

Annex A

Exemptions utilised under the Freedom of Information Act

Section 35(1)(a)- the formulation or development of government policy.

We have weighed up the competing public interests here. It is recognised that there is a public interest in greater transparency in the workings of public authorities and their decision making processes, in order to ensure accountability. However, Ministers and officials need to be able to discuss and debate their policies and programmes, including, in this context, having frank discussions with the Inquiry Chair about the workings of the Inquiry. Otherwise, there is the risk that disclosure might inhibit frank discussions of all policy options in future, thus closing off better options. This is not conducive to the successful, effective delivery of Government business. For these reasons we consider that the public interest in maintaining this exemption outweighs the public interest in disclosing it.

Sections 40(2) and (3)(a)- personal information

Some of the information you have requested, is personal data relating to third parties, the disclosure of which would contravene the first data protection principle. This provision states that personal data should be processed fairly and lawfully. It is the fairness aspect of this principle, which, in our view, would be breached by disclosure. This relates to both junior officials' names, (which it is standard practice to withhold), as well as names and identifying personal details of third parties, unless they have given their consent to disclosure. In such circumstances, section 40 confers an absolute exemption on disclosure. There is, therefore, no public interest test to apply.

Section 42(1)- legal professional privilege

Some of the information you have requested is exempt under section 42(1), legal professional privilege, specifically legal advice privilege. We have weighed up the competing public interests. Transparency of public authorities' decision making and knowing that their decisions are taken in the correct legal context are two reasons why it might be argued that information subject to section 42(1) should be disclosed. However, the process of providing legal advice relies for its effectiveness on both lawyer and client being open and candid with each other, and this in turn serves the wider interests of the administration of justice. It is important that the government is able to seek legal advice so that it can make its decisions in the correct legal context. The legal adviser must be in possession of all material facts in order to provide sound advice. The government must, therefore, feel confident that it can disclose *all* relevant facts to its legal adviser. It should be able to do so without fearing that this information will be disclosed to the public (although it may have been discussed on a restricted and confidential basis with a third party without waiving privilege, such as in this context with the Inquiry Chair Ms Wass). In turn the legal adviser will consider the issues and the arguments and weigh up their relative merit. We recognise that there is a public interest in the public knowing that policies have been developed with the benefit of sound

legal advice. However, in relation to your request, the public interest does not outweigh the strong countervailing public interest in maintaining the confidentiality of legal advice

Section 42- Legal professional privilege

Some information has been withheld under litigation privilege, also part of s.42, legal professional privilege. This privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. For information to be covered by litigation privilege, it must have been created for the dominant (main) purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation. In terms of the public interest balance, we consider there to be a general public interest in transparency. However, with regards to this particular information, our view is that the public interest in disclosing this information is limited in that it adds little or nothing to the debate about sex abuse on St Helena, the work of the Wass Inquiry and the role of the FCO. Furthermore, there is a strong countervailing public interest in the confidentiality of communications entered into for the purpose of providing legal advice about contemplated litigation. Our conclusion is that the public interest in withholding the information outweighs the public interest in disclosing it.

Section 41(1)- information provided in confidence

Finally, some information has been withheld under section 41 (1) of the Freedom of Information Act – information provided in confidence. This allows for information to be exempt if it was obtained by the public authority from any other person and the disclosure of the information to the public (otherwise than under the Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person. Section 41 also confers an absolute exemption on disclosure, and therefore a public interest test is not required.