The conclusion of the review, which the previous Health Secretary had been "minded" to approve, with conditions, was overturned in a comparatively short space of time following Mr Neil's appointment. It is in the public interest to understand the reasons for this, given the previous investment of time and money.
43. Against this, the Commissioner also accepts that (as the Ministers have argued) there is some public interest in safeguarding the smooth running of the Scottish Government and avoiding excessive scrutiny (Commissioner's emphasis) of internal processes. Although accepting this, the Commissioner must apply this understanding to the specific information under consideration because there may be occasions when, in order to achieve transparency, some scrutiny of internal processes is required, and the degree of scrutiny required may depend upon the significance and seriousness of the matter to which those processes relate.
44. If these were the only considerations as to whether the withheld information should be disclosed or not, then the decision would be straightforward. However, the Commissioner must consider whether the public interest in disclosure of the withheld information is outweighed by the public interest in maintaining the exemption applied by the Ministers. She must consider the reasons why it might be in the public interest to withhold the information, and balance this against the public interest in disclosure. In doing so, she must take into consideration the context created by factors such as the timing of events, the contents of the withheld information, and what information was already in the public domain at the time Mr Pentland made his request.



45. The Commissioner has concluded that the information already disclosed to Mr Pentland, specifically the information in documents 122 and 123, goes a substantial way towards fulfilling the public interest in understanding issues relating to the possible contravention of paragraph 7.5 of the Ministerial Code; it goes a long way in detailing the chain of events following Mr Neil's appointment as Health Secretary. The Commissioner considers that the Ministers have disclosed significant information, which aids public understanding.
46. In view of the disclosure of this information, the Commissioner does not consider that release of the withheld information in the remaining documents in this group would contribute in any significant sense towards satisfying the public interest as identified by Mr Pentland, or that the balance of public interest lies in disclosing the information.
47. On balance, in all the circumstances of this case, the Commissioner concludes that the public interest in disclosing the remaining withheld information in this group of documents is outweighed by that in maintaining the exemption in section 30(c) of FOISA. Therefore, the Commissioner finds that the Ministers were entitled to withhold the information in documents 98 and 101 to 122 in line with section 30(c) of FOISA.

Section 30(c), group 2 - Letters from MPs and MSPs

Is the exemption engaged?

48. In their submission of 5 June 2013, the Ministers stated that all letters sent to and from MSPs and MPs were exempt from disclosure under section 30(c) of FOISA. The Ministers were told it was unlikely, due to the public nature of the MP/MSP role, that the Commissioner would accept that this information should automatically be withheld. The Ministers then withdrew their reliance on the exemption in section 30(c) in relation to Ministerial responses to the letters from MSPs and MPs (considering that the exemption in section 30(a) was more appropriate), but maintained their view that the letters from MPs and MSPs were exempt from disclosure under section 30(c) of FOISA.
49. The Ministers accepted that some of the issues raised within the withheld letters had also been raised openly in Parliament by the MPs or MSPs; however, the Ministers considered that it was appropriate that detailed correspondence and questions to Ministers should be private, especially when relating to a "delicate" matter.
50. The Ministers stated that MSPs and MPs normally write to Ministers on the understanding that their correspondence is intrinsically confidential. The Ministers argued that, at the time of Mr Pentland's request, a final decision on the review of mental health services had not been taken by NHS Lanarkshire. It was, therefore, appropriate that this correspondence should not be released into the public domain to avoid speculation about NHS Lanarkshire's likely decision. The Ministers commented that, although a Ministerial decision was not ultimately required, this was not known at the date of the response to Mr Pentland's request.
51. The Ministers asserted that release of these letters would be likely to prejudice substantially the effective conduct of public affairs. They argued it was likely to deter MSPs and MPs from expressing their views or their constituents' views, either at all, or so frankly, if they knew the



letters were likely to be released. The Ministers considered that this would be likely to have a detrimental impact on the ability of both Ministers and MSPs or MPs to carry out their public duties. It would also be likely to have a significantly harmful impact on policy making in cases if it led to Ministers and their officials not being made aware of particular concerns.

52. The Commissioner considers that it is standard practice for MPs and MSPs to write to Ministers about matters of concern to themselves or their constituents. In this case, it seems clear that, whatever the Ministers' view might be, the issues and concerns raised in the correspondence were not considered by the writers to be secret or confidential: in at least two cases, the MSPs had raised similar questions in Parliament or on their own websites. The Commissioner does not accept the Ministers' view that this correspondence was intrinsically confidential in nature.
53. It is reasonable to assume, given the nature of their role, that MPs and MSPs would be well aware of the existence of FOISA and so there existed the possibility that information from their letters to Ministers could be requested and disclosed. The Commissioner does not accept that correspondence from MPs or MSPs should be treated any differently from other types of correspondence; it is the content of the information withheld, not the class of document, which is the key consideration in relation to the exemption in section 30(c) of FOISA. Having considered the withheld correspondence in detail, the Commissioner notes that they do not include any indication that it should be treated confidentially, and does not find any other stated reason why the correspondence would be regarded as sensitive. The Commissioner considers that it is unlikely that the MPs or MSPs concerned would be discouraged from similar correspondence in future by the disclosure of this information.
54. The Commissioner has concluded that the Ministers have failed to show why disclosure of the letters in question would, or would be likely to, cause substantial prejudice to the conduct of public affairs, and finds that, in relation to this information, the Ministers' submissions are based on unsubstantiated arguments. The Commissioner has not been provided with any evidence to show that disclosure of such information would result in the harm envisaged by the Ministers and would change the practices of MPs and MSPs in writing such letters.
55. As the Commissioner is not satisfied that the letters from MPs or MSPs were withheld correctly under section 30(c) of FOISA, she is not required to go on to consider the application of the public interest test in section 2(1)(b) of FOISA in relation to this group of documents (details of which are provided in Appendix 2). She requires the Ministers to provide this information to Mr Pentland.

Section 30(a) – collective responsibility of the Scottish Ministers

Is the exemption engaged?

56. Section 30(a) of FOISA exempts information if its disclosure would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers. As with the other exemptions in section 30, the exemption is subject to the public interest test in section 2(1)(b) of FOISA.



57. The concept of collective ministerial responsibility is a long-standing constitutional convention, which is not regulated by statute, but is formalised in the Scottish Ministerial Code¹⁷, which provides guidance on the convention. The Ministers' submission referred to paragraphs 2.2 and 2.3 of the 2002 Code, but the Commissioner considers that the correct reference should be to paragraphs 2.4 to 2.6 of the 2011 Code (as the 2011 Code was in operation at the date of Mr Pentland's request), specifically:

2.4 The internal processes through which a Government decision has been made should not normally be disclosed. Such decisions are, however, normally announced and explained as the decision of the Minister concerned. On occasion, it may be desirable to emphasise the importance of a decision by stating explicitly that it is the decision of the Scottish Government. This, however, is the exception rather than the rule.

2.5 In accordance with the principle of collective responsibility, it is important that Ministers and their staff preserve the privacy of Government business and protect the security of Government documents, subject to the provisions of the Freedom of Information (Scotland) Act 2002 (see also paragraphs 2.26 and 2.27).

2.6 The issue of collective responsibility is particularly acute where the portfolio Minister is likely to take a decision that might be unpopular in the constituency or region which another Minister represents as MSP. Once a decision has been reached, the Minister who is constituency or regional MSP must be prepared to defend that decision, even if, individually, he or she might have argued against it in private, or, in the case of a constituency issue, might have made representations as a constituency or regional MSP.

58. In a number of earlier decisions, for example, *Decision 056/2007 Mr Paul Hutcheon and the Scottish Executive*¹⁸, the Commissioner noted that in order to rely on the exemption in section 30(a), the Ministers are required to do more than assert that the documents contain views expressed by a Minister and therefore should be protected. They are required to show that disclosure would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Ministers.

The Ministers' arguments on why the exemption is engaged

59. When considering the exemption in section 30(a), it may be relevant that views expressed are at variance with the final policy, or reveal disagreement among Ministers, the exemption will only apply if the disclosure of a divergence or disagreement would, or would be likely to, cause substantial prejudice to the maintenance of the convention of collective responsibility. The Commissioner will therefore consider the nature and content of the withheld information.

