

THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

REFUSAL NOTICE

Request Number: 2023-694146

Date: 7 December 2023

This refusal notice is provided in accordance with section 16 of the Freedom of Information (Scotland) Act 2002 (FOI(S)A).

You have requested certain information which we have decided not to disclose to you. Further information about this decision is set out below.

Information which is the subject of the request	<p>Part 1 <i>"how is the charge calculated (units and unit price and dates data was consumed), on what iPad-based activities"?</i></p> <p>Part 3 <i>- any internal reports investigating the charge</i></p> <p>Part 4 <i>- any correspondence with the provider, understood to be EE including investigations on the charges</i></p> <p>Part 5 <i>- any responses provided by Mr Matheson or his office in relation to the costs</i></p>
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This information is held by us but we have decided not to disclose it as we consider it to be exempt information under FOI(S)A. Details are set out below.

Exemption(s)	<p>Section 33(1)(b) – prejudice to commercial interests of any person. This exemption applies to part 1 and 4 of the request (referred to above)</p> <p>Section 35(1)(g) and (2)(b) - prejudice to a public authority function to ascertain whether a person is responsible for conduct which is improper. This exemption applies to parts 3, 4 and 5 of the request.</p> <p>Section 30(c) - prejudice to the effective conduct of public affairs. This exemption applies to parts 3, 4 and 5 of the request.</p> <p>Section 38(1)(b) - third party personal data. This exemption applies to part 5 of the request.</p>
Why exemption(s) applies	<p><u>Section 33(1)(b)</u></p>

Section 33(1)(b) applies because the disclosure of information about the EE unit pricing would, or would be likely to, prejudice substantially the commercial interests of the Scottish Parliamentary Corporate Body (SPCB) and EE as set out below.

SPCB's interests:

The SPCB procures many goods and services, including the services which are the subject of this request. The SPCB pays for these services with funds provided through the public purse.

In interaction with private commercial entities, the SPCB operates like any other commercially active entity in that it is necessary for the SPCB to obtain best value for money in the procurement of the goods and services it purchases. The SPCB competes with other organisations in the open market who require the same services from the same pool of suppliers.

How the SPCB would be prejudiced:

Disclosure of EE unit pricing would, or would be likely to, detrimentally affect the SPCB's ability to obtain best value for public funds. The disclosure of this information is likely to diminish potential bidders' confidence in freely bidding for SPCB contracts because they would have to take into consideration that their commercial pricing information could be released into the public domain, allowing competitors access to their commercial pricing information which would allow them to seek to undercut their pricing in tender situations. This is likely to decrease the number of bids the SPCB receives which in turn would hinder healthy competition and the ability to obtain best value for money.

Substantially:

The prejudice must be substantial, i.e. it must be of real and demonstrable significance.

Decrease in competition as a result of bidder willingness to bid were their commercial pricing information to be made public, would significantly prejudice the SPCB's commercial interests for the reasons set out above.

Losing potential bidders' confidence in the confidentiality of the procurement process will have a significant impact on achieving value for money.

Passage of time

While the contract with EE has expired, there are still some legacy voice and data connections with EE remaining live and in use by the SPCB that were awarded under this Contract. As such, it is our view that the passage of time has not had any diminishing effect on the relevance of the commercial interests.

The likelihood of prejudice:

The disclosure of the information would immediately prejudice the SPCB's commercial interests because a loss of confidence in the procurement process would apply to all contracts awarded by the SPCB which is an ongoing process with new contracts awarded frequently.

EE's interests:

Disclosure of the EE unit pricing would or would be likely to prejudice substantially the commercial interests of EE. This is because release of this information would disclose the Tariff provided to the SPCB. From this, competitors could discern the public sector rates these companies offer and adjust their own pricing in future procurements accordingly.

How they would be substantially prejudiced:

The release of the pricing offered would decrease the supplier's ability to compete effectively in future tendering exercises because it would give competitors a clear advantage over them.

Disclosing the information would give competitors the advantage of knowing the unit pricing provided by EE which could lead to a targeted approach to competitive bidding in the future. This is especially true given that the pricing model is an annual payment for particular services therefore it can be directly attributed to the service.

For those reasons, EE's commercial interests would or would be likely to be substantially prejudiced by the disclosure of their pricing information.

Section 35(1)(g) and (2)(b)

Section 35(1)(g) provides that information is exempt information if its disclosure would, or would be likely to, prejudice substantially the exercise by any Scottish public authority of its functions for any of the purposes mentioned in subsection (2).