60. Before considering whether the withheld information contains views of such significance, the Commissioner has examined whether, in each case, it actually represents the views of a Scottish Minister. She notes that some or all of the withheld information does not represent "views" as such, but simply shows Ministerial involvement in an ongoing process of policy

¹⁷ <http://www.scotland.gov.uk/Resource/Doc/158641/0043036.pdf>

¹⁸ http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200500957_200501430.aspx



development. There is no indication that the Minister had reached a final or settled view in any of the matters under consideration. The Commissioner has concluded that the exemption in section 30(a) of FOISA is not engaged with respect to the information in these documents (see Appendix 2 for details of the documents).

61. In relation to the remaining information withheld under section 30(a) of FOISA, the Ministers stated that the exemption applied because the information represented the individual views of a number of Ministers, either expressed directly on their behalf by their private offices, expressed in their letters to MPs or MSPs, or replicated by officials; for example, in emails which explain a Minister's view to colleagues or others who needed to know it (in this case NHS Lanarkshire). As such, the Ministers considered that release of this information would breach the convention of collective responsibility.
62. The Ministers stated that to promote strong government and avoid potential confusion about Scottish Government policy, it was important for the Scottish Government (both its Ministers and its officials) to present a united front. The Ministers commented that whilst the Ministerial Code notes that a decision will normally be announced and explained as the decision of the Minister concerned, it would not be appropriate to reveal whether other Ministers may have held different views.
63. The Ministers argued that the final decision on the review of mental health service provision was not taken by NHS Lanarkshire until 26 June 2013 (some months after Mr Pentland's application to the Commissioner), so it would have been inappropriate to release into the public domain any information which revealed Ministers' views. They pointed out that while a Ministerial decision was ultimately not required, that might not have been the case and was not known at the time the review response was sent to Mr Pentland.
64. The Ministers stated that it is entirely legitimate that Cabinet Secretaries and Ministers may pursue issues of concern to their constituents in their capacity as a local MSP, as Mr Neil did in this case; this work is separate from their work as a Minister. In line with the Ministerial Code, and given Mr Neil's constituency interests, it was agreed (26 September 2012) that another Minister (Michael Matheson MSP) should take any decisions relating to NHS Lanarkshire's review of mental health services.

The Commissioner's views on whether the exemption is engaged

65. The Commissioner notes that it is a matter of public record that the direction of the review of NHS Lanarkshire's mental health services changed significantly after Mr Neil took over as Cabinet Secretary for Health and Wellbeing.^{19,20,21} Mr Neil had previously made known his opposition to the recommendations which were to be presented for approval. It is quite clear that the revised proposals, which appeared shortly after he took up his Ministerial post, represented his own views on the desired outcome of the review, and differed from the

¹⁹ <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7911&i=72039&c=1447443&s=!mental>

²⁰ <http://www.acadvertiser.co.uk/lanarkshire-news/local-news/monklands-news/2011/08/17/airdrie-politicians-united-in-opposition-to-potential-loss-of-monklands-mental-health-unit-65864-29246412/>

²¹ <http://johnpentland.org/2013/01/23/msp-blasts-delay-in-mental-health-plan/>



position taken by the previous Health Secretary on this matter. (Ms Sturgeon's views were disclosed in correspondence released by NHS Lanarkshire.)

66. Therefore, the question for the Commissioner is not whether the two Health Secretaries (or any other Minister) had differing views about the review of NHS Lanarkshire's mental health services - to some extent this is already a matter of public record - but whether the withheld information would reveal more than is already publicly known about those Ministers' views, and whether disclosure would, or would be likely to, prejudice substantially the maintenance of the convention of collective responsibility of the Scottish Ministers. As stated above, although the information may reveal divergent views among Ministers, those views must be capable of undermining the convention of collective responsibility to a significant extent for the exemption in section 30(a) of FOISA to apply.
67. Having read the withheld information in detail and fully considered the matters under consideration, the Commissioner is not convinced that, in all instances, the views expressed in the withheld documents would, or would be likely to, have this effect. Some of the information does not reveal a definite view from either Ms Sturgeon or Mr Neil, but shows them to be seeking further information as part of their involvement, as a constituency MSP or as Health Secretary, in the process of reviewing the proposed recommendations on the delivery of mental health services in Lanarkshire. The Commissioner does not accept that disclosure of this information would, or would be likely to, cause substantial prejudice to the maintenance of the convention of collective responsibility, given that there is already information in the public domain to show that, prior to Mr Neil's ministerial appointment, Ms Sturgeon and Mr Neil held different views about NHS Lanarkshire's review.
68. In document 9 (page 58), the withheld information includes views expressed by Mr Neil in his capacity as an MSP before he became a Minister. The Commissioner accepts that it would be possible for information about the views held by an individual before their appointment to have the effect of undermining the convention of collective responsibility, if disclosed after the individual had taken up a ministerial post. In this instance, however, she does not accept that disclosure would have this effect, as it is public knowledge that Mr Neil held these particular views before he became Health Secretary. The Commissioner has therefore concluded that the exemption in section 30(a) of FOISA was wrongly applied to this information.
69. The withheld information in documents 12 and 19 represents more specific views of the Minister concerned (Ms Sturgeon). The consideration for the Commissioner is whether disclosure of these views would, or would be likely to, prejudice substantially the maintenance of the convention of collective responsibility. In coming to a view, the Commissioner has considered whether the views expressed were at variance with the final policy; whether the information reveals disagreement among Ministers; and whether the views expressed relate to a matter beyond the scope of the Minister's responsibilities. Given what is already in the public domain, she has concluded that none of these apply, and that the exemption in section 30(a) of FOISA was wrongly applied to the withheld information in question.
70. The Commissioner finds that the remaining documents withheld under section 30(a) of FOISA contain ministerial views which are more directly stated, and more directly related to the decision on the review of mental health service provision in NHS Lanarkshire than the other



information withheld under this exemption. However, as with the other documents, the information does not reveal anything beyond what was already known about the views held by Mr Neil and Ms Sturgeon at the time Mr Pentland made his request. The Commissioner does not accept that the collective convention of responsibility would, or would be likely to be, prejudiced substantially by disclosure of information which simply serves to confirm what is already known about the views of certain Ministers, at certain times, in relation to the decision to reconsider the findings of the review.

71. The Commissioner might have been more likely to accept the Ministers' arguments if little had been known about Mr Neil's views about the NHS Lanarkshire mental health services review; if his views had not been made public or discussed in the Scottish Parliament; or if it was not already known that Ms Sturgeon had been minded to approve the proposals while she was Health Secretary; but this is not the case. The Ministers have released information which confirms that, on 26 September 2012, Mr Neil made known his concerns about the proposed reconfiguration of mental health services across Lanarkshire. Mr Neil's views at this date were not a secret.
72. Having examined the withheld information and having considered the submissions by the Ministers, the Commissioner cannot accept that disclosure of the withheld information would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Ministers. To the extent that it reveals individual Ministers' views at all, those views are in line with what was already in the public domain. The correspondence does not reveal anything of substance about debate among the Ministers. In the circumstances, therefore, the Commissioner cannot uphold the Ministers' reliance on the exemption in section 30(a) of FOISA in relation to the withheld information.

Commissioner's view on the application of section 30(a) to Ministerial correspondence

73. As previously discussed, the Ministers withheld the responses from Ministers to letters from MPs and MSPs under section 30(a) of FOISA. Having considered these letters in detail, the Commissioner takes the view that the contents do not go beyond what would reasonably be expected to have been included in public statements about the situation or what was publicly stated in the Scottish Parliament debate on 24 January 2013. It is evident that the responses do not concern any personal matters, or contain any indication that the views expressed should be treated confidentially.
74. The Commissioner has concluded that the Ministers have failed to show why disclosure of the correspondence would, or would be likely to, cause substantial prejudice to the conduct of public affairs, and finds that, in relation to this information, the Ministers' submissions are based on unsubstantiated arguments. The Commissioner has not been provided with any evidence to show that disclosure of the information would result in the harm envisaged by the Ministers and would change the practices of MPs and MSPs in initiating or engaging in such correspondence.
75. As the Commissioner is not satisfied that the information from the Ministerial correspondence was correctly withheld under section 30(a) of FOISA, she is not required to consider the



application of the public interest test in section 2(1)(b) of FOISA in relation to this group of documents (details of which are provided in Appendix 2).

Consideration of the public interest test

76. As the Commissioner has not found that the exemption in section 30(a) applies to any of the information withheld under this exemption (details of which are provided in Appendix 2), she is not required to go on to consider the application of the public interest test in relation to this exemption.

Section 30(b)(i) and (ii) – Prejudice to effective conduct of public affairs

77. Under section 30(b) of FOISA, information is exempt from disclosure where disclosure 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.
78. The exemptions in 30(b)(i) and (ii) of FOISA are qualified exemptions, which means that where a public authority finds that information falls within the scope of either exemption it is required to go on to consider the public interest test laid down in section 2(1)(b) of FOISA.
79. The main consideration in determining whether the exemption in section 30(b) of FOISA applies is not whether the information constitutes the provision of advice or views (although this will be relevant in some cases) but rather whether the release of the information would, or would be likely to, have a substantially inhibiting effect on the free and frank provision of advice or views for the purposes of deliberation. It is essential that authorities can demonstrate a real risk or likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is a remote possibility. Also, the harm in question should take the form of substantial inhibition from expressing advice/views in as free and frank a manner as would be the case if disclosure could not be expected to follow. The word "substantial" is important here: the degree to which a person will or is likely to be inhibited in expressing themselves has to be of some real and demonstrable significance.
80. Guidance issued by the Commissioner²² states that where advice or views are communicated and received as part of individuals' expected day-to-day professional functions, then the risk of substantial inhibition resulting from the release of that information will be diminished.
81. The Ministers provided three separate submissions relating to three distinct types of information withheld under section 30(b) of FOISA. These were:
- (i) information relating to changes in government policy;
 - (ii) information relating to the Ministerial Code and the collective responsibility of Ministers;
and

²² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section30/Section30.aspx>



(iii) free and frank advice or views on NHS Lanarkshire's proposals.

82. The exemptions in section 30(b) are not “class exemptions” and can only be used to withhold information if (because of its nature and/or the context in which it exists, and not simply because it falls within a particular category of information) its disclosure would, or would be likely to, cause officials to be substantially inhibited from providing advice or views. In other words, it is not sufficient to argue that information should not be disclosed solely because it has been provided in a certain context or because it relates to a particular subject.
83. The Commissioner accepts that, in this case, there were particular sensitivities surrounding the provision of advice or views in each of the categories identified by the Ministers, and that in this context, it is possible that the disclosure of apparently innocuous information could have the effect of substantially inhibiting officials from providing free and frank advice or views for the purpose of discussion in future. She will consider whether the Ministers have shown that this would be a likely outcome, not merely a possible outcome. She will consider the information withheld under each of the three categories identified by the Ministers, but her decision will reflect whether the exemption applies to each piece of information withheld, not to a general category of information.

Section 30(b)(i) and (ii) - Information relating to changes in government policy – the Ministers' arguments

84. The withheld information in this group of documents consists of discussions, comments and queries raised by officials from the Scottish Government and NHS Lanarkshire, in order to help develop and shape the Health Board's proposals for delivering mental health services in Lanarkshire.
85. The Ministers provided detailed and candid submissions as to why they considered the exemption in section 30(b) applied to the information withheld in the above documents. The Ministers stated that the advice in these documents reflected the personal views of the officials who had provided it. The Ministers went on to explain why they considered that disclosure would lead to officials being substantially inhibited from providing similar advice or views should a similar situation arise in future. (The Commissioner has been asked, and has agreed not to disclose the details of the Ministers' submission on this point.)
86. The Ministers stated that if the information was disclosed, officials would be likely to be much more reluctant to express their views frankly in writing about any policy which is still in development, for fear that those views may be released and might not be in line with formal Scottish Government policy. The Ministers considered that this would, or would be likely to, substantially inhibit officials from providing similar free and frank advice or exchanges of views in future. This would significantly impact on the smooth running of government: it is more effective to provide advice or views in writing rather than by phone or verbally, to ensure they are fully taken into account and checked by those within the Scottish Government with an interest. If officials were reluctant to express their views fully, either in writing or at all, this would harm the effective development of policy within the government, which requires all relevant views and advice to be considered.



The Commissioner's view

87. The Commissioner has considered carefully the Ministers' comments with regard to the likelihood of inhibition, should the advice/views under consideration in this case be disclosed.
88. The Commissioner considers that it is possible that disclosure might lead officials to take care in recording their advice or views, and to pay careful attention to the manner in which advice or views are expressed. However, if the effect of disclosure was simply to increase the care taken by officials when offering advice or exchanging views, to ensure they are justifiable and measured and provide an accurate representation of the issues being addressed, it is difficult to see how this could be views as causing substantial inhibition.
89. The Commissioner notes the Ministers' comment that if the withheld information was disclosed, officials would be more reticent in the future in providing advice or views and would do so orally as opposed to it being written down. However, the Ministers have not provided any evidence to support this assertion, and so it is difficult for the Commissioner to accept that this is a likely outcome, should the withheld information in this case be disclosed. The Commissioner considers that the officials involved in the correspondence did so as part of their professional duties, and would have given their correspondence careful consideration before it was sent. The drafting and sending of such correspondence is a part of the normal duties of the officials concerned and, without evidence to back up the Ministers' assertion, the Commissioner has concluded that it is highly unlikely that these officials would significantly change their practices in this respect.
90. The majority of correspondence relates to discussion about the details of the mental health services review, and to questions about the content or final outcome of the review. It is normal for policies to go through such a process of development, so disclosure of information showing that this process took place is unlikely, in itself, to cause inhibition among officials taking part in similar policy development in future. In this case, for the most part, the withheld correspondence does not concern any significant or controversial change to the policy.
91. It is only to be expected that the officials working for the Health Secretary or NHS Lanarkshire would exchange correspondence concerning changes to the policy and its implementation. In any event, the Commissioner does not consider that the information is as candid or frank nature as the Ministers have intimated. For the most part, the changes in question relate to the recommendations which preceded Mr Neil's appointment as Cabinet Secretary (which were superseded by the time Mr Pentland made his request) and focussed on the development of well-rounded and considered proposals rather than the personal views of the Minister.
92. Having considered all of the above, the Commissioner is not satisfied that the disclosure of the information would (or would be likely to) substantially inhibit officials from providing such advice or exchanging such views in the future, particularly given that the withheld information does not reveal any matter of substance that was not already known.



93. The Commissioner therefore finds that the Ministers incorrectly applied the exemptions in section 30(b)(i) and (ii) of FOISA to the withheld information considered under this category (details of which are provided in Appendix 2).
94. As the Commissioner is not satisfied that the exemptions in section 30(b)(i) and (ii) of FOISA has been engaged, she is not required to go on to consider the public interest test in section 2(1)(b).

Section 30(b)(i) and (ii) – Information relating to the Ministerial code and collective responsibility- Ministers' arguments

95. In their submissions, the Ministers stated that documents in this category contain sensitive and frank comments which are closely linked to some of the information withheld under section 30(a) of FOISA (collective responsibility of the Scottish Ministers). The Ministers also stated that some of the information withheld in this category had close links to information withheld under section 30(c) of FOISA (requirements of the Ministerial Code).
96. The Ministers stated that release of these documents would cause significant harm, for the reasons provided in their submissions on section 30(a) and 30(c) (already considered in this decision). The Ministers provided further reasoning, which they asked the Commissioner to consider but exclude from the decision notice.
97. While the Commissioner has agreed not to summarise or otherwise disclose the submissions made to her by the Ministers in this case, she has considered them fully.

The Commissioner's view

98. The Ministers have withheld point 6 within document 3, under section 30(b)(i) of FOISA. In considering the information withheld in this point, the Commissioner notes that it has been disclosed in document 7. The Commissioner has concluded as this information has been disclosed, the exemption does not apply and the Ministers were wrong to withhold this information under section 30(b)(i).
99. The Commissioner accepts that, on face value, some of the correspondence appears to be frank and candid, as the Ministers argued. In this case, the timing of the request and the request for review are significant, in the Commissioner's view, in assessing the sensitivity of the information covered by the request and deciding whether its disclosure would, or would be likely to, cause substantial inhibition among those responsible for providing similar advice or views in future. The request for review was submitted some six months after Mr Neil took up his ministerial post, and after the events which led to Mr Pentland's request had been discussed and addressed in Parliament and more widely.