Under section 35(2)(b), one of the recognised purposes is to ascertain whether a person is responsible for conduct which is improper.

Under section 21 of the Scotland Act 1998, the Scottish Parliamentary Corporate Body ("SPCB") is responsible for providing the Parliament with the property, staff and services required for the Parliament's purposes. SPCB funded services and resources are provided to support Members conduct their parliamentary duties. Among other things, the SPCB administers payments under the Reimbursement of Members Expenses Scheme agreed by the Parliament. The SPCB also provides IT equipment to members to enable them to carry out their parliamentary functions.

On 23 November 2023, the SPCB announced an investigation under the Code of Conduct for MSPs of the data roaming charges incurred between 28 December 2022 and 3 January 2023 through the use of equipment provided by the SPCB to Michael Matheson MSP. This will investigate and make findings as to whether an improper claim was made by the Member in respect of the charges (or any part of them) under the Reimbursement of Members Expenses Scheme, and whether the Member failed to abide by the policies adopted by the SPCB as required by Section 7.3 of the Code of Conduct for MSPs.

The SPCB is required to conduct its investigation independently against the backdrop of a high degree of political sensitivity. As a matter of due process, there is a need to ensure that there is, and is seen to be, a fair and impartial investigation into these matters that respects the rights of the member subject to the investigation. The SPCB's investigations are being conducted confidentially to preserve the fairness and integrity of the process.

The SPCB will seek to conclude its investigation promptly and its findings in fact will be published. Depending on those findings, there may be a number of options open to the SPCB, as set out in Section 9 of the Code of Conduct for MSPs, including referral to the Standards, Procedures and Public Appointments Committee (SPACC) of the Scottish Parliament.

The SPPAC may conduct any inquiry into such matters referred to it itself or consider whether it wishes to refer any matter to the Ethical Standards Commissioner under section 12 of the Scottish Parliamentary Standards Commissioner Act 2002.

In light of the above, disclosure of the information sought would be likely to prejudice substantially the fairness of the investigative process. There is a real risk that disclosure of the information sought could restrict the willingness of individuals to co-operate with an investigation of this nature, which in turn could affect the effectiveness of such an investigation. This would be to the substantial prejudice of the SPCB's function to promote the observance of standards of conduct under the Code of Conduct for MSPs.

Section 30(c)

Section 30(c) provides that information is exempt information if its disclosure would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

In line with its statutory duty to provide the Parliament with the property, staff and services required for the Parliament's purposes, the SPCB must be able to secure: (a) the integrity of the Reimbursement of Members' Expenses Scheme; (b) the principle that SPCB funded resources are used for parliamentary purposes; and (c) public confidence in these matters.

Disclosure of information relevant to an ongoing investigation into breaches of the Members Expenses Scheme, and SPCB policies, by Mr Matheson MSP would be likely to prejudice the effectiveness of that investigation. In circumstances where it is expected that the investigations process will be conducted confidentially, it would be damaging for the SPCB to release information relevant to the investigation. This would prejudice the SPCB's ability to effectively administer the Scheme, and to promote the observance of requirements under the Scheme and SPCB policies.

Section 38(1)(b)

Section 38(1)(b) provides that information is exempt information if it constitutes personal data and the first, second or third condition is satisfied. The first condition under section 38(2A)(a) is that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles.

Personal data is information which relates to an individual who can be identified either directly or indirectly from that information or from the information in combination with other information.

Details of responses provided by Mr Matheson MSP or his office in relation to the costs is personal data from which he can be identified and which relates to him.

Such information is exempt from the duty of disclosure if disclosing the personal data would contravene the data protection principles in Article 5 of the UK GDPR.

Under Article 5(1)(a) of the UK GDPR, personal data must be processed lawfully, fairly and in a transparent manner in relation to the data subject. In order to be processed lawfully, the processing must satisfy a condition in Article 6. Article 6(1)(f) provides that processing shall be lawful if it is necessary for the legitimate interests pursued by the controller or a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data.

Therefore, if the requester as a third party has a legitimate interest in disclosure of this information, it is necessary to consider whether the disclosure is necessary to meet that legitimate interest. If so, the requirement is to balance this right with the rights of the data subject whose personal data falls within the scope of the request.