100. The information which has been withheld from this group of documents must be considered in the context of what was already in the public domain at that time. For example, it was known that Mr Neil, in his capacity as a constituency MSP, had objected to the recommendations of the review which the previous Health Secretary had intended to approve. It was known that he was to be given the opportunity to comment on those recommendations when the approval was made public. It is also known that, once he became Health Secretary, he requested a review of those recommendations. In this context, the Commissioner takes the view that some of the information is less sensitive than the Ministers have argued.
101. Having said that, the Commissioner considers the Ministers were entitled to conclude that disclosing the last sentence of the first paragraph of document 41 would inhibit substantially, or be likely to inhibit substantially, the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation. This sentence includes frank and candid comments which go beyond simply passing comment or noting observations, and relates to a matter which is clearly sensitive. The Commissioner accepts that disclosure of the advice and views in the last sentence of the first paragraph of document 41 would, or would be likely to, inhibit substantially the provision of such advice and views in future.
102. In addition, the Commissioner notes that, by the time Mr Pentland made his request, part of document 79 had been disclosed by NHS Lanarkshire. The information disclosed from document 79 makes a public statement of NHS Lanarkshire's position in October 2012. The two (withheld) paragraphs preceding this text provide context as to why the statement was drafted, and show that it did not relate to any matter requiring confidentiality. The Commissioner does not consider that the exemption in section 30(b)(i) was correctly applied to these two paragraphs; this information should therefore be disclosed. The remaining withheld information in document 79 relates to suggested lines to take, which had not yet been agreed with the Minister. The Commissioner accepts that the exemption in section 30(b)(i) applies to this information, for the reasons put forward by the Ministers. (She will consider below the public interest in relation to this information.)
103. After considering the submissions put forward by the Ministers and the content of the information withheld under section 30(b)(i) or (ii), the Commissioner finds that, with the exception of last sentence of the first paragraph of document 41 and information in document 79 (discussed above) the exemptions were wrongly applied to the information in this group of documents (details of which are provided in Appendix 2).
104. Sections 30(b)(i) and (ii) of FOISA are qualified exemptions, which means that their application is subject to the public interest test in section 2(1)(b) of FOISA. Therefore, having decided that information in documents 41 and 79 is exempt under sections 30(b)(i) and (ii), the Commissioner must now go on to consider whether, in all the circumstances of the case, the public interest in disclosing that information is outweighed by the public interest in maintaining the exemption.



Public interest test

105. The Ministers acknowledged that there is some public interest in releasing information in order to promote transparency. However, the Ministers considered that it was more important in the public interest, for the sake of effective policy making, to avoid a situation in which officials felt unwilling to express any queries or concerns which may be sensitive, for fear that their views might be disclosed publicly. The Ministers argued there was a strong public interest in the promotion of a strong and united government with a clear policy and by avoiding undue levels of scrutiny regarding individual comments of officials or other matters. Disclosure in this case could undermine that.
106. Therefore, on balance, the Ministers considered that any public interest in release of the information was outweighed by the strong public interest in avoiding a negative impact on the smooth running of government and on the clarity of its policy, as well as the public interest in ensuring thorough consideration of all advice and views in future to ensure effective policy making.
107. In his submissions on the public interest (which related to all the withheld information, not just the information currently under consideration), Mr Pentland argued that the public have a right to know about the processes involved in making decisions that significantly affect their public services and, in particular, to have access to the full facts regarding the evolution of proposals for those services.
108. The Commissioner recognises that NHS Lanarkshire's mental health services review is of significant importance and concern to the communities and individuals affected by the changes. As well as engendering great interest on the part of the public, she accepts that there is a significant public interest in understanding the process followed during the review, especially as it has been on-going for ten years and has involved substantial sums of public money.
109. Having considered the public interest arguments advanced by the Ministers, the Commissioner has concluded that, should the information in documents 41 and 79 be disclosed (as discussed above), the likely outcome is that officials will be unwilling to express in writing any queries or concerns which may be sensitive, for fear they may be disclosed publicly. This would not be in the public interest.
110. The Commissioner considers that the public interest arguments in favour of disclosure are strong, given that the matter under consideration was of serious concern, but, in relation to the specific information under consideration at this point, the Commissioner considers that there is a stronger public interest in allowing Ministers and officials the private space to engage in free and frank discussions, without fear that these discussions will be made public.
111. For these reasons, the Commissioner has concluded, on balance, that the public interest in disclosing the information in documents 41 and 79 (as described above) is outweighed by that in maintaining the exemptions in section 30(b)(i) and (ii) of FOISA. Therefore, the Commissioner finds that the Ministers were entitled to withhold the information under section 30(b)(i) and (ii).



Section 30(b)(i) – NHS Lanarkshire’s proposals – Ministers’ arguments

112. There is only one document to consider in relation to this category of information, document 12.
113. The Ministers disclosed a redacted version of document 12 to Mr Pentland, but withheld two paragraphs under section 30(b)(i) of FOISA, arguing that, if this information were disclosed, it could cause embarrassment to NHS Lanarkshire. The Ministers described the information as containing advice and queries on sensitive points in order to help NHS Lanarkshire ensure their final proposals were robust and that any errors were corrected. The Ministers considered that NHS Lanarkshire would have considered and addressed the points made in document 12 before making a decision.
114. The Ministers stated that the release of the information would cause significant harm by making officials much less likely to raise (in writing) sensitive issues or query points which they think are incorrect in future. The Ministers considered that this would be likely to lead to errors or other issues in draft proposals not being spotted until the proposals had been published or were being implemented.

The Commissioner’s views

115. The Commissioner notes that the Ministers partially disclosed this document to Mr Pentland during the investigation. The disclosed sections of this document raise questions about certain statements within the mental health services proposal. The Ministers did not provide any submission or explanation as to why some parts of the document were withheld, while other parts were disclosed. The Commissioner considers that, on face value, the withheld information does not differ greatly (in terms of its purpose) than the information disclosed from the document. However, she notes that it differs from other internal Scottish Government documents in that the withheld information provides comments on NHS Lanarkshire’s proposal rather than detailing of any action contemplated by Scottish Government officials or Ministers.
116. The Commissioner notes that the information in this document is perhaps more specific and detailed than the other documents in this correspondence chain, but she does not find the comments to be particularly forthright or trenchant, simply of the type which might be expected during any exchange forming part of a policy development process.
117. The Commissioner has also considered the timing of the creation of this document, in relation to both the development of NHS Lanarkshire’s proposals and the date of Mr Pentland’s request. The Commissioner notes that by the time Mr Pentland made his request, NHS Lanarkshire’s initial proposals had been revised and modified, which could reasonably be seen as reducing the sensitivity of information relating to the initial proposals. The information concerns operational details rather than high level strategy. The Commissioner does not accept that the information is of such sensitivity to make it likely that disclosure would, or would be likely to, cause substantial inhibition in the provision of such advice in future. She finds that the exemption in section 30(b)(i) was wrongly applied to this information.



118. As the Commissioner is not satisfied that the exemption in section 30(b)(i) of FOISA has been engaged (details of which are provided in Appendix 2), she is not required to go on to consider the public interest test in section 2(1)(b).

Section 29(1)(a) – Formulation of Scottish Administration policy etc.

Is the exemption engaged?

119. Under section 29(1)(a) of FOISA, information held by the “Scottish Administration” (defined in section 126 of the Scotland Act 1998 as members of the Scottish Executive and junior Scottish Ministers, and non-ministerial office holders of the Scottish Administration, and their respective staff) is exempt information if it relates to the formulation or development of government policy.
120. The Commissioner’s view, as expressed in her briefing on the application of section 29²³ is that:
- “formulation” suggests the early stages of the policy process, where the options are identified and considered, risks are identified, consultation takes place and recommendations and submissions are presented to the Ministers; while
 - “development” suggests the processes involved in reviewing, improving upon or amending existing policy; it can involve piloting, monitoring, analysing, reviewing or recording the effects of existing policy.
121. For information to fall under this exemption, it need only “relate” to the formulation or development of government policy. That is, to the consideration or development of options and priorities for Scottish Ministers, who will then determine which of these should be translated into political action and/or legislation, and when.
122. The information being withheld under section 29(1)(a) largely concerns the progress of the review of NHS Lanarkshire’s mental health services.
123. The Ministers stated that the policy in relation to mental health services in Lanarkshire was still being developed at the time when Mr Pentland’s review response was issued (March 2013): the finalised policy was issued on 26 June 2013²⁴. The Ministers commented that although a Ministerial decision was not required, as NHS Lanarkshire’s proposals did not ultimately entail significant service change, that might not have been the case and was not known at the time the review response was sent to Mr Pentland.
124. Having considered the withheld information, the Commissioner is satisfied that it relates to the formulation or development of Government policy and, accordingly, that the exemption in section 29(1)(a) of FOISA is engaged. The information includes discussions on changes and amendments to the detail of the mental health services review. The Commissioner accepts

²³ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section29/Section29.aspx>

²⁴ <http://www.nhslanarkshire.org.uk/news/news/Pages/MentalHealthImprovements.aspx>



that this information was intended to assist Ministers and officials in formulating or developing policy in relation to the consideration of NHS Lanarkshire's mental health services.

Public interest test

125. The exemption in section 29(1)(a) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Having decided that the information is exempt under section 29(1)(a), the Commissioner must go on to 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.

Ministers' public interest submissions

126. The Ministers recognised some public interest in release of the information in order to promote greater transparency, raise awareness of policies which the Scottish Government is considering, and show how policy was developed. However, they considered that the withheld information would show only some of the policy development considerations and would not significantly add to public understanding.
127. The Ministers commented that the Scottish Government should be able to seek a range of views, both internally externally (in this case, through correspondence with NHS Lanarkshire), to assist them in providing advice to Ministers to enable Ministers to form a policy view and, where necessary, make a decision. They identified a strong public interest in enabling officials and Ministers to consider fully all the options, taking account of consultation with stakeholders such as NHS Lanarkshire, before reaching a settled view without fear that those internal considerations will be made public before a decision has been taken, potentially skewing the public debate or influencing the considerations.
128. The Ministers argued that in order to ensure that officials and Ministers are not afraid to put forward views which may not be in line with finalised Government policy, or to challenge proposals and identify concerns where there may be errors or issues to be addressed, the process of policy development should be undertaken in private. This allows proposals such as the recommendations for NHS Lanarkshire's delivery of mental health services to be thoroughly scrutinised, and enables any issues or errors to be identified and addressed before a final decision is taken and the public are informed of that decision.
129. The Ministers took the view that it was also important to avoid causing confusion about government policy. In this case, they anticipated that confusion would be caused by releasing elements of internal discussions or discussions with NHS Lanarkshire while the policy was being developed. As noted in the submissions on section 30(a), the Ministers believe that, in order to promote strong government, the Scottish Government must be able to set out a clear policy position.
130. In their submissions, the Ministers identified the information withheld within document 71 as requiring specific attention. The Ministers stated that the information in this document discusses the broader development of mental health policy (going beyond the specifics of service delivery proposals for Lanarkshire), and described policy development work as still



ongoing. Given that the document speculates about how services might be delivered differently in future, the Ministers considered it would not be appropriate to release the document before the policy has been finalised. They argued that disclosure at this stage could cause confusion about what Scottish Government policy is, if the final policy turned out to be different. They considered it was appropriate that the options should be fully considered internally before settled policy view was reached, at which point the policy would be made public.

131. The Ministers also considered that it was not in the public interest to release information where this is likely to cause confusion. Given that document 71 concerns only a small part of mental health policy and refers to options that were under consideration, but were not finalised or agreed, the Ministers believed that disclosure could cause confusion and misunderstandings about the Scottish Government's policies on mental health services. The Ministers argued that disclosure of the other documents exempt under section 29(1)(a) could also cause confusion, giving reasons which they asked the Commissioner not to include in the decision notice.
132. The Ministers concluded that, on balance, the public interest lay in withholding the information, in order to safeguard the detailed process of consideration of options in developing policy.

Mr Pentland's public interest submissions

133. As noted previously, in his submissions Mr Pentland referred to the public interest in understanding the processes involved in making decisions that significantly affect public services. He identified a particular public interest in understanding what role the current Health Secretary had played (his views being influential) in the change of policy and discussions on a matter from which it was publicly stated he had withdrawn.

Commissioner's view

134. The Commissioner has carefully considered the representations made by both Mr Pentland and the Ministers when balancing the public interest both for and against disclosure of the information pertaining to the development of policy relating to the review of NHS Lanarkshire's mental health services.
135. In the Commissioner's view, disclosure of the policy discussions would serve the public interest in informing the public about the development of the policy, and the course this had taken. As noted above, the review of NHS Lanarkshire mental health services had taken many years to complete, and had involved substantial sums of public money. The proposals resulting from the review would have a direct effect on the communities in which the mental health services were to be provided. The Commissioner accepts that there is a strong public interest in the disclosure of information which would show why the development of this policy took the direction it did.
136. The Commissioner disagrees with the Ministers that, as the policy was not finalised or agreed at the time of Mr Pentland's request for review, disclosure of the withheld information at that time (particularly that found in document 71) could have caused confusion and



misunderstanding, and so would not be in the public interest. As the Commissioner has previously commented, disclosure of information under FOISA does not prohibit an authority from disclosing further explanatory information to aid understanding or comprehension, where this is considered useful. Even if there was potential for misunderstanding, it was in the Ministers' gift (as it would be for any public authority) to provide contextual explanation if they considered it necessary to assist understanding of the information disclosed.

137. The Commissioner has given weight to the particular circumstances of this case, which saw proposals put forward by NHS Lanarkshire after a long period of development and consultation (and which the previous Health Secretary had been minded to approve with conditions) being overturned in a comparatively short space of time following Mr Neil's appointment. In these circumstances, the Commissioner finds it is legitimate for the public to seek to understand why there was a relatively rapid change in policy, given the previous investment of time and public money.
138. In general, the Commissioner accepts the Ministers' argument that it is in the public interest that all policy options can be explored and considered candidly by the Ministers and that space should be afforded for doing so before reaching a settled public view. Generally, this does not preclude the public from engaging with and influencing future policy development.
139. However, in the circumstances of this case, the Commissioner considers that the public interest in allowing policy options to be explored before reaching a settled view is outweighed by competing public interest considerations which favour disclosure. As noted above, considerable public money and time had been spent in reviewing NHS Lanarkshire's mental health services and developing proposals for service delivery. In these circumstances, it is in the public interest that there should be transparency over the process by which one set of proposals were developed to the point where conditional approval was about to be given, only for a complete review of those proposals to be ordered within a matter of weeks.
140. Recognising that there will usually be scope for an authority to mitigate the potential for information being taken out of context, the Commissioner has concluded that disclosure of the withheld information, at the time the Ministers were dealing with Mr Pentland's request and request for review, would not have been likely to harm the policy-making process to any significant degree, and any adverse effects of disclosure (in terms of the public interest) would be outweighed by the benefits likely to follow disclosure of the information.
141. Having considered all of the representations made by Mr Pentland and the Ministers, the Commissioner has concluded, that, the public interest in disclosure of the withheld information (details of which are provided in Appendix 2) outweighs the public interest in maintaining the exemption in section 29(1)(a) of FOISA.



DECISION

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 John Pentland.

The Commissioner finds that the Ministers breached section 1(1) of FOISA by failing to provide information which was later disclosed during the investigation.

The Commissioner found that the Ministers had wrongly applied the exemptions in section 30(a) and section 29(1)(a) of FOISA to all information withheld under these exemptions.

The Commissioner found that the Ministers had applied the exemption in sections 30(b)(i) and (ii) and 30(c) of FOISA correctly to some, but not all of the information, withheld under these exemptions.

The Commissioner requires the Ministers to provide Mr Pentland with the information specified in Appendix 2, by **6 May 2014**.

Appeal

Should either Mr John Pentland MSP 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.

Rosemary Agnew
Scottish Information Commissioner
19 March 2014



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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

29 Formulation of Scottish Administration policy etc.

- (1) Information held by the Scottish Administration is exempt information if it relates to-
- (a) the formulation or development of government policy;

...