In this case, there is a legitimate interest in the information sought, particularly given the seniority of

	<p>the member involved as a Government Minister and the media interest surrounding this issue.</p> <p>However, in the current circumstances, disclosure is not necessary to meet this public interest. The public interest in the matters subject to investigation will be served in due course by the findings, and the reasons for such findings, relating to the subject matter of the investigation being published when appropriate.</p> <p>Even if it were considered to be necessary, the interests in disclosure would be overridden by the rights of Mr Matheson MSP whose personal data falls within the scope of the request.</p> <p>The SPCB is required to conduct its investigation independently against the backdrop of a high degree of political sensitivity. As a matter of due process to the data subject, there is a need to ensure that there is, and is seen to be, a fair, impartial and confidential investigation into these matters that respects the rights of the member subject to the investigation. Accordingly, the SPCB's investigations are being conducted confidentially to preserve the fairness and integrity of the process.</p> <p>Disclosure of the personal data of the member would be likely to prejudice substantially the fairness of the investigative process and is therefore outweighed by the rights of the member.</p> <p>In summary, to disclose the personal data would be neither lawful nor fair and therefore in breach of data protection principles.</p> <p>This means the exemption in section 38(1)(b) applies and the information is exempt from disclosure. This exemption is absolute and is not subject to the public interest.</p>
<p>Public interest (where relevant)</p>	<p><u>Section 33(1)(b)</u></p> <p>The exemption in section 33(1)(b) is subject to the public interest test in section 2(1)(b) FOISA.</p> <p><u>Public interest in disclosure:</u> The SPCB accepts that there is a public interest in enabling public understanding of the SPCB's purchasing activities to ensure the SPCB is held to account for spending public money and achieving value for money. In recognition of this a list of all</p>

current contracts over £5,000 in value can be accessed on our website via our contract register: [Contract register | Scottish Parliament Website](#)

Interest in maintaining the exemption:

There is also a public interest in ensuring healthy competition for public contracts. Public authorities would be significantly disadvantaged in achieving best value for public funds if detailed information about commercial pricing were to be published under FOI legislation.

There is a clear public interest in public authorities not being disadvantaged against private commercial undertakings in a commercial environment.

It is in the public interest for the SPCB, in common with other public authorities, to be able to consider tenders effectively in a competitive market with a view to awarding contracts which achieve best value for money for the public purse and the SPCB's specific requirements.

When balancing the competing public interests set out above, in this particular case considering that the information requested will disclose tariff pricing for specific services provided, it is the SPCB's opinion that the greater public interest lies in protecting the commercial interests of the SPCB and its suppliers in order to achieve best value for public contracts for the reasons set out above.

Section 35(1)(g) and (2)(b)

The exemptions in section 35 are qualified exemptions. This means that the application of the exemption in section 35(1)(g) and (2)(b) is subject to the public interest test. It is therefore necessary to consider whether, in all the circumstances, the public interest in disclosing this information is outweighed by the public interest in maintaining the exemption. It is recognised that there is a public interest in the information sought; particularly in transparency around spending from public funds, the seniority of the member involved as a Government Minister, and the media interest surrounding this issue. However, this needs to be balanced against the public interest in maintaining fairness in the investigative process, and the effect of not doing so on future investigations of this nature.

There is no definition of public interest in FOI(S)A, but it has been described as something that is of obvious concern and benefit to and in the interests of the public, rather than simply of interest to the public. In this instance, the public interest in disclosure of the information sought is outweighed by the public interest in withholding it.

The public interest in the matters subject to investigation will be served in due course by the findings, and the reasons for such findings, relating to the subject matter of the investigation being published when appropriate.

On balance, the public interest would not be served by disclosing the information in light of this future publication. The balance weighs in favour of non-disclosure to avoid prejudice to the: (a) fairness of the investigative process; (b) the willingness of individuals to co-operate with future investigations of this nature (and the effectiveness of such investigations); and (c) SPCB's ability to effectively promote the observance of standards of conduct under the Code of Conduct for MSPs.

Section 30(c)

Section 30(c) is a qualified exemption, which means the application of this exemption is subject to the public interest test. It is therefore necessary to consider whether, in all the circumstances, the public interest in disclosing the information sought is outweighed by the public interest in maintaining the exemption.

It is recognised that there is a public interest in the information sought, particularly given the seniority of the member involved as a Government Minister, the media interest surrounding this issue, and transparency around spending from public funds.

On balance, however, it is considered that this is outweighed by the public interest in maintaining fairness in, and effectiveness of, the investigative process, and in preserving the ongoing adherence to the requirements and procedures set out in the Scheme and SPCB policies.

The public interest in the matters subject to investigation will be served in due course by the findings, and the reasons for such findings, relating to the subject matter of the investigation being published when appropriate. On balance, the public interest would not be served by disclosing the information sought.

Section 38(1)(b)

As section 38(1)(b) is an absolute exemption it is not subject to the public interest test.