- (4) In this section-

"government policy" means-

- (a) the policy of the Scottish Administration; and
(b) in relation to information created before 1st July 1999, the policy of the Government of the United Kingdom;

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

- (a) would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers
- (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



Appendix 2 – Schedule Of Documents

Key to colours: green , disclose information in full; red , withhold information in full; yellow disclose specific information as indicated; grey , not considered or part of decision (as already disclosed or otherwise accessible) but reference included for completeness.											
Doc No:	Document Status	FOISA Exemption(s)									Decision
		Formulation of Scottish Administration policy etc. 29(1)(a)	Collective responsibility of the Scottish Ministers 30(a)	Information relating to changes in government policy 30(b)(i) 30(b)(ii)		Information relating to Ministerial Code and collective responsibility 30(b)(i) 30(b)(ii)		NHS Lanarkshire's proposals 30(b)(i)	Group 1 - paragraph 7.5 of the Ministerial Code 30(c)	Group 2 - Letters from MPs and MSPs 30(c)	
1	Withheld in entirety	✓									Exemption applies, public interest favours disclosure – disclose.
				✓	✓						Exemptions do not apply – disclose.
2	Not considered										N/A
3	Partly disclosed					✓					Exemption does not apply – disclose.
4	Not considered										N/A
5	Not considered										N/A
6	Not considered										N/A



Key to colours: **green**, disclose information in full; **red**, withhold information in full; **yellow** disclose specific information as indicated; **grey**, not considered or part of decision (as already disclosed or otherwise accessible) but reference included for completeness.

Doc No:	Document Status	FOISA Exemption(s)									Decision
		Formulation of Scottish Administration policy etc. 29(1)(a)	Collective responsibility of the Scottish Ministers 30(a)	Information relating to changes in government policy 30(b)(i) 30(b)(ii)		Information relating to Ministerial Code and collective responsibility 30(b)(i) 30(b)(ii)		NHS Lanarkshire's proposals 30(b)(i)	Group 1 - paragraph 7.5 of the Ministerial Code 30(c)	Group 2 - Letters from MPs and MSPs 30(c)	
7	Not considered										N/A
8	Not considered										N/A
9	Partly disclosed		✓								Page 33 – exemption does not apply – disclose page.
			✓								Page 58 – exemption does not apply – disclose page.
10	Not considered										N/A
11	Not considered										N/A
12	Partly disclosed	✓									Exemption applies, public interest favours disclosure – disclose.
			✓					✓			Exemption does not apply - disclose.



Key to colours: **green**, disclose information in full; **red**, withhold information in full; **yellow** disclose specific information as indicated; **grey**, not considered or part of decision (as already disclosed or otherwise accessible) but reference included for completeness.

Doc No:	Document Status	FOISA Exemption(s)									Decision
		Formulation of Scottish Administration policy etc. 29(1)(a)	Collective responsibility of the Scottish Ministers 30(a)	Information relating to changes in government policy 30(b)(i) 30(b)(ii)		Information relating to Ministerial Code and collective responsibility 30(b)(i) 30(b)(ii)		NHS Lanarkshire's proposals 30(b)(i)	Group 1 - paragraph 7.5 of the Ministerial Code 30(c)	Group 2 - Letters from MPs and MSPs 30(c)	
13	Withheld in entirety	✓									Exemption applies, public interest favours disclosure – disclose.
				✓	✓						Exemptions do not apply – disclose.
14	Partly disclosed	✓									Exemption applies, public interest favours disclosure – disclose.
					✓						Exemptions do not apply – disclose.
15	Withheld in entirety	✓									Exemption applies, public interest favours disclosure – disclose.
				✓	✓						Exemptions do not apply – disclose.



Key to colours: **green**, disclose information in full; **red**, withhold information in full; **yellow** disclose specific information as indicated; **grey**, not considered or part of decision (as already disclosed or otherwise accessible) but reference included for completeness.

Doc No:	Document Status	FOISA Exemption(s)									Decision
		Formulation of Scottish Administration policy etc. 29(1)(a)	Collective responsibility of the Scottish Ministers 30(a)	Information relating to changes in government policy 30(b)(i) 30(b)(ii)		Information relating to Ministerial Code and collective responsibility 30(b)(i) 30(b)(ii)		NHS Lanarkshire's proposals 30(b)(i)	Group 1 - paragraph 7.5 of the Ministerial Code 30(c)	Group 2 - Letters from MPs and MSPs 30(c)	
16	Withheld in entirety	✓									Exemption applies, public interest favours disclosure – disclose.
				✓	✓						Exemptions do not apply – disclose.
17	Withheld in entirety	✓									Exemption applies, public interest favours disclosure – disclose.
				✓	✓						Exemptions do not apply – disclose.
18	Not considered										N/A
19	Partly disclosed	✓									Exemption applies, public interest favours disclosure – disclose.
			✓	✓							Exemption does not apply – disclose.
20	Not considered										N/A



Key to colours: **green**, disclose information in full; **red**, withhold information in full; **yellow** disclose specific information as indicated; **grey**, not considered or part of decision (as already disclosed or otherwise accessible) but reference included for completeness.

Doc No:	Document Status	FOISA Exemption(s)									Decision
		Formulation of Scottish Administration policy etc. 29(1)(a)	Collective responsibility of the Scottish Ministers 30(a)	Information relating to changes in government policy 30(b)(i) 30(b)(ii)		Information relating to Ministerial Code and collective responsibility 30(b)(i) 30(b)(ii)		NHS Lanarkshire's proposals 30(b)(i)	Group 1 - paragraph 7.5 of the Ministerial Code 30(c)	Group 2 - Letters from MPs and MSPs 30(c)	
21	Not considered										N/A
22	Withheld in entirety	✓									Exemption applies, public interest favours disclosure – disclose.
			✓								Exemption does not apply – disclose.
23	Not considered										N/A
24	Withheld in entirety	✓									Exemption applies, public interest favours disclosure – disclose.
				✓	✓						Exemptions do not apply – disclose.



Key to colours: **green**, disclose information in full; **red**, withhold information in full; **yellow** disclose specific information as indicated; **grey**, not considered or part of decision (as already disclosed or otherwise accessible) but reference included for completeness.

Doc No:	Document Status	FOISA Exemption(s)									Decision
		Formulation of Scottish Administration policy etc. 29(1)(a)	Collective responsibility of the Scottish Ministers 30(a)	Information relating to changes in government policy 30(b)(i) 30(b)(ii)		Information relating to Ministerial Code and collective responsibility 30(b)(i) 30(b)(ii)		NHS Lanarkshire's proposals 30(b)(i)	Group 1 - paragraph 7.5 of the Ministerial Code 30(c)	Group 2 - Letters from MPs and MSPs 30(c)	
25	Withheld in entirety	✓									Exemption applies, public interest favours disclosure – disclose.
				✓	✓						Exemptions do not apply – disclose.
26	Not considered										N/A
27	Not considered										N/A
28	Not considered										N/A
29	Not considered										N/A
30	Withheld in entirety	✓									Exemption does not apply – disclose.
			✓								Exemption does not apply – disclose.
				✓							Exemption does not apply – disclose.



Key to colours: **green**, disclose information in full; **red**, withhold information in full; **yellow** disclose specific information as indicated; **grey**, not considered or part of decision (as already disclosed or otherwise accessible) but reference included for completeness.

Doc No:	Document Status	FOISA Exemption(s)									Decision
		Formulation of Scottish Administration policy etc. 29(1)(a)	Collective responsibility of the Scottish Ministers 30(a)	Information relating to changes in government policy 30(b)(i) 30(b)(ii)		Information relating to Ministerial Code and collective responsibility 30(b)(i) 30(b)(ii)		NHS Lanarkshire's proposals 30(b)(i)	Group 1 - paragraph 7.5 of the Ministerial Code 30(c)	Group 2 - Letters from MPs and MSPs 30(c)	
31	Partly disclosed		✓								Exemption does not apply – disclose.
32	Withheld in entirety		✓								Exemption does not apply - disclose.
						✓					Exemption does not apply – disclose.
33	Not considered										N/A
34	Not considered										N/A
35	Not considered										N/A
36	Not considered										N/A
37	Not considered										N/A
38	Not considered										N/A
39	Withheld in entirety									✓	Exemption does not apply – disclose.



Key to colours: **green**, disclose information in full; **red**, withhold information in full; **yellow** disclose specific information as indicated; **grey**, not considered or part of decision (as already disclosed or otherwise accessible) but reference included for completeness.

Doc No:	Document Status	FOISA Exemption(s)									Decision
		Formulation of Scottish Administration policy etc. 29(1)(a)	Collective responsibility of the Scottish Ministers 30(a)	Information relating to changes in government policy 30(b)(i) 30(b)(ii)		Information relating to Ministerial Code and collective responsibility 30(b)(i) 30(b)(ii)		NHS Lanarkshire's proposals 30(b)(i)	Group 1 - paragraph 7.5 of the Ministerial Code 30(c)	Group 2 - Letters from MPs and MSPs 30(c)	
40	Withheld in entirety		✓								Exemption does not apply – disclose.
41	Withheld in entirety		✓								Exemption does not apply - disclose.
						✓	✓				Last sentence of first paragraph - exemption applies + public interest does not favour disclosure – withhold Remainder - exemptions do not apply – disclosure (see paragraphs 101 to 111).
42	Withheld in entirety		✓								Exemption does not apply – disclose.
						✓	✓				Exemptions do not apply – disclose.



Key to colours: **green**, disclose information in full; **red**, withhold information in full; **yellow** disclose specific information as indicated; **grey**, not considered or part of decision (as already disclosed or otherwise accessible) but reference included for completeness.

Doc No:	Document Status	FOISA Exemption(s)									Decision
		Formulation of Scottish Administration policy etc. 29(1)(a)	Collective responsibility of the Scottish Ministers 30(a)	Information relating to changes in government policy 30(b)(i) 30(b)(ii)		Information relating to Ministerial Code and collective responsibility 30(b)(i) 30(b)(ii)		NHS Lanarkshire's proposals 30(b)(i)	Group 1 - paragraph 7.5 of the Ministerial Code 30(c)	Group 2 - Letters from MPs and MSPs 30(c)	
43	Not considered										N/A
44	Not considered										N/A
45	Not considered										N/A
46	Not considered										N/A
47	Partly disclosed						✓				Exemption does not apply – disclose.
48	Not considered										N/A
49	Withheld in entirety		✓								Exemption does not apply – disclose.
50	Withheld in entirety								✓		Exemption does not apply - disclose.
51	Not considered										N/A
52	Not considered										N/A



Key to colours: **green**, disclose information in full; **red**, withhold information in full; **yellow** disclose specific information as indicated; **grey**, not considered or part of decision (as already disclosed or otherwise accessible) but reference included for completeness.

Doc No:	Document Status	FOISA Exemption(s)									Decision
		Formulation of Scottish Administration policy etc. 29(1)(a)	Collective responsibility of the Scottish Ministers 30(a)	Information relating to changes in government policy 30(b)(i) 30(b)(ii)		Information relating to Ministerial Code and collective responsibility 30(b)(i) 30(b)(ii)		NHS Lanarkshire's proposals 30(b)(i)	Group 1 - paragraph 7.5 of the Ministerial Code 30(c)	Group 2 - Letters from MPs and MSPs 30(c)	
53	Withheld in entirety		✓								Exemption does not apply - disclose.
							✓				Exemption does not apply – disclose.
54	Not considered										N/A
55	Not considered										N/A
56	Not considered										N/A
57	Not considered										N/A
58	Not considered										N/A
59	Not considered										N/A
60	Not considered										N/A
61	Not considered										N/A



Key to colours: **green**, disclose information in full; **red**, withhold information in full; **yellow** disclose specific information as indicated; **grey**, not considered or part of decision (as already disclosed or otherwise accessible) but reference included for completeness.

Doc No:	Document Status	FOISA Exemption(s)									Decision
		Formulation of Scottish Administration policy etc. 29(1)(a)	Collective responsibility of the Scottish Ministers 30(a)	Information relating to changes in government policy 30(b)(i) 30(b)(ii)		Information relating to Ministerial Code and collective responsibility 30(b)(i) 30(b)(ii)		NHS Lanarkshire's proposals 30(b)(i)	Group 1 - paragraph 7.5 of the Ministerial Code 30(c)	Group 2 - Letters from MPs and MSPs 30(c)	
62	Not considered										N/A
63	Not considered										N/A
64	Not considered										N/A
65	Not considered										N/A
66	Withheld in entirety		✓								Exemption does not apply – disclose.
67	Partly disclosed	✓									Exemption applies, public interest favours disclosure – disclose.
				✓							Exemption does not apply – disclose.
68	Not considered										N/A
69	Withheld in entirety		✓								Exemption does not apply - disclose.
70	Withheld in entirety								✓		Exemption does not apply - disclose.



Key to colours: **green**, disclose information in full; **red**, withhold information in full; **yellow** disclose specific information as indicated; **grey**, not considered or part of decision (as already disclosed or otherwise accessible) but reference included for completeness.

Doc No:	Document Status	FOISA Exemption(s)									Decision
		Formulation of Scottish Administration policy etc. 29(1)(a)	Collective responsibility of the Scottish Ministers 30(a)	Information relating to changes in government policy 30(b)(i) 30(b)(ii)		Information relating to Ministerial Code and collective responsibility 30(b)(i) 30(b)(ii)		NHS Lanarkshire's proposals 30(b)(i)	Group 1 - paragraph 7.5 of the Ministerial Code 30(c)	Group 2 - Letters from MPs and MSPs 30(c)	
71	Withheld in entirety	✓									Exemption applies, public interest favours disclosure – disclose.
				✓	✓						Exemptions do not apply – disclose.
72	Not considered										N/A
73	Not considered										N/A
74	Not considered										N/A
75	Not considered										N/A
76	Not considered										N/A
77	Not considered										N/A
78	Not considered										N/A



Key to colours: **green**, disclose information in full; **red**, withhold information in full; **yellow** disclose specific information as indicated; **grey**, not considered or part of decision (as already disclosed or otherwise accessible) but reference included for completeness.

Doc No:	Document Status	FOISA Exemption(s)									Decision	
		Formulation of Scottish Administration policy etc. 29(1)(a)	Collective responsibility of the Scottish Ministers 30(a)	Information relating to changes in government policy 30(b)(i) 30(b)(ii)		Information relating to Ministerial Code and collective responsibility 30(b)(i) 30(b)(ii)		NHS Lanarkshire's proposals 30(b)(i)	Group 1 - paragraph 7.5 of the Ministerial Code 30(c)	Group 2 - Letters from MPs and MSPs 30(c)		
79	Partly disclosed					✓						Exemption does not apply to first two paragraphs – disclose these paragraphs Exemption does apply to remaining information + public interest does not favour disclosure – withhold remainder (see paragraphs 102 to 111).
80	Withheld in entirety										✓	Exemption does not apply – disclose.
81	Not considered											N/A
82	Not considered											N/A
83	Not considered											N/A



Key to colours: **green**, disclose information in full; **red**, withhold information in full; **yellow** disclose specific information as indicated; **grey**, not considered or part of decision (as already disclosed or otherwise accessible) but reference included for completeness.

Doc No:	Document Status	FOISA Exemption(s)									Decision
		Formulation of Scottish Administration policy etc. 29(1)(a)	Collective responsibility of the Scottish Ministers 30(a)	Information relating to changes in government policy 30(b)(i) 30(b)(ii)		Information relating to Ministerial Code and collective responsibility 30(b)(i) 30(b)(ii)		NHS Lanarkshire's proposals 30(b)(i)	Group 1 - paragraph 7.5 of the Ministerial Code 30(c)	Group 2 - Letters from MPs and MSPs 30(c)	
84	Not considered										N/A
85	Not considered										N/A
86	Partly disclosed								✓		Exemption does not apply – disclose.
87	Not considered										N/A
88	Not considered										N/A
89	Not considered										N/A
90	Not considered										N/A
91	Withheld in entirety		✓								Exemption does not apply – disclose.
92	Withheld in entirety		✓								Exemption does not apply – disclose.
93	Withheld in entirety									✓	Exemption does not apply - disclose.



Key to colours: **green**, disclose information in full; **red**, withhold information in full; **yellow** disclose specific information as indicated; **grey**, not considered or part of decision (as already disclosed or otherwise accessible) but reference included for completeness.

Doc No:	Document Status	FOISA Exemption(s)									Decision
		Formulation of Scottish Administration policy etc. 29(1)(a)	Collective responsibility of the Scottish Ministers 30(a)	Information relating to changes in government policy 30(b)(i) 30(b)(ii)		Information relating to Ministerial Code and collective responsibility 30(b)(i) 30(b)(ii)		NHS Lanarkshire's proposals 30(b)(i)	Group 1 - paragraph 7.5 of the Ministerial Code 30(c)	Group 2 - Letters from MPs and MSPs 30(c)	
94	Withheld in entirety									✓	Exemption does not apply – disclose.
95	Not considered										N/A
96	Not considered										N/A
97	Not considered										N/A
98	Withheld in entirety								✓		Exemption applies + public interest does not favour disclosure – withhold.
99	Not considered										N/A
100	Not considered										N/A
101	Withheld in entirety								✓		Exemption applies + public interest does not favour disclosure – withhold.



Key to colours: **green**, disclose information in full; **red**, withhold information in full; **yellow** disclose specific information as indicated; **grey**, not considered or part of decision (as already disclosed or otherwise accessible) but reference included for completeness.

Doc No:	Document Status	FOISA Exemption(s)									Decision
		Formulation of Scottish Administration policy etc. 29(1)(a)	Collective responsibility of the Scottish Ministers 30(a)	Information relating to changes in government policy 30(b)(i) 30(b)(ii)		Information relating to Ministerial Code and collective responsibility 30(b)(i) 30(b)(ii)		NHS Lanarkshire's proposals 30(b)(i)	Group 1 - paragraph 7.5 of the Ministerial Code 30(c)	Group 2 - Letters from MPs and MSPs 30(c)	
102	Withheld in entirety								✓		Exemption applies + public interest does not favour disclosure – withhold.
103	Withheld in entirety								✓		Exemption applies + public interest does not favour disclosure – withhold.
104	Withheld in entirety								✓		Exemption applies + public interest does not favour disclosure – withhold.
105	Withheld in entirety								✓		Exemption applies + public interest does not favour disclosure – withhold.
106	Withheld in entirety								✓		Exemption applies + public interest does not favour disclosure – withhold.



Key to colours: **green**, disclose information in full; **red**, withhold information in full; **yellow** disclose specific information as indicated; **grey**, not considered or part of decision (as already disclosed or otherwise accessible) but reference included for completeness.

Doc No:	Document Status	FOISA Exemption(s)									Decision
		Formulation of Scottish Administration policy etc. 29(1)(a)	Collective responsibility of the Scottish Ministers 30(a)	Information relating to changes in government policy 30(b)(i) 30(b)(ii)		Information relating to Ministerial Code and collective responsibility 30(b)(i) 30(b)(ii)		NHS Lanarkshire's proposals 30(b)(i)	Group 1 - paragraph 7.5 of the Ministerial Code 30(c)	Group 2 - Letters from MPs and MSPs 30(c)	
107	Withheld in entirety								✓		Exemption applies + public interest does not favour disclosure – withhold.
108	Withheld in entirety								✓		Exemption applies + public interest does not favour disclosure – withhold.
109	Withheld in entirety								✓		Exemption applies + public interest does not favour disclosure – withhold.
110	Withheld in entirety								✓		Exemption applies + public interest does not favour disclosure – withhold.
111	Withheld in entirety								✓		Exemption applies + public interest does not favour disclosure – withhold.



Key to colours: **green**, disclose information in full; **red**, withhold information in full; **yellow** disclose specific information as indicated; **grey**, not considered or part of decision (as already disclosed or otherwise accessible) but reference included for completeness.

Doc No:	Document Status	FOISA Exemption(s)									Decision
		Formulation of Scottish Administration policy etc. 29(1)(a)	Collective responsibility of the Scottish Ministers 30(a)	Information relating to changes in government policy 30(b)(i) 30(b)(ii)		Information relating to Ministerial Code and collective responsibility 30(b)(i) 30(b)(ii)		NHS Lanarkshire's proposals 30(b)(i)	Group 1 - paragraph 7.5 of the Ministerial Code 30(c)	Group 2 - Letters from MPs and MSPs 30(c)	
112	Withheld in entirety								✓		Exemption applies + public interest does not favour disclosure – withhold.
113	Withheld in entirety								✓		Exemption applies + public interest does not favour disclosure – withhold.
114	Withheld in entirety								✓		Exemption applies + public interest does not favour disclosure – withhold.
115	Withheld in entirety								✓		Exemption applies + public interest does not favour disclosure – withhold.
116	Withheld in entirety								✓		Exemption applies + public interest does not favour disclosure – withhold.



Key to colours: **green**, disclose information in full; **red**, withhold information in full; **yellow** disclose specific information as indicated; **grey**, not considered or part of decision (as already disclosed or otherwise accessible) but reference included for completeness.

Doc No:	Document Status	FOISA Exemption(s)									Decision
		Formulation of Scottish Administration policy etc. 29(1)(a)	Collective responsibility of the Scottish Ministers 30(a)	Information relating to changes in government policy 30(b)(i) 30(b)(ii)		Information relating to Ministerial Code and collective responsibility 30(b)(i) 30(b)(ii)		NHS Lanarkshire's proposals 30(b)(i)	Group 1 - paragraph 7.5 of the Ministerial Code 30(c)	Group 2 - Letters from MPs and MSPs 30(c)	
117	Withheld in entirety								✓		Exemption applies + public interest does not favour disclosure – withhold.
118	Withheld in entirety								✓		Exemption applies + public interest does not favour disclosure – withhold.
119	Withheld in entirety								✓		Exemption applies + public interest does not favour disclosure – withhold.
120	Withheld in entirety								✓		Exemption applies + public interest does not favour disclosure – withhold.
121	Withheld in entirety								✓		Exemption applies + public interest does not favour disclosure – withhold.



Key to colours: **green**, disclose information in full; **red**, withhold information in full; **yellow** disclose specific information as indicated; **grey**, not considered or part of decision (as already disclosed or otherwise accessible) but reference included for completeness.

Doc No:	Document Status	FOISA Exemption(s)									Decision
		Formulation of Scottish Administration policy etc. 29(1)(a)	Collective responsibility of the Scottish Ministers 30(a)	Information relating to changes in government policy 30(b)(i) 30(b)(ii)		Information relating to Ministerial Code and collective responsibility 30(b)(i) 30(b)(ii)		NHS Lanarkshire's proposals 30(b)(i)	Group 1 - paragraph 7.5 of the Ministerial Code 30(c)	Group 2 - Letters from MPs and MSPs 30(c)	
122	Partly disclosed								✓		Exemption applies + public interest does not favour disclosure – withhold.
123	Not considered										N/A
124	Not considered										N/A
125	Not considered										N/A
126	Not considered										N/A
127	Not considered										N/A
128	Withheld in entirety								✓		Exemption does not apply – disclose.
129	Not considered										N/A
130	Withheld in entirety		✓								Exemption does not apply – disclose.



Key to colours: **green**, disclose information in full; **red**, withhold information in full; **yellow** disclose specific information as indicated; **grey**, not considered or part of decision (as already disclosed or otherwise accessible) but reference included for completeness.

Doc No:	Document Status	FOISA Exemption(s)									Decision
		Formulation of Scottish Administration policy etc. 29(1)(a)	Collective responsibility of the Scottish Ministers 30(a)	Information relating to changes in government policy 30(b)(i) 30(b)(ii)		Information relating to Ministerial Code and collective responsibility 30(b)(i) 30(b)(ii)		NHS Lanarkshire's proposals 30(b)(i)	Group 1 - paragraph 7.5 of the Ministerial Code 30(c)	Group 2 - Letters from MPs and MSPs 30(c)	
131	Withheld in entirety		✓								Exemption does not apply – disclose.
132	Withheld in entirety								✓		Exemption does not apply – disclose.
133	Withheld in entirety								✓		Exemption does not apply – disclose.
134	Withheld in entirety								✓		Exemption does not apply – disclose.
135	Not considered										N/A
136	Not considered										N/A
137	Not considered										N/A
138	Not considered										N/A
139	Not considered										N/A
140	Not considered										N/A



Key to colours: **green**, disclose information in full; **red**, withhold information in full; **yellow** disclose specific information as indicated; **grey**, not considered or part of decision (as already disclosed or otherwise accessible) but reference included for completeness.

Doc No:	Document Status	FOISA Exemption(s)									Decision
		Formulation of Scottish Administration policy etc. 29(1)(a)	Collective responsibility of the Scottish Ministers 30(a)	Information relating to changes in government policy 30(b)(i) 30(b)(ii)		Information relating to Ministerial Code and collective responsibility 30(b)(i) 30(b)(ii)		NHS Lanarkshire's proposals 30(b)(i)	Group 1 - paragraph 7.5 of the Ministerial Code 30(c)	Group 2 - Letters from MPs and MSPs 30(c)	
141	Not considered										N/A
142	Not considered										N/A
143	Not considered										N/A
144	Not considered										N/A
145	Not considered										N/A
146	Not considered										N/A
147	Not considered										N/A
148	Not considered										N/